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Sisters Inside Inc. is an independent community organisation which exists to advocate for the human rights of women in the criminal justice system

30 July 2025

Queensland Law Reform Commission

By email: LawReform.Commission@justice.qld.gov.au

Re: QLRC Review of particular criminal defences

We welcome the opportunity to provide a submission to the Queensland Law Reform Commission's review of particular criminal defences, including self-defence and killing for preservation in an abusive domestic relationship.

Sisters Inside

Established in 1992, Sisters Inside is an independent Aboriginal led community organisation based in Queensland, which advocates for criminalised and imprisoned women and girls and their families. Our policy and advocacy is informed by the experiences of the formerly and currently incarcerated and criminalised women who lead our organisation, and the women and girls we support. Our work is guided by our underpinning Values and Vision.[1] We believe that prisons are an irrational response to social problems that serve to further alienate socially marginalised groups in our communities, especially Aboriginal women and girls and Torres Strait Islander women and girls. Criminalisation is usually the outcome of repeated and intergenerational experiences of racism, violence, poverty, homelessness, child removal, and unemployment, resulting in complex health issues and compounding trauma. Aboriginal women and girls and Torres Strait Islander women and girls are massively incarcerated due to systemic racism at the core of the Australian legal system.

Sisters Inside is uniquely placed to contribute to this consultation. We see daily the realities of life for women and girls in all places of custody throughout Queensland, many of whom are victim survivors of domestic and family violence. We also work with women and girls and their families following their release from prison, which enables us to directly witness the wider consequences of the criminal legal system. This submission is underpinned by the wisdom and insights that this work has given us.

[1] Sisters Inside Inc., 'Values and Visions'. Available at https://sistersinside.com.au/our-values-and-vision.

Submission summary

Our submission focuses specifically on the circumstances of women who are victim survivors of domestic abuse who commit intimate partner homicide (IPH), and how criminal defences to murder may or may not afford them legal protection.

For the purposes of the review, we make the following recommendations:

> **Recommendation 1 - That murder no longer attract a mandatory penalty of imprisonment for life.**
>
> **Recommendation 2 - That Queensland's self-defence provision be amended to reflect the Victorian and Canadian provisions.**
>
> **Recommendation 3 - That section 304B of the Queensland Criminal Code be retained.**

The abolition of the mandatory life sentence for people convicted of murder is long overdue in Queensland. Until this occurs, it is extremely important to offer a range of appropriate criminal defences for women who are victim survivors of abuse who commit IPH. We acknowledge that self-defence remains the preferred defence for these women, because it provides a complete defence to murder, however we consider the current iteration of self-defence under Queensland law to be unduly strict.

The most significant problem with self-defence in Queensland is that it requires an imminent attack, which is often missing in cases where women who are victim survivors of abuse commit IPH. Victoria's self-defence provision is better adapted to the situation because it does not require an imminent attack, and the response does not have to be 'proportionate'. Canadian legislation also specifically provides for consideration of subjective characteristics - including gender, size and age - of the person accused of IPH when assessing the reasonableness of their actions.

The defence of killing for preservation in an abusive domestic relationship in section 304B of the Queensland Criminal Code offers several benefits for women who are victim survivors of abuse who commit IPH. We believe that concerns about its underutilisation, and its potential to confuse jurors, have been adequately addressed by recent amendments to evidential and jury direction provisions in Queensland.

Recommendation 1 - That murder no longer attract a mandatory penalty of imprisonment for life

Section 305(1) of the Queensland Criminal Code provides for mandatory life imprisonment when a person is convicted of murder. Imposing a mandatory life sentence for murder has been rightfully criticised, as it removes the court's capacity to consider the individual circumstances of the case.[2] It also undermines key sentencing principles of proportionality, restraint, and

[2] See, eg, B Mitchell and JV Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart Publishing, 2012) 56-8; Law Reform Commission of Western Australia, *Review of the Law of Homicide* (Final report 97, September 2007)

rehabilitation.[3]

Queensland's position is relatively unique among Australian jurisdictions, with only the Northern Territory and South Australia continuing to impose mandatory life sentences for murder.[4] In Tasmania and Victoria, the penalty for murder is a maximum of life imprisonment, but the court maintains discretion to impose a shorter or different sentence.[5] This better caters to the circumstances of women who are victim survivors who are convicted of murder, by ensuring that the facts of each and every offence are always taken into account in sentencing.

Recommendation 2 - That Queensland's self-defence provision be amended to reflect Victorian and Canadian provisions

Women who are victim survivors of abuse who commit IPH should have the benefit of the defence of self-defence[6], however the current iteration of self-defence under the Queensland Criminal Code is exceptionally strict.[7] The law on self-defence causing death is encompassed in sections 271 and 272 of the Criminal Code. These sections require:

(1) A triggering assault, causing reasonable apprehension of death or grievous bodily harm; and

(2) That the force used is reasonably necessary to protect the defendant against the perceived harm.

The requirement of a triggering assault is a significant obstacle to establishing self-defence where

299, 307–308; Victorian Law Reform Commission, *Law of Homicide in Victoria: Sentence for murder* (1985) 6–7; K FitzGibbon, 'The mandatory life sentence for murder: an argument for judicial discretion in England' (2013) 13(5) *Criminology and Criminal Justice* 512–14. See generally Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Final report, July 2019) 87–9.

[3] B Mitchell and JV Roberts (n 2) 63-4.

[4] *Criminal Code Act 1983* (NT) s 157; *Criminal Law Consolidation Act 1935* (SA) s 11.

[5] *Criminal Code Act 1924* (Tas) s 158; *Crimes Act 1958* (Vic) s 3. This is also consistent with the Model Criminal Code: Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 fatal offences against the person* (Discussion paper, June 1998) 65 <https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>.

[6] See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged With Homicide: Analysing Defence Lawyering in "R v Falls"' (2014) 38(2) *Melbourne University Law Review* 66. Note that the Northern Territory, Australian Capital Territory, Tasmania and New Zealand have self-defence provisions but no partial defences. *Criminal Code 2002* (ACT) s 42; *Criminal Code Act 1983* (NT) s 43BD; *Criminal Code Act 1924* (TAS) s 46.

[7] Sheehy, Stubbs and Tolmie (n 6); Kerstin Braun, '"Till Death Do Us Part" Homicide Defenses for Women in Abusive Relationships – Similar Problems, Different Responses in Germany and Australia' (2017) 23(10) *Violence Against Women* 1177; Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39(3) *Monash Law Review* 864; Michelle Edgely and Elena Marchetti, 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues To Ignore Reality' (2011) *Flinders Law Journal* 126.

women who are victim survivors of abuse commit intimate partner homicide in non-confrontational circumstances.[8] Queensland is the only jurisdiction to require a specific and objectively dangerous threat before self-defence becomes available.[9] Furthermore, while aspects of sections 271 and 272 are framed subjectively, in practice women who are victim survivors of abuse are required to establish that the force they used was *objectively* necessary.[10] Establishing the objective necessity of the force used can be difficult for the following reasons:

(1) In non-confrontational settings, juries may be less likely to consider the force as strictly necessary for preservation;

(2) Jurors and legal professionals without sufficient domestic violence education have been historically distracted by the rhetoric that "she should just leave" the relationship;[11] and

(3) Women who are victim survivors of abuse who commit IPH often use weapons,[12] which can be viewed by jurors as disproportionate and indicative of pre-meditation.[13][4]

Accordingly, in its 2008 report the Queensland Law Reform Commission concluded that "*it is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser.*"[14]

In contrast, section 322M(1) of the *Crimes Act 1958* (Vic) specifically provides that, in family violence contexts, the accused's conduct may be considered reasonable even if the threat of harm is not immediate, or the force used is excessive.[15] We recommend that Queensland adopt

[8] Sheehy, Stubbs and Tolmie (n 6); Edgely and Marchetti (n 7).

[9] Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia, and Queensland' (2010) 35(3) *Alternative Law Journal* 132. See also Sheehy, Stubbs and Tolmie (n 6); Edgely and Marchetti (n 7).

[10] Edgely and Marchetti (n 7) 138.

[11] Amanda Clough, 'Coercive Control: Transforming Partial Defences to Murder in England and Wales' (2023) 87(2) *Journal of Criminal Law* 109; Victorian Law Reform Commission, *Defences to Homicide* (Options Paper, September 2003) [4.184] ('*Defences to Homicide*'); Marion Whittle and Guy Hall, 'Intimate Partner Homicide: Themes in Judges' Sentencing Remarks' (2018) 25(6) *Psychiatry, Psychology and Law* 922.

[12] This is attributable to the size and strength imbalances often seen between partners involved in domestic violence: Danielle Tyson, Deborah Kirkwood and Mandy McKenzie, 'Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' (2017) 23(5) *Violence Against Women* 559.

[13] Susan Edwards and Jennifer Koshan, 'Women Who Kill Abusive Men: The Limitations of Loss of Control, Provocation and Self-Defence in England and Wales and Canada' (2023) 87(2) *Journal of Criminal Law* 75; *R v Silva* [2015] NSWSC 148.

[14] Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report, No 64, September 2008).

[15] Cf *Criminal Code Act Compilation Act 1913* (WA) s 248(4)(a) which removes the imminence requirement for **all** self-defence claims (as in, not only in family violence contexts).

this approach.

We also recommend the introduction of a new subsection modelled on section 34(2) of the *Canadian Criminal Code*, which lists factors relevant to determining whether the accused's act was reasonable in the circumstances. These factors relate to the subjective characteristics of the accused, including their size, age, gender and physical capabilities and also any prior use or threat of force. This would allow for gendered considerations to be taken into account when determining whether a woman accused acted reasonably, including circumstances of past abuse. The provision has been praised for the flexibility it imports into the reasonableness element of self-defence.[16] Relevantly, the Scottish Law Commission is currently considering altering the assessment of reasonableness in a similar way.[17]

Recommendation 3 - That section 304B of the Queensland Criminal Code be retained

Section 304B provides a partial defence to murder when the person killed had committed acts of serious domestic violence against the accused during an abusive domestic relationship. The defence requires that, at the time of the killing, the accused believed their acts were necessary for the accused's preservation from death or grievous bodily harm, and that there were reasonable grounds for this belief, having regard to the abusive relationship and all the circumstances of the case.

We note that s304B has been criticised for being under-utilised. Certainly published case law suggests it is predominantly raised by men.[18] This is not consistent with the purpose of the section.[19] Further, we acknowledge the complex overlap between self-defence and section 304B, and the concern that the availability of alternative defences may confuse juries and place defendants in a tactically awkward position.[20] There is a risk that juries will err on the side of

[16] Sheehy, Stubbs and Tolmie (n 6), citing *R v Lavallee* [1990] 1 SCR 852 and *R v Malott* (1998) 106 O.A.C. 132 (SCC).

[17] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 27 May 2021) 174 [12.30], citing Lady Scott, "Women Who Kill" (2019) 19.

[18] Although, rarely successfully. See, eg, *R v Robbins* (2023) 13 QR 433 (man convicted of murdering his brother); *R v Jones* [2015] QCA 161 (man convicted of murdering his mother); *R v Gaskell* [2016] QCA 302 (man convicted of murdering his former wife).

[19] See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (Cameron Dick) 3670. See also Queensland Law Reform Commission (n 14) 3; Victorian Law Reform Commission, 'Defences to Homicide' (n 11) [4.188]. However, the defence is not gender specific, so its apparent overuse by men may be due to the different homicide rates between men and women.

[20] Hopkins and Easteal (n 9); Edgely and Marchetti (n 7). In the Victorian context, see Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52(1) *British Journal of Criminology* 159; Victorian Law Reform Commission (n 11) [4.158]-[4.159].

caution and convict for manslaughter rather than acquitting for self-defence.[21] This is problematic, particularly since research suggests Aboriginal women and Torres Strait Islander women often plead guilty to manslaughter even where self-defence arguments are available.[22] Furthermore, section 304B is limited to situations of personal abuse and does not capture circumstances in which the defendant has killed the abuser to protect another (such as the defendant's child).[23]

Despite these criticisms, we recommend that s304B be retained for a number of reasons:

(1) Section 304B operates as a 'halfway house' defence, encouraging women who are victim survivors of abuse to proceed to trial and run both self-defence and section 304B arguments, rather than pleading guilty.[24] A 2023 study found that Queensland, being the only state with this specific domestic violence defence, has the greatest rate of acquittals in the country for women who kill their abusive partners.[25] This is important because research suggests women in these circumstances are frequently overcharged and reluctant to go to trial.[26]

(2) Downgrading the charge from murder to manslaughter enables judges to exercise greater sentencing discretion, rather than imposing a mandatory life sentence.

(3) Section 304B is better tailored to non-confrontational killings as it does not require the abusive actions of the deceased to have occurred immediately prior to the accused's acts or omissions.[27]

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[21] Hopkins and Easteal (n 9); *R v Sweeney* (Unreported, Supreme Court of Queensland, Henry J, 3 March 2015), cited in Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2023) 30(9) *Violence Against Women* 2275.

[22] Julie Stubbs, 'Murder, Manslaughter, and Domestic Violence' in Kate Fitz-Gibbon and Sandra Walklate (eds), *Homicide, Gender and Responsibility: An International Perspective* (Routledge, 2016) 36.

[23] Queensland Law Reform Commission (n 14) 3. See also Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report, 9 July 2009) 37 [3.52], 45 [4.29]; Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal consideration and informed imagining: Recognising and responding to the lived experiences of abused women who kill' (2018) 41(3) *Melbourne University Law Review* 1201.

[24] See, eg, Crofts and Tyson (n 7); *R v Irsigler* (2012) QSC (28 February 2012) (female accused was found not guilty of murdering her husband, with both s 304B and self-defence being raised); *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010). Although, some have suggested that the defendants in these cases fell within the category of 'good victims', being (variously) young, white, mothers, without criminal histories, and no history of drug or alcohol abuse: Heather Douglas, 'A Consideration Of The Merits Of Specialised Homicide Defences For Battered Women' (2012) 45(3) *Journal of Criminology* 367, 377.

[25] See generally Nash and Dioso-Villa (n 21).

[26] Ibid 2278, 2283. See also Charlotte King, Lorana Bartels and Patricia Easteal, 'Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis' (2016) 42(1) *Monash University Law Review* 138; Hopkins, Carline and Easteal (n 23); Tyson, Kirkwood, and McKenzie (n 12); Sheehy, Stubbs and Tolmie (n 6); Edgely and Marchetti (n 7).

[27] See generally Nash and Dioso-Villa (n 21). Although, *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010) suggests this may not be strictly necessary for self-defence either. In that case, the

(4) Section 304B provides a 'fairer label' of the defendant, reflecting reduced moral culpability.[28]

(5) Section 304B may have some normative influence on prosecutorial practice and judicial attitudes.[29] This is important as the literature has tended to criticise the legal profession's ignorance of both the nature of family violence and of the provisions introduced specifically to protect women in these situations.[30]

Concerns about the under-utilisation of section 304B by women who are victim survivors of and its potential to confuse jurors may be ameliorated by new evidential and jury direction provisions in Queensland. Victoria has received praise in the literature for its broad evidential provisions[31] and mandatory jury directions on family violence.[32] The new provisions in Queensland are a move in a similar direction.

Queensland's new evidential provisions[33] were modelled on those in Victoria and Western Australia, which broaden the types of domestic violence evidence that may be relevant and admissible in criminal proceedings.[34] This may include, among other things, evidence of violence committed against other persons (such as a child)[35] and expert evidence.[36] Allowing domestic

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defendant sedated and killed her abuser after he made a specific threat to kill their child. She was acquitted on the basis of self-defence. In directing the jury on both self-defence and s 304B, Applegarth J highlighted that an 'assault' for the purpose of self-defence can include an ongoing risk of death or serious injury. As discussed above, other states have taken this one step further, by legislatively enshrining that self-defence in the context of family violence can be available to defendants, even where the threat being responded to is not immediate: see, eg, *Crimes Act 1958* (Vic) 322M(1)(a).

[28] Mackenzie and Colvin (n 29) 35 [3.44].

[29] See, eg, *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010). See also Hopkins, Carline and Easteal (n 23); Bronwyn Naylor and Danielle Tyson, 'Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 72.

[30] See, eg, Australia's National Research Organisation for Women's Safety, *Women Who Kill Abusive Partners: Understandings of Intimate Partner Violence in the Context of Self-defence, Key Findings and Future Directions* (Report, 2019); Tyson, Kirkwood and McKenzie (n 18), citing comments from the sentencing judge in *R v Black* [2011] VSCA 152, the prosecution's disputing of whether the defendant being forced to have sex with another man in the deceased's presence was an instance of family violence in *R v Creamer* [2012] VSCA 182, and various other failures by defence counsel to raise family violence provisions or lead expert evidence on the impacts of such violence

[31] See Hopkins, Carline and Easteal (n 23) 1227-8; Stubbs (n 22); Sheehy, Stubbs and Tolmie (n 6).

[32] Nash and Dioso-Villa (n 21); *Jury Directions Act 2015* (Vic) s 58. See also *Evidence Act 1906* (WA) s 38; *Evidence Act 1929* (SA) s 34W.

[33] See *Evidence Act 1977* (Qld) pt 6A, div 1A.

[34] See, eg, *Crimes Act 1958* (Vic) pt IC; *Evidence Act 1906* (WA) ss 38-39A.

[35] *Evidence Act 1977* (Qld) s 103AB.

[36] *Evidence Act 1977* (Qld) s 103CC.

violence evidence to be put before a court in criminal matters may address the concern that Magistrates, Judges and jurors do not understand the impacts of family violence and maintain the belief that the woman should have left the relationship instead of using violence. There have been successful uses of the Victorian provisions:[37] in one case a Magistrate discharged a woman who had been charged with the murder of her husband. The woman led evidence that she had suffered physical and psychological abuse from her husband over the course of their 30-year marriage[38] and, on this basis, the Magistrate doubted the ability of the prosecution to make out any charge or disprove self-defence.[39]

Further to this, Queensland's new jury direction provisions[40] allow Judges to give directions to a jury emphasising that partial defences should only be considered after self-defence has been ruled out.[41] The suggested direction on the partial defence of killing for preservation in an abusive domestic relationship now provides:

> *"You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder."*[42]

This is essentially the direction that Applegarth J gave in the case of *R v Falls*: the partial defence in section 304B only arises for consideration once the complete defence of self-defence cannot be made out. If self-defence has been made out, the killing is no longer considered 'unlawful'.[43]

Effective directions to the jury may ameliorate concerns that, firstly, having multiple defences available is confusing to jurors and, secondly, Judges and juries may apply a partial defence instead of self-defence. Queensland's new laws should help to ensure that both self-defence and section 304B operate as intended for women who are victim survivors of abuse who commit IPH.

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[37] See discussion in Kellie Toole, 'Self-defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36(1) *Melbourne University Law Review* 250, 253, 267-9.

[38] This was the case of Freda Dimitrovski; cited in ibid 268-9.

[39] Ibid.

[40] See *Evidence Act 1977* (Qld) pt 6A, div 3.

[41] See also *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010).

[42] Supreme Court of Queensland, *Killing for Preservation in an Abusive Domestic Relationship S 304B Benchbook* (Supreme Court of Queensland Library, August 2024) 99.3 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/136497/sd-bb-99-killing-for-preservation-in-an-abusive-domestic-relationship-s-304b.pdf>.

[43] *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010). For discussions of this point in the context of defensive homicide provisions, see Stubbs (n 22); Naylor and Tyson (n 35); Crofts and Tyson (n 7); Fitz-Gibbon and Pickering (n 20). For examples of convictions for defensive homicide in circumstances of domestic violence, see *R v Middendorp* [2012] VSCA 47; *R v Creamer* [2012] VSCA 182 and *R v Black* [2011] VSCA 152, all cited in Hopkins, Carline and Easteal (n 23).

More broadly, we submit that it is in the interests of fairness to provide a range of possible defences to accused persons. Partial defences are important because they recognise the reduced culpability of women who are victim survivors of abuse who commit IPH and they allow the court to impose a sentence other than life imprisonment. As Crofts and Tyson state, this approach:

> *"…stands to more appropriately recognise the fact that not all situations in which a person kills in response to family violence are the same and that a person may not always be killing for self-preservation. It has the advantage of ensuring that there are varied defences which can appropriately reflect different circumstances in which a person kills and different levels of culpability. It reduces the chances that a defendant misses out on an appropriate defence altogether because she either does not fit the paradigm case for that defence or she has to remould her story to fit an existing defence. It also minimises the dangers that claims that would have fallen transparently under provocation are reshaped to fit newly formulated defences or defences."*[44]

Thank you for your consideration.

Yours sincerely,

Debbie Kilroy

Chief Executive Officer

Sisters Inside Inc.

[44] Crofts and Tyson (n 13) 877.

Prepared by Daisy Rice and Marnie Ball
1 October 2024

THE UNIVERSITY OF QUEENSLAND
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Annotated Bibliography

Criminal defences available to abused women who kill

Prepared for Sisters Inside

IPH: intimidate partner homicide.
IPV: intimate partner violence.
BWS: battered women syndrome.
***: particularly relevant, worth the read

Contents

DOMESTIC SOURCES

Title	Australia's divergent legal responses to women who kill their abusive partners***
Author/s	Caitlin Nash and Rachel Dioso-Villa
Year	2023
DOI/URL	https://doi.org/10.1177/10778012231156154
Source kind	Peer reviewed journal article published in *Violence Against Women*
Methodology	Analysis of 69 Australian female IPH cases from 2010-2020 with a focus on the different legal responses in the jurisdictions
Findings	The authors first identify the legal barriers for women who kill abusive partners. They note that while self-defence is *universally acknowledged to be the preferable defence for those who kill in response to prolonged abuse*, it is rarely successfully raised by abused women in Australia. This is particularly true in non-confrontational killings. Abused women's cases are hindered by the common misconception surrounding DV: 'W*hy didn't they just leave?'* While BWS was originally useful in explaining this question, it is now criticised for perpetuating stereotypes with an individual deficit focus. This has prompted a shift towards 'social context evidence.' The authors rely on Sheehy's (2012) research to elucidate the pressure to plead guilty to manslaughter, considering mandatory life imprisonment for murder in some jurisdictions. The authors provide the following table, which clearly outlines the legal developments in Australian homicide law: Changes / Vic / WA / NSW / Qld / SA / NT / ACT / Tas Expanding self-defense Removed requirement for imminence: 2005 / 2008 Legislated social context evidence: 2005 / 2020 / 1998 / 2020 Introduced jury directions: 2014 / 2020 / 2020 Amending partial defenses Introduced a specialized defense: 2010 Abolished provocation: 2005 / 2008 / 2020 / 2003 Retained provocation: 2014 / 2011 / 2006 / 2003 Introduced excessive self-defense[a]: 2005 / 2008 / 2001 / 1997 Abolished excessive self-defense[a]: 2014 Provides no partial defenses: 2014 / 2003 [a]*Note.* Also includes Victoria's offence of defensive homicide. The common law test for self-defence can be found in *Zecevic v DPP.* Through reformulation, imminence and proportionality are no longer required. However, these factors are still informative in assessing the reasonableness of the belief in the necessity of the orce. Some states have legislatively enshrined this common law adaptation (e.g., VIC), and others have provided legislative guidance on the relevance of family evidence to self-defence claims (i.e. to establish reasonableness of belief) (e.g., VIC, WA and SA). Some

	states have provided mandatory jury directions on family violence in the context of self-defence (VIC, WA, SA). QLD is the only state with a specialised defence for victims of DV. The authors note the widespread criticism that the defence is only partial but commend its availability in non-confrontational killing. The authors describe the gendered operation of provocation as a partial defence. QLD, NSW, and Canada retain a reformed version of provocation. The rationale is that its abolition would limit avenues for victims of prolonged abuse. The authors consider excessive self-defence (see Victoria's previous '*defensive homicide'*) but note that these cases should realistically be catered for under self-defence. TAS, VIC and NZ currently offer *no* partial defences to murder, suggesting that self-defence should be the primary focus for abused women. However, the complete lack of partial defences has been strongly critiqued as limiting the options and resulting in more murder convictions. The results of their study pertinently found: • Most female IPH perpetrators were charged with murder; • 48% of cases were resolved with a guilty plea to manslaughter. Most were convicted as they lacked *mens rea*. 35% were convicted on the basis of a partial defence. • Of the 34 who went to trial, 44% were convicted of manslaughter, 21% were convicted of murder, and 16% were acquitted. • 11 QLD cases were studied. Five were resolved by a guilty plea to manslaughter. The majority proceeded to trial. Four were acquitted at trial. Two were found guilty of murder and manslaughter, respectively. Of the six manslaughter convictions, two were through the operation of section 304B. • None of the women convicted of murder adduced expert testimony in trial. In only four (6%) of the cases heard at trial was more expansive social context evidence led. Two of these cases were in Queensland (though they did controversially adopt the BWS framework). • 46% of the homicides occurred in confrontational circumstances, 36% occurred during a verbal argument, and 17% occurred in non-confrontational circumstances. • Majority of those acquitted killed their partner in confrontational settings (77%). Most women found guilty of murder (57%) killed their partner in non-confrontational settings. • Most cases involving a triggering physical assault (53%) resulted in a plea deal (where self-defence could have been available). • 83% used a weapon. Tentatively, the results indicate that Queensland's current approach has merit. *Most* of the accused women proceeded to trial, and

	Queensland had the greatest rate of acquittals (36%) among the jurisdictions. Self-defence was successfully raised three times in Queensland (interesting compared to Victoria, which only had one self-defence acquittal despite the reforms). Importantly, one successful self-defence case featured non-confrontational circumstances (*R v Falls*). This optimism, however, must be tempered by the relatively small sample size. WA had the greatest convictions for murder. All but two of the women convicted of murder received life sentences. Of those convicted of manslaughter, the vast majority (94%) received a term of imprisonment, with the average being 6.4 years. There was no difference in the average sentence length between those who proceeded to trial and those who pleaded guilty to manslaughter. Queensland had the highest average sentence length for manslaughter convictions, with 8.16 years. On average, Aboriginal and or Torres Strait Islander defendants were more likely to plead guilty. The findings regarding partial defences were mixed. Some cases suggested that partial defences continue to offer additional protection for defendants. However, a 304B case (*R v Sweeney*) was identified as an example of partial defences undermining legitimate self-defence claims.
Summary of position	Female IPH offenders continue to be overcharged, which increases the pressure for guilty pleas, even where there is a genuine self-defence argument that could be raised. Prosecution guidelines ought to be provided in this regard. The effectiveness of 304B will only be fully seen/realised if abused women proceed to trial to test them. Looking at Victoria, the authors suggest that abolishing partial defences is 'premature' as self-defence remains fraught with difficulty. The lack of a 'safety net,' as in the Victorian cases, could be facilitating further guilty pleas. Women infrequently attempt to rely on self-defence in non-confrontational killings. Even in states with more liberal self-defence frameworks, the legislation is not being applied in practice. Legislating the admissibility of social context evidence is critical.

Title	Female perpetrated intimate partner homicide: Indigenous and non-Indigenous offenders
Author/s	AIC, Isabella Voce & Samantha Bricknell
Year	2020
DOI/URL	https://www.aic.gov.au/publications/sr/sr20
Source kind	A statistical report
Methodology	Results from the National Homicide Monitoring Program between 2004-2014 in conjunction with police, coronial and court data. The report looks at 115 cases of female IPH adopting a descriptive and exploratory approach. For 33 cases, additional data was sought from the Intimate Partner Homicide Supplementary Dataset (**IPHSD**) allowing greater contextual information to be gleaned.
Findings	Approximately ***half*** of the 115 IPHs were premeditated (48%, IPHSD). 86 of the 115 incidents involved self-defence (i.e. violence immediately preceding). Majority (60%) of the IPHs occurred in a relationship *characterised* by DV (per IPHSD data). Physical violence was the most common form of DV (80% of IPHSD). More often than not (54%), women were the primary victim of the abuse. Reciprocal violence occurred in 47% of the IPHSD cases. The primary motive (57%) was domestic arguments. The perpetrators were often unemployed (49%), had a criminal history (42%), had mental illness (42%), and were using substances at the time of the offending (alcohol = 68%; drugs = 19%). These adversities were amplified for Aboriginal and or Torres Strait Islander female offenders, who were found to be significantly more likely to kill an intimate partner (60%). The Aboriginal and or Torres Strait perpetrators had slightly higher rates of DV prior to the homicides (67% vs. 58%). The study did not explore whether the women had formal support prior to the offending.
Summary of position	*These findings add support to the body of evidence suggesting that female IPH perpetrators often experience physical and psychological abuse at the hands of the male partners they kill.*

Title	Women who kill abusive partners: Understandings of intimate partner violence in the context of self-defence. Key findings and future directions
Author/s	Australia's National Research Organisation for Women's Safety
Year	2019
DOI/URL	https://www.anrows.org.au/publication/women-who-kill-abusive-partners-understandings-of-intimate-partner-violence-in-the-context-of-self-defence-key-findings-and-future-directions/
Source kind	Summary of research report, *full* report found here
Methodology	Applies 'social entrapment framework' to IPH trials where women raise self-defence. Applies the framework to *WA v Liyanage*.
Findings	The authors contend that *how* the CJS conceptualises IPV influences the defences available. They suggest that social entrapment analysis the best way to conceptualise IPV. Social entrapment analysis requires a) documenting *all* the abusive behaviours, b) examining external responses to the behaviours (i.e. family, agencies, etc.) and then c) situating the IPV in the context of structural inequality. They suggest that despite reforms allowing self-defence to extend to *non-imminent* self-defence, the outdated framing of IPV by courts and practitioners mitigates the effectiveness of reforms. Using *WA v Liyanage* as a case study, they note that the *imminent* and *non-imminent* self-defence requirements were often conflated and blurred for the jury. They critique the Crown's and expert witnesses' presentation of the case, which minimised the extent of the violence and assumed she had safety options. This spoke to the reasonableness of the belief in the necessity of the force. Dr Liyanage's self-defence argument was unsuccessful; she was convicted of manslaughter. To conclude, the authors provide a short guide on how practitioners can implement a social entrapment framework in their work (p.9).
Summary of position	The defence of self-defence, in the context of IPV, should be viewed through the social entrapment framework. This paper highlights that merely arguing self-defence in IPH cases featuring ongoing abuse will not be sufficient. Reform must be coupled with a shift in the way that courts, practitioners, and society understand DV.

Title	Reforming the defences to murder, an Australian case study
Author/s	Danielle Tyson and Bronwyn Naylor
Year	2018
DOI/URL	https://www.taylorfrancis.com/chapters/edit/10.4324/9781351068048-3/reforming-defences-murder-australian-case-study-danielle-tyson-bronwyn-naylor
Source kind	Book chapter published in '*Contesting Femicide'* (1st edn)
Methodology	An analysis of the effectiveness of Victorian reforms
Findings	The chapter first canvases the historical arguments surrounding IPH defences. Female-perpetrated IPH is not captured by either self-defence or provocation, while male-perpetrated IPH is often defended by victim-blaming provocation narratives. In 2005, Victoria abolished provocation as a partial defence to murder. Self-defence (section 9AC) was amended to introduce a *subjective* test; if the defendant reasonably believes that the conduct is necessary to protect themselves or another person, they will be acquitted of murder (cf Qld provision). Section 9AD, a defensive homicide defence, provided women who kill with the *unreasonable* belief that it was necessary for personal or another's protection with a partial defence (reminiscent of excessive self-defence). This defence came with new evidence laws allowing relationship and DV evidence to be admitted in IPH cases to determine the reasonableness of the belief (both for self-defence and defensive homicide arguments). Family violence evidence, under s9AH, features a far broader understanding of family violence, including physical, sexual, and psychological abuse. At first blush, this appeared to be effective for female-perpetrated IPH. However, cases soon revealed that the defence often operated as a quasi-provocation defence to the benefit of men. It was more often used by men. The defence was abolished in 2014, as '*there [was] no clear evidence that defensive homicide [was] working to support women who kill in response to family violence*.' The authors examined the defence narratives raised in 51 cases where men were prosecuted for IPH in Victoria. In 53% of the cases, the defendant had abused his partner. Without provocation as a crutch, the authors identified that defence counsel often leaned into ideas such as accident, lack of intent, loss of self-control, or mental illness. At the crux of all these defences/explanatory frameworks were the actions of the woman (i.e. her leaving caused him mental distress, or he accidentally stabbed her while he was defending himself). The authors critique how the gendered underpinnings of the provocation defence continue to shine through in counsel tactics. The authors considered gendered narratives to continue to permeate sentencing pleas. In their case studies, provocation was rarely relied on, but it reared its head in similar narratives, such as loss of self-

	control. When provocation *was* relied on, it was met by judicial reticence. Sentencing judges often outrightly rejected provocation-like arguments and reiterated the rights of women to leave relationships and otherwise act autonomously. In some cases, the perpetrator's mental condition was presented as being linked to or provoked by the victim's behaviour. The judges often accepted that perpetrators could lose control in highly evocative situations.
Summary of position	The authors do not specifically comment on whether the abolition of defensive homicide has benefitted females who have committed IPH. This article is nonetheless useful because it confirms that Victoria had similar experiences with its defensive homicide defence to what Queensland is currently experiencing (e.g., Marnie finding that only 1/12 cases involved a female defendant). Usefully, the authors highlight that even without a provocation defence, it still permeates both trial tactics and sentencing pleas.

Title	Equal consideration and informed imagining: Recognising and responding to the lived experiences of abused women who kill***
Author/s	Anthony Hopkins, Anna Carline and Patricia Easteal
Year	2018
DOI/URL	https://www.proquest.com/scholarly-journals/equal-consideration-informed-imagining/docview/2362897156/se-2?accountid=14723
Source kind	Peer-reviewed journal article published in *Melbourne University Law Review*
Methodology	An analysis of the availability of self-defence in England/Wales, Queensland and Victoria for abused women who kill and a consideration of whether the law engages with the experiences of these women.
Findings	The key question asked by the authors is whether self-defence gives abused women equal consideration in law. The authors navigate this question by comparing the UK, Queensland, and Victoria positions. England/Wales: the test for self-defence comprises both a subjective and objective element. The defendant must have *genuinely* believed there was the need to use the force, but that force must be objectively reasonable in the (subjective) circumstances. The circumstances must feature an ongoing or imminent attack. The authors discuss the role of psychiatric conditions in a self-defence argument; a psychiatric disorder that distorts the accused's perception of the reality of the threat could undermine a self-defence argument. The authors compare the protections afforded to household owners during burglaries (can plead self-defence even where the force is excessive) compared to abused women (can only plead loss of self-control if the force is excessive). The authors view the imminence and reasonableness requirements as excluding the experiences of abused women. Overall, they consider that the law in England/Wales '*does little to facilitate the presentation of evidence at trial designed to illuminate the experience of battered women who kill.'* Queensland: the authors note that Queensland is the final jurisdiction to require an 'assault' before self-defence can be invoked (though an immediate physical threat is not strictly necessary). Evidence of family violence can be adduced to probe whether the accused had a *genuine* belief in the need for the force. However, the authors note the difficulties that remain for abused women who kill their sleeping abuser who has no actual or present ability to carry out the threat (s 245). This, according to the authors, denies equal consideration of the experiences of abused women. Regarding section 304B, the authors commend the omission of an 'assault' requirement but critique the second and third prongs, which require the accused to believe on reasonable grounds that the force is necessary. While this reflects the common law (which would have

	provided a complete defence), section 304B only offers a partial defence. They commend the section for requiring jurors to consider the reasonableness of the belief in the context of the abusive relationship but critique that this does not extend to when a woman seeks an acquittal. Victoria: the authors commend the Victorian self-defence framework. Specifically, they praise that the threat faced need not be imminent, nor does the force have to be proportionate. It focuses on whether the *conduct* was a reasonable response in the circumstances as perceived rather than whether reasonable grounds existed for the belief. They further commended the 'inclusive' definition of family violence adopted in the legislation and the jury directions. Ultimately, the authors consider that the Victorian framework best facilitates the admission of evidence to assist jurors and judges in considering the experiences of abused women who kill.
Summary of position	The Victorian position on self-defence is best set up to 'recognise and respond to the lived reality of women who kill their abusers' compared to England/Wales and Queensland.

Title	Intimate partner homicide: Themes in Judges' Sentencing Remarks
Author/s	Marion Whittle and Guy Hall
Year	2018
DOI/URL	https://doi.org/10.1080/13218719.2018.1482571
Source kind	Peer-reviewed journal article published in '*Psychiatry, Psychology and Law*'
Methodology	Qualitative analysis of sentencing remarks in IPH cases using grounded theory
Findings	The authors analysed sentencing remarks between 2009-2014 of IPH committed by both men and women from NSW, NR, SA, Tas, Vic and WA. The second (offender violence) and fourth (provocation) themes were the most pertinent for our purposes. The authors described the different motivations for the violence. The men were more often motivated by jealousy or control, while the women were spurred into action by ongoing DV. All females in the sample, except one, were victims of long-term DV. In the remarks, DV was often neutralised/mutualised by the defendant's behaviour, and judges were often misguided as to why the women did not leave the relationship. In one case, despite clear evidence of DV against the defendant, her actions were described as 'wicked' and 'gravely reprehensible.' Nonetheless, judges often acknowledged their inability to fully understand the situation, accepted remorse as being genuine and commented on the continuing pain, regret, and suffering post offence. Most of the women (all but two, who had financial motivations) were sentenced for manslaughter rather than murder. The remarks '*echo themes of offenders' denial of responsibility, minimising harm, as well as justifying domestic and homicidal violence against females*.' Provocation was identified as '*favouring males as the main beneficiaries*.' In every case where the defence of provocation had not yet been abolished, the female victim's actions were accepted as provocative by the judge. Even after provocation was abolished, provocation was brought up in every male sentencing remark. The men were described as *tortured* by jealousy and a lack of emotional coping skills, with their behaviour considered 'out of character.' The provocative behaviour of female victims was described as *central* to the male IPH, while the female offenders were more often framed as 'cold-blooded.'
Summary of position	While not *directly* relevant, this article suggests 1) that the courts might be unequipped to fully cognise the nature of DV and 2) that even if provocation were to be abolished, it may still powerfully rear its head in sentencing proceedings.

Title	Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia***
Author/s	Danielle Tyson, Deborah Kirkwood, Mandy McKenzie
Year	2017
DOI/URL	https://doi.org/10.1177/1077801216647796
Source kind	Peer-reviewed journal article published in '*Violence Against Women*'
Methodology	An analysis of seven female IPH cases over an 8-year period.
Findings	The authors canvas the legislative history of the Victorian amendments. They outline that both provocation and self-defence were operating in a gendered fashion to the detriment of both female IPH offenders and victims (p. 561). The authors describe the most important aspect of the Victorian amendments making the self-defence test subjective rather than wholly objective. If the subjective belief of the need for self-defence was not reasonable, then the defendant could be found guilty of defensive homicide.' The female-perpetrated IPH was primarily in response to ongoing violence. In each case, a weapon was used. All seven women were charged with murder. All attempted to plead guilty to manslaughter or defensive homicide. Three manslaughter pleas were accepted, and two defensive homicide pleas were accepted. Two proceeded to trials. The authors considered that the family violence provisions were rarely used to their full potential, and self-defence remained difficult to raise successfully. **Limited understanding of family violence:** In *R v Black,* the family violence provision under 9AH was raised. The sentencing judge considered the family violence to be '*limited to threats, intimidation, harassment and jabbing and prodding*' such that the force was 'disproportionate to the threat' and that her offending was not at '*the lower end of the spectrum.*' The authors assert that this represents a fundamental misunderstanding of the impacts of family violence. Expert evidence on family violence and historical rapes were not raised. In *R v Creamer,* the defendant was found guilty of defensive homicide. In that case, the deceased was trying to get the defendant to have sex with other men in his presence. It was questioned at trial whether this was a form of DV. The defence submitted that this *did* constitute family violence (to be interpreted according to 9AH). A forensic psychologist led evidence to support this submission. The prosecution disputed that the defendant was a victim of family violence, bringing evidence from another psychiatrist. The authors critiqued the 'lack of understanding about psychological manipulation, sexual degradation and coercive control,' particularly

	where the judge viewed their sexual relationship as one characterised by autonomy rather than control. **Limited use of family violence experts:** Jemma Edwards' plea of defensive homicide was accepted. In sentencing, both parties agreed that there had been extensive family violence. The authors critiqued the defence counsel's approach, where they did not avail themselves of the family violence provisions under 9AH to establish that she had reasonable grounds for believing the force was necessary. Jade Kells was charged with murder and found guilty of manslaughter at trial. The defence submitted that she was acting in self-defence, drawing upon the family violence provisions (only in the final days of the trial). Concerning the mutuality of the violence, the authors critiqued the lack of expert evidence on family violence to substantiate the relevance of family violence to the homicide. **Pressure to plead guilty:** Abused women are more likely to plead guilty to manslaughter than to run a self-defence argument in a murder trial due to feelings of shame and difficulties with credibility. They suggest that women who do not meet the 'benchmark' for a battered woman are less likely to be acquitted or even consider a self-defence argument. Aboriginal and or Torres Strait Islander women are also more likely to plead guilty (see Veronica Hudson). The authors considered that the effectiveness of the provisions is tempered by society's and the profession's lack of education on family violence. They recommended comprehensive training. While they commend the legislative progress, they note that self-defence (at the time of the article) had not been successfully raised in female IPH cases in over 12 years.
Summary of position	The authors articulate the key issues with the Victorian provisions: a) The profession has a limited understanding of family violence. This impacts prosecution decision-making, defence trial tactics, judicial directions and sentencing decisions; b) Self-defence, despite amendments, remains very difficult for female IPH offenders to raise. Few even attempt to raise it; and c) The evidential provisions were rarely used to their full benefit. This denies jurors the opportunity to understand the relevance of family violence to IPH. Expert family violence evidence was rarely called. The article highlights that legislative amendments must be accompanied by further education for those in the profession.

Title	"Till Death Do Us Part" Homicide Defenses for Women in Abusive Relationships—Similar Problems—Different Responses in Germany and Australia
Author/s	Kerstin Braun
Year	2017
DOI/URL	https://doi.org/10.1177/1077801216656832
Source kind	Peer-reviewed journal article published '*Violence Against Women*'
Methodology	Comparing Australia's and Germany's approach to non-confrontational IPH defences
Findings	In Germany, a non-confrontational IPH offender could be charged with aggravated murder (includes murder *by stealth* - mandatory life imprisonment) or murder (minimum five years, maximum 15 years). There is no manslaughter offence. Self-defence is narrowly construed in Germany (imminency required) and does not capture non-confrontational IPH. A defendant also cannot rely on excessive self-defence without an imminent attack. Necessity cannot be relied on. Duress is broader, looking at imminent *danger,* perhaps including long-term dangers. This defence is seldom made out as it requires defendants to establish that the killing was objectively necessary; victims are required to first to attempt to leave the relationship. Provocation is relevant in sentencing. The authors then turn to the Australian legal landscape. They canvass the historical difficulty of raising self-defence due to the imminence requirement. In *Zeceviv,* the imminence requirement was abrogated in most jurisdictions (*R v Kontinnen; R v Osland*), except Queensland, where it is retained in statute. Even in Queensland, imminence has been whittled down, and a wider interpretation was adopted in *Falls.* The authors comment on the objective criteria imported into a seemingly subjective self-defence framework (did the accused believe it was necessary to use the force, but was that assessment *reasonable*?). They view tobjectivity as an obstacle to self-defence arguments in non-confrontational IPH. Provocation in Australia has been widely ineffective for female IPH offenders, but *R v Chhay* indicates that some jurisdictions may consider provocation to include *cumulative* provocation. They briefly consider section 304B, outlining the critiques put forth by Edgely and Marchetti (2011). Pertinently, they consider that *R v Falls* may suggest that section 304B does not weaken the chances of succeeding with self-defence in Queensland.
Summary of position	The authors consider (with reference to Victoria) that Australian legislative amendments have not put female IPH offenders in a better position than those in Germany with *no* specific provisions.

Title	Reforming defences to homicide in Victoria: Another attempt to address the gender question***
Author/s	Bronwyn Naylor and Danielle Tyson
Year	2017
DOI/URL	https://doi.org/10.5204/ijcjsd.v6i3.414
Source kind	Peer-reviewed journal article published in '*International journal for crime, justice and social democracy"*
Methodology	Analysis of the Victorian reforms
Findings	Concerns prior to reforms: men often used provocation as a partial defence to IPH, while female IPH offenders could rarely raise self-defence, even when the offending was in the context of DV (*Osland v R*). With self-defence, the difficulty arose in establishing that a) there was sufficient immediacy of the deceased's conduct and b) the fatal response was proportionate, particularly where the offender continued to live with the abusive partner. While BWS was raised to explain these matters, its evidence base was underdeveloped. The 2005 reforms abolished provocation, codified self-defence (expanding its availability to manslaughter), inserted a provision for expert family violence (to assess the reasonableness of the force, even if the response was excessive or not immediate and added the offence 'defensive homicide.' The expert family violence provision was praised for allowing broader evidence on family dynamics to be introduced, which previously would not have been legally relevant. By 2010, there had only been two cases of female IPH, neither of which proceeded to trial. Men often relied on defensive homicide (*DPP v Sherna*): *"[t]he price of having defensive homicide for the comparatively small number of women who kill is substantially outweighed by the cost of inappropriately excusing men who kill.'* In 2014, despite backlash from feminist groups, defensive homicide was abolished. Self-defence was re-framed and available to 'prevent or terminate unlawful deprivation.' The expert family violence provisions were amended to allow its use in self-defence arguments. Jury directions on family violence were provided. The authors provided research to suggest that: the evidential provisions are rarely used to their full potential and that self-defence arguments are rarely pursued. The authors emphasised the importance of 'social context evidence' in self-defence arguments, using *DPP v Bracken* and *DPP v Williams* to elucidate the educative value for practitioners, jurors, and judges in adducing such evidence. They provide a detailed analysis of the pros and cons of retaining the defensive homicide defence. Positively, it provided a 'halfway house' for defendants and a reasonable alternative when a jury could not be convinced that the belief of the necessity of the force

	was reasonable (see esp. *R v Williams)*. Conversely, it perhaps encouraged guilty pleas and jurors to convict where they otherwise may have been acquitted. The authors conclude that an in-depth review of defensive homicide 'in light of the educative role by the other reforms' (i.e. the evidential provisions) would have been more constructive – its abolition was focussed on *men's* use of the provision, rather than how *women* could avail themselves of it. According to the authors, the biggest impact post-reform can be seen in sentencing. While provocation-like language can be seen in sentencing, they draw upon research to suggest that judges have picked up on the spirit of reforms by explicitly referring to women's rights and autonomy and by critiquing gendered power in relationships. The authors highlight the role of practitioner and judicial training on family violence in reshaping the dominant narratives.
Summary of position	The defensive homicide offence was abolished before its operation (in conjunction with the evidential provisions) was properly reviewed and analysed. They commend the evidential provisions and the symbolic value of the reforms. The abolition of provocation was viewed as being effective in reducing gendered defence narratives, both in trials and in sentencing. They encourage further training for practitioners to be confident in adducing context evidence and once again highlight its educative importance. They ultimately conclude that the impact of the reforms on legal procedure and social inequalities remains to be seen.

Title	Did defensive homicide in Victoria provide a safety net for battered women who kill? A case study analysis
Author/s	Charlotte King, Lorana Bartels, Patricia Easteal
Year	2016
Source kind	Peer-reviewed journal article in *Monash University Law Review*
Methodology	A review of the trial transcript and sentencing remarks in *R v Williams* [2014] VSC 304 to appraise the impact of the 2014 Victorian reforms
Findings	Post-abolition of the defensive homicide defence, the authors note that manslaughter is the 'sole refuge' between a murder conviction and an acquittal. Self-defence is an '*all or nothing'* option. They describe the arguments against and in favour of retaining defensive homicide. Against, they draw upon Fitz-Gibbon's work to suggest that convictions of the offence could send the message that the defendant's actions were not reasonable (i.e. if it *were* reasonable, self-defence would have been made out). The offence also could have facilitated plea bargaining rather than encourage women to attempt a self-defence argument. In favour of retention, they describe the defence as 'filling a gap' in the law, the support from several organisations and the stigma associated with a murder conviction. The downfall of the offence was its dominant use by men (*R v Middendorp*). Between 2005 and 2013, 25 men were sentenced for defensive homicide. Only three women were convicted of defensive homicide. In all three cases, the deceased was a violent intimate partner. The authors consider the defence's utility through its application in *R v Williams*. Angela Williams killed her partner and buried him, confessing four years later. The homicide occurred during a vitriolic argument in which the deceased violently assaulted and orally harassed Williams. The relationship was one characterised by DV. After unsuccessful plea deals, a trial commenced. Williams was charged with murder, to which she pleaded self-defence. At trial, the defence called an expert in family violence (Patricia Easteal), adducing evidence under s9AH. The purpose of the evidence was to assist the jury in understanding the impact of family violence to inform the assessment of necessity and reasonableness. Easteal provided evidence of the nature of family violence and the ways it can manifest, the risks of spousal violence and its effects. Importantly, Easteal gave evidence on Williams' actions in the context of family violence and why leaving the relationship may not have been an option.

	The authors then analysed the judicial directions. The judge directed that Easteal's evidence was largely unchallenged. Hollingwood J directed that self-defence was available, even if the harm was not immediate or if the force was not proportionate. She directed that if the jury considered that there were no reasonable grounds to believe the force was necessary, self-defence must fail. The defence relied on the history of violence. The prosecution submitted that Williams could have left the room, and the judge directed that the law does not require such a retreat. The judge further stated that defensive homicide was available should the jury not be convinced of the reasonableness of the belief. Williams was found guilty of defensive homicide (see esp. p.167). Considering *Williams* post-2014 reforms, the authors consider that the defensive homicide defence captured cases that fall outside the scope of self-defence without warranting a murder conviction. Without the defence, the authors suggest that Williams would likely have been found guilty of murder. With the continued focus on 'reasonableness' in the self-defence framework, the authors consider that the jury may have found that Williams genuinely believed the homicide was necessary but that it was not reasonable (see *R v Silva*). However, they consider that the starkness of murder conviction vs. acquittal *could* spur jurors to sympathise more with female IPH offenders, though from the case law, this seems unlikely.
Summary of position	The defensive homicide offence did achieve its purpose of providing a safety net for female IPH offenders subject to DV. Merely considering family violence in sentencing is not sufficient.

Title	Murder, manslaughter, and domestic violence
Author/s	Julie Stubbs
Year	2016
DOI/URL	https://ebookcentral.proquest.com/lib/uql/detail.action?docID=4456357
Source kind	Chapter in the book *Homicide, Gender and Responsibility: An International Perspective* by Kate Fitz-Gibbon and Sandra Walklate
Findings	The relevant part of the chapter (beginning at p.44) considers the legal responses to IPH for abused women. Stubbs suggests that reforms sought to ensure that *men* do not unfairly use the protections. This can be seen with the misuse of Victoria's defensive homicide offence and WA's one-punch laws by male IPH offenders. Victoria's evidential provisions are praised. For self-defence, Stubbins comments that women are in a paradoxical position: they must show that their belief was reasonable, but evidence invoked to show ongoing trauma could lead to the conclusion that the defendant has '*impaired psychological function such that her action may be unreasonable due to impairment*.' Concerning s304B, the author critiques that the elements required for the defence would ground acquittal in other states. She notes the potential of s304B to undermine self-defence arguments and its limited application. The author elucidates the concerning trend that Aboriginal and or Torres Strait Islander offenders are more likely to plead guilty to manslaughter, even where a self-defence argument is *prima facie* available. While some advocate for the abolition of provocation and the expansion of self-defence, the author posits that this would not capture all defendants. Compared to NZ, which has *no* partial defences for murder, Australia and Canada have fewer abused women convicted of murder. Australia had more guilty pleas to manslaughter through the operation of partial defences. 1/3 of Canadian cases and 1/5 of Australian cases did not proceed or saw an acquittal compared to only 10% in NZ. Australia was the only jurisdiction with self-defence acquittals in non-confrontational killings. Stubbs views partial defences favourably, noting the 'substantial role' they play in plea bargaining to manslaughter. The authors consider that gendered inequalities continue to permeate sentencing.
Summary of position	The reforms are powerful social tools, reflecting political concerns surrounding female IPH offending. However, they are 'likely to be insufficient to achieve the desired change.' Generally speaking, partial defences should be retained.

Title	Securing fair outcomes for battered women charged with homicide: Analysing defence lawyering in 'R v Falls'
Author/s	Elizabeth Sheehy, Julie Stubbs and Julia Tolmie
Year	2014
DOI/URL	https://www.proquest.com/scholarly-journals/securing-fair-outcomes-battered-women-charged/docview/1661349679/se-2?accountid=14723
Source kind	Peer-reviewed journal article in *Melbourne University Law Review*
Methodology	Analysis of *R v Falls* to document strategies on formulating effective self-defence arguments in non-confrontational killing.
Findings	Most female IPH offenders are charged with murder, despite most resolving through guilty pleas to manslaughter. In those cases which proceed to a murder trial, female IPH offenders are seldom acquitted for self-defence in non-confrontational killings both in Australia and Canada. This argument has *never* been successful in NZ. The authors outline Queensland's strict self-defence formulation, requiring a) a specific triggering assault and b) a *reasonable* belief that the force was necessary to protect against death or GBH. Applegarth J adopted a wide interpretation of the first limb in *Falls*, finding that an ongoing and non-specific threat inherent in the dangerous nature of a relationship could be sufficient. The authors consider that defence counsel brought evidence to elucidate a) the violence towards the accused (through indirect corroboration), b) the deceased's violence towards others (to bolster credibility), c) the power imbalance, d) escalation prior to the homicide and e) entrapment of the accused (to establish objective reasonableness of her actions). They highlight the importance for practitioners to understand *how* to bring evidence to establish ongoing violence, position homicide in DV contexts, and unveil more subtle forms of DV through indirect testimony. The authors discuss the progressive use of expert evidence. The expert witnesses explained the shift away from BWS, the dynamics of power imbalances, and the impacts of trauma and confirmed the escalation of the violence in the case. They emphasised the role of lawyers in getting an accused early therapy to increase the chances of obtaining detailed testimony.
Summary of position	Most female IPH offenders are unsuccessful in trying to raise self-defence. The culmination of evidentiary, academic, rhetorical, and therapeutic dimensions and the broad framing of self-defence, led to Falls' acquittal. While only tangentially relevant, this article highlights the importance of sufficient practitioner education to ensure that abused women are receiving the best representation and chance of acquittal. It emphasises the power of expert evidence.

Title	Homicide law reform in Australia: Improving access to defences for women who kill their abusers
Author/s	Thomas Crofts and Danielle Tyson
Year	2013
DOI/URL	https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/MonashULawRw/2013/17.html
Source kind	Peer-reviewed journal article published in '*Monash Law Review*'
Methodology	Comparison of reforms in VIC, WA, QLD, and NSW
Findings	Context to the article: • VIC abolished provocation, codified and expanded self-defence, introduced 'defensive homicide' and evidential provisions. • WA reformed self-defence, abolished provocation, and the mandatory life sentence for murder. • QLD retained and amended provocation and introduced killing for preservation (section 304B). • NSW reformed self-defence and introduced excessive self-defence. A Parliamentary Committee further recommended evidential provisions. The authors discuss the problems with provocation, highlighting its gender-biased and victim-blaming operation. They discuss the VLRC's and LRCWA's reviews and ultimately find that the costs of retaining provocation outweighed any advantages. QLRC's 2008 review was narrower in scope. While concerns surrounding provocation were raised, it was not in favour of abolition unless the mandatory life sentence was abrogated, and the sentencing regime was not up for question. NSW retained provocation. In the author's view, retaining provocation can fill a gap where the accused did not act in self-defence such that it sometimes has a 'legitimate role to play.' They reject the argument that provocation should be an issue for sentencing, noting the salience of offence stigma. The authors suggest that keeping provocation in the realm of trials rather than sentencing fosters greater transparency. They consider the QLD reforms, which shifted the onus of proof and reduced its availability, to be effective at reducing its questionable use by men (now not available when the accused claims to be provoked by their partner leaving). They praise the variety of defences available in NSW that offer accused women a range of options. This praise largely centred around the fact that, unlike other Australian jurisdictions, NSW has maintained a wider range of partial defences (namely, extreme provocation and excessive self-defence) which give abused women who kill more alternatives. For example, Crofts and Tyson state: > [T]he approach of retaining a reformed and relabelled form of provocation alongside self-defence and excessive self-defence

	stands to more appropriately recognise the fact that not all situations in which a person kills in response to family violence are the same and that a person may not always be killing for self-preservation. It has the advantage of ensuring that there are v**aried defences which can appropriately reflect different circumstances in which a person kills and different levels of culpability**. It **reduces the chances that a defendant misses out on an appropriate defence altogether** because she either does not fit the paradigm case for that defence or she has to remould her story to fit an existing defence. It also minimises the dangers that claims that would have fallen transparently under provocation are reshaped to fit newly formulated defences or defences.[1] The authors then turn to self-defence. WA and QLD have stricter formulations of self-defence. The specific issues with self-defence for female IPH offenders, according to the authors, are the requirements of immediacy, proportionality, and a thinly veiled duty to retreat. On the topic of reform, they note the initial (but now diminishing) importance of BWS evidence to explain why women do not leave abusive relationships. While the authors commend the broadening of self-defence, they refer to Toole's work to suggest that it can activate pre-existing stereotypes. Finally, the new partial defences were considered. The authors view Victoria's defensive homicide provision as a reintroduction of excessive self-defence. Advantageously, it can operate as a halfway house, recognising the reduced culpability at the offence level rather than at sentencing. Alternatively, they highlight that it could give jurors an easy option to convict for manslaughter rather than consider the full acquittal. Further, it had been predominantly relied on by men (*Middendorp*). However, the authors consider that this does not mean the defence was a failure. The authors finally turn to s304B. They reiterate concerns from other scholars that the provision may jeopardise self-defence arguments and critique that the Queensland review did not consider reforming self-defence. Similar to the Victorian provisions, they cite concerns that jurors may be more minded to convict of the lesser offence, given its specific focus on people responding to family violence. However, family violence can and is invoked to establish that past abuse can act as a sufficient trigger for self-defence. The authors describe there to be a 'need' for this halfway house.'
Summary of position	Each jurisdiction has taken a divergent approach to female IPH defences. The authors consider that the shortcomings of the

[1] Note that otherwise, our research suggests that the defences available in NSW to women who kill abusive partners are comparable to those available in other Australian jurisdictions. These defences are set out in the *Crimes Act 1900* (NSW), which supplements and sometimes supplants the common law. In terms of partial defences to murder, NSW offers: extreme provocation, excessive self-defence, and mental impairment. Self-defence is a complete defence to murder. Incidentally, there is no mandatory life penalty for murder in NSW, unlike in Queensland.

	Queensland offence could be overcome with reform in the self-defence space, or making it a full defence, rather than repealing the provision.

Title	Homicide law reform in Victoria, Australia: From provocation to defensive homicide and beyond***
Author/s	Kate Fitz-Gibbon and Sharon Pickering
Year	2012
DOI/URL	https://doi.org/10.1093/bjc/azr060
Source kind	Peer reviewed journal article in *British Journal of Criminology*
Methodology	An analysis of Victorian reforms drawing upon 31 interviews with judges, prosecution and defence counsel and policy stakeholders
Findings	The authors outline the gendered operation of provocation and commend TAS, VIC and WA for abolishing the defence. They note that men predominantly use defensive homicide for homicides involving male victims. The interviewees considered the provision to complicate self-defence law by creating additional and overlapping avenues in which self-defence can be argued. They doubted the ability of jurors to understand its operation. The consensus was mixed concerning whether the provision provided a 'safety net' to female perpetrators. While some policy stakeholders described it 'sensible,' others considered that it encourages jurors to convict for defensive homicide rather than genuinely consider self-defence. Other policy stakeholders criticised its operation only as a partial defence and that it may serve to disadvantage female offenders. The interviewees expressed concern that defensive homicide merely provided a defence for those who would have previously argued provocation. In this way, the defence was viewed as allowing for the perpetuation of victim-blaming narratives. Most considered that defensive homicide simply *was* a provocation defence, just expressed with different terminology. The interviewees were polarised on whether provocation ought to have been abolished. Some expressed faith in jurors to look past the egregious use of the provocation defence and reflected that, in practice, it was rarely used. Most participants praised the abolition. All participants emphasised that gender discourses in sentencing continued despite the abolition of provocation.
Summary of position	According to the authors, the interview data highlights that the defensive homicide provision unnecessarily complicated the legal landscape and did not create a legal category that more accurately represents the culpability of the crime. They consider that while the defence provides a halfway house, reformed self-defence could be a more effective approach.

Title	Self-defence and the reasonable woman: Equality before the new Victorian law
Author/s	Kellie Toole
Year	2012
DOI/URL	https://www.proquest.com/scholarly-journals/self-defence-reasonable-woman-equality-before-new/docview/1348588751/se-2?accountid=14723
Source kind	Peer-reviewed journal article published in '*Melbourne University Law Review*'
Methodology	Analysis of the impact of Victorian reforms using four case studies
Findings	At the time of the article, four women were charged for IPH. Two did not proceed beyond committal, and two were convicted for defensive homicide. They point out that as men predominantly commit homicides, self-defence has developed to apply neatly to confrontational homicides between men. Accordingly, abused women, who often kill their abusers a) without a triggering event and b) with a weapon to overcome size/power differences, have rarely been able to rely on self-defence (cf. *R v MacDonald*). While immediacy is not strictly required, these aspects of female IPH cast doubt on whether the defendant reasonably/genuinely believed in the necessity of the violence. *R v MacDonald* occurred on the brink of reforms, and the authors consider the case to highlight the need for such reforms. At issue in that case was also the concept of BWS, which has historically suggested that responses to abuse can be 'irrational and individualised' rather than complex and intentional. The authors instead support the social framework approach to evidence, which explains the cumulative effects of DV and risks associated with leaving the relationship. The authors praise that the codification of self-defence omitted immediacy and proportionality requirements. They critique the specification of the threat required (i.e. a threat of death or really serious injury) and query whether this would preclude self-defence against rape (using *R v Black* to illustrate the point). They commend the 9AH evidential provision, allowing more evidence to be adduced to understand the defendant's specific circumstances (in *Creamer,* the judge took this very far, allowing consideration of the deceased's intention to move on with a new partner). The authors consider the 'halfway house' of defensive homicide as a distinct advantage. However, they consider that women are often still reticent to run self-defence arguments. Self-defence requires consideration of *reasonableness,* which can be assessed through the additional family violence evidence. However, defensive homicide, explicitly created to protect abused women, is predicated on the notion that the conduct of the woman is *un*reasonable. This perpetuates stereotypes associated with victims of family violence.

	The authors discuss the impact of the provisions in light of *SB* and *Dimitrovski,* two cases in which proceedings did not continue past the committal stage. In SB, the prosecution discontinued the matter on the strength of the self-defence argument. In *Dimitrovski,* after applying 9AH, the Magistrate dismissed the proceedings, finding that there was overwhelming evidence of family violence such that she doubted the ability of the prosecution to make out any charge. These decisions were heralded as signifying the success of the provisions, but they ultimately did not have the *immediacy* issue seen in most female IPH cases. They consider that female IPH stereotypes (i.e. that it occurs *only* in the context of seeking safety from a DV situation) benefitted *Creamer,* where evidential lacunae saw both the jury and judge filling the gaps with these stereotypes rather than finding her guilty of murder. They suggest defensive homicide was stretched too far in this case.
Summary of position	The reforms *do* provide assistance to female IPH offenders, but '*they have neither seriously challenged pre-existing attitudes toward family violence dynamics nor delivered outcomes wholly satisfactory to either abused women or to the broader community.'* The new provisions could further perpetuate stereotypes associated with victims of family violence. Overall, the authors note that there is a lack of case law to consider the impacts of the new provisions thoroughly. The existing law, however, 'raises serious doubts about the adequacy and effectiveness of the provisions.'

Title	**A consideration of the merits of specialised homicide defences for battered women*** **
Author/s	Heather Douglas
Year	2012
DOI/URL	https://doi.org/10.1177/0004865812456851
Source kind	Peer-reviewed journal article published in *Melbourne University Law Review*
Methodology	Exploration of Victoria and Queensland's IPH defensive provisions
Findings	**Victorian provision:** The AG contended that the provision operated as a '*halfway house,'* allowing women to plead not guilty to murder with self-defence and still have the defensive homicide safety net. This offence arises when a person kills with the *unreasonable* belief that it was necessary to prevent death or serious injury. Between 2005-2010, 13 defendants were charged with defensive homicide. In 10 cases, the defendant pleaded guilty. In three cases, they were found guilty of defensive homicide after murder trials. In all cases, the perpetrator was male. There was only one case where the victim was female. After 2010, another 9 cases followed. The majority of the cases featured backgrounds of DV. The defence was abolished in 2014. *R v Middendorp* catalysed a review of the defence. In this case, the defendant (male) killed the victim after she returned home with a friend. A DVO was in place against the defendant, and she had previously reported being fearful of him. The deceased chased off the victim's friend with a knife such that *she* then advanced with a knife. The defendant stabbed her multiple times in her back. Middendorp was found guilty of defensive homicide. Critics assert that this case was reframed as defensive homicide to circumvent the abolition of the provocation defence and that it was the antithesis of the section's purpose. In *R v Creamer,* the female defendant had killed her partner after she believed that he was trying to arrange for her to have sex with other men in his presence. The trial was run either as manslaughter or domestic homicide. Creamer was found guilty of domestic homicide. They finally analysed *R v Black,* in which a female defendant stabbed her partner after ongoing physical and emotional torment – a plea of defensive homicide was accepted. The authors consider the Victorian defensive homicide provision to be broader than Queensland's (ours focuses on abusive relationships). Regarding the effectiveness of the reforms, the authors consider that men disproportionately used the defence (though still mostly in the context of family violence). However, several cases of female IPH were not prosecuted *at all,* and male IPH offenders could no longer rely on provocation. Using *Creamer* as an example, the author suggests that the offence has merit as a halfway house. Though, they hedge their bets by warning that these

	decisions could alternatively indicate that jurors are less likely to give self-defence proper scrutiny. **Queensland provision:** The authors first delve into the legislative history. Reform was prompted by *R v Sebo*. The QLRC considered the defences to IPH and concluded that provocation ought to be retained but reframed. Concerning a separate defence for domestic abuse defensive homicide, the authors outlined the ineffectiveness of self-defence for female IPH (esp. the '*unlawfully assaulted*' requirement). Ultimately, the preservation defence was enacted. Its distinguishing feature is that there is no need to establish a triggering assault. The mandatory murder sentence was never up for debate. At the time of the article, three cases raised the defence: *R v Falls, R v Irsigler* and *R v Ney*. All three defendants were women. In *R v Falls,* Judge Applegarth directed the jury on self-defence and the s304B defence. Applegarth *specifically* indicated that self-defence can capture historic abuse (*R v Secretary; R v Stjernquist*) and that self-defence is available for wives who kill their husbands. Evidence was provided by two experts on the long-term effects of abuse and the difficulties of leaving abusive relationships safely. The prosecution sought to exclude this evidence (perhaps given the lack of a specific evidentiary provision at the time), but this was rejected. Falls was acquitted. In *R v Ney,* the defendant pleaded not guilty through self-defence or otherwise guilty of manslaughter due to s304B. The initial jury was discharged, and a later plea of manslaughter, based on diminished responsibility, was accepted. In sentencing, the judge accepted expert evidence on BWS to understand why Ney had not left the relationship; this mitigated the penalty. In *R v Irsliger,* while the jury was directed on both self-defence and the preservation defence, she was acquitted of murder (self-defence) but guilty of interfering with a corpse. The authors consider s304B to have a limited scope. They assert that stereotypes afforded to the battered woman (i.e. the appearance of victim, drug-free, white) may continue to inform the choices of the prosecution and juries (e.g., Ney was Indigenous, Creamer was in an open relationship). The authors critique that the defence is only partial and its non-availability for protection of family members. They critique the lack of legislative guidance on the evidence that can be adduced to support a 304B argument (compared to the extensive explanatory notes). They note, however, that the new provision may indirectly (and positively) influence prosecution practices and the way judges consider sentencing.

Title	**Defences to homicide for battered women: A comparative analysis of laws in Australia, Canada and New Zealand*** **
Author/s	Elizabeth Sheehy, Julie Stubbs and Julie Tolmie
Year	2012
Source kind	Peer reviewed journal article in *Sydney Law Review*
Methodology	Comparison of the defences available to women accused of IPH in Australia, Canada and New Zealand in 100 cases.
Findings	The authors begin with self-defence. They note immediacy and BWS evidence (often understood as explaining *subjective* state of mind, but not *objective* reasonableness) as undermining the availability of self-defence. WA and VIC's provisions specifically state that imminence is not required, while the rest of the states do not explicitly mention immediacy. However, the authors note that the immediate attack requirement was walked back in *R v Falls.* In Canada, self-defence is conceptualised as the 'defence of person' and extends to defence for others. It mentions immediacy as a *factor* to be considered by the jury. Canadian case law has placed strong emphasis on the subjective elements, which was viewed favourably by the authors (see *Lavallee* and *Malott*). New Zealand similarly does not require immediacy legislatively, but the development of self-defence in case law has resulted in a conservative approach. Queensland is the strictest in this regard, requiring defence against an unlawful and unprovoked *assault* such that a reasonable apprehension arises. It is the only jurisdiction to adopt this position. The authors then consider the partial defences. NSW, SA, and WA had excessive self-defence as a partial defence at the time of the article. Victoria offered an equivalent through defensive homicide. Canada has no such equivalent. This defence has been critiqued for 'normalising manslaughter as an appropriate outcome in battered women's self-defence claims.' The authors discuss the rationale of s304B and outline its primary sources of criticism. First, it is put forth that s304B should result in a full acquittal, but a partial defence was made based on the submissions from the legal community. The authors critique this, suggesting that there was a lack of hard evidence to support such an approach and that 'without knowing the expertise of the lawyers consulted, it is difficult to know what weight to assign their views and the soundness of their recommendations.' Using both *Falls* and *Stjernqvist,* the authors suggest that jurors may be more generous in considering self-defence than what s 304B gives them credit for. Provocation has been retained in QLD, NSW, ACT and NT. Some states have amended the defence to increase its availability to victims of abuse (e.g., NT). In interpreting the QLD provision, *Pollock v R* saw the High Court adopt a broader understanding of

	provocation, whittling away the immediacy required. Provocation is also available as a partial defence in Canada. There is limited case law on its application to female IPH offenders. NZ and Tasmania offer no partial defences to murder. Victoria boasts the broadest evidential provisions. s9AH allows jurors to draw on a wide range of evidence to inform their findings regarding self-defence's subjective and objective elements. Queensland has a similarly spirited provision (s 132B, now repealed), but it is less extensive (has since been widened). The authors consider that these provisions provide guidance to lawyers and judges on what is relevant and significant. Canada does not have similar legislation, but these evidential principles have been borne out of case law. In analysing women's homicide cases in Australia, Canada, and New Zealand between 2000-2010, the authors found: • New Zealand had the most convictions for murder. • Most Australian and Canadian cases are settled by plea deal, typically to manslaughter. • Canada had the highest proportion of cases that did not result in conviction (i.e. either acquitted or did not proceed). • 1/5 of Australian cases resulted in no conviction (19.4%). In Australia, Queensland and Western Australia had the lowest percentage of cases resulting in no conviction (10%), while Victoria had the highest (25%). • Australia saw the greatest reliance on partial defences to reach a manslaughter conviction, both in trials and in plea bargaining. The authors reflect on the heightened pressures to plead guilty to manslaughter, particularly given QLD's mandatory murder sentence. They note that there were many cases which had *prima facie* strong self-defence arguments (e.g., *Kennedy* [2000] NSWSC 109). They express concern that the prosecution is overcharging, despite being willing to accept guilty pleas. In this vein, the authors recommended stronger prosecution guidelines to reach appropriate charges.
Summary of position	Overwhelmingly, female defendants appear to be pleading guilty rather than proceeding to trial. With the highest conviction rate, NZ was considered the jurisdiction with the least protective framework (paradoxical, however, given that they have the most liberal self-defence provision). Canada was seemingly more capable of accommodating abused female defendants.

Title	**Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality*** **
Author/s	Michelle Edgely, Elena Marchetti
Year	2011
Source kind	Peer-reviewed journal article published in *Flinders Law Journal*
Methodology	Analysing defences to female perpetrated IPH through the theoretical framework of criminal responsibility
Findings	s304B arose out of the insufficiency of the self-defence framework 'non-confrontational' IPH, coupled with the mandatory life sentence murder attracts (see *R v Kina*). However, in the drafting stages, there was reticence towards expanding self-defence law with fears of casting protection too wide. As such, a separate and partial defence was created. s304B, when successfully invoked, reduces a murder charge to manslaughter, thereby allowing judicial discretion in sentencing. The article outlines the gendered nature of DV. It provided statistics, (now outdated). Importantly, they highlight that the greatest risk to safety arises when women seek to leave their abusive relationships. Pertinently, the authors consider the utility of self-defence (s 271(2)) compared to a domestic relationship defence (section 304B) for non-confrontational killings. Section 271(2) comprises of four elements. The difficulty in its application is that the first element (requiring the deceased to have made an unprovoked and temporally proximate assault) is seldom able to be made out in non-confrontational assaults. Further, while the section requires the accused to *subjectively* believe in the need for defensive force on reasonable grounds, this ultimately requires *objective* evidence to prove. The distinction with section 304B is that a) there is no need to prove a triggering domestic assault, b) it does not extend to the protection of a third party, and c) it is a partial defence. The authors argue that '*seemingly, a woman's killing while in fear for her life has some equivalency in law to a (man's) killing brought on by his sudden, angry loss of control or his diminished mental capacities.* The authors consider that the intersection between self-defence and s304B places defendants in a tactically awkward position. The only opportunity to get a full acquittal *requires* a triggering assault. However, even where there *is* this triggering assault, s304B may be available, which requires the judge to direct on *both* defences. s304B could encourage defendants to plead guilty to the lesser offence rather than run a self-defence argument. Where both arguments are run, there is an inherent risk that juries may err on the side of convicting for manslaughter (where they may have otherwise been

	acquitted), given the preservation defence's specific focus on family violence. Further, the requirement of *imminence* for self-defence inherently requires an abused woman to wait for a physical confrontation (a thinly veiled retreat rule), even if waiting for this confrontation could limit the effectiveness of any defensive force. The authors suggest this requires a pre-emptive retreat. They note that all other Australian jurisdictions have removed the requirement for imminence from self-defence rather than adding a separate domestic abuse defence. The authors describe the facts of *R v Falls, Coupe, Cumming-Creede and Hoare* in detail. The defendant, Susan, relied on self-defence and s304B after she had purchased a gun, sedated her abusive husband, and then shot him multiple times. Applegarth J directed the jury on both defences, first self-defence and then secondly section 304B. In describing self-defence, Applegarth held that the endurance of a threat (i.e. through prolonged abusive behaviours) can be a form of violence, and this can continue even if the deceased becomes temporarily unable to follow through with the threat (i.e. because they are asleep). He emphasised that self-defence can be available to women who kill their abusive partners. Finally, he explained that s304B only became relevant if the jury were convinced beyond a reasonable doubt that Susan was guilty of murder and that self-defence could not be made out. Susan was acquitted. Through the theory of criminal responsibility, the authors explore 'justifications' (which focus on the act, e.g., self-defence) and 'excuses' (which focus on the actor, e.g., provocation). The authors posit that s304B is situated in the 'excuses' basket – it seeks to vitiate the defendant's culpability rather than treat the act as something inherently right/authorised (i.e., a justification approach). They argue that DV defensive killing should be considered a *justification* - the distinction bears moral and policy implications.
Summary of position	Section 304B is ineffective and operates in a clunky manner alongside self-defence. It sits awkwardly against the theoretical framework which is used to explain self-defence. Abused women who kill their partner, even in a non-confrontational setting, do not deserve to be convicted. s304B, being only a partial defence, is inherently gendered (using a hostage analogy at p.173). Rather than creating a separate defence, self-defence should have been evaluated and modified, putting *necessity* at its crux rather than *imminence,* as per other Australian jurisdictions. *'If a woman believes that her abusive partner will kill her (or will inflict grievous bodily harm) and she believes that the only way to save herself is to kill him during a nonconfrontational moment, then why is she not entitled to a full defence?'*

Title	**Walking in her shoes: Battered women who kill in Victoria, Western Australia, and Queensland*** **
Author/s	Anthony Hopkins and Patricia Easteal
Year	2010
DOI/URL	https://doi.org/10.1177/1037969X1003500301
Source kind	Peer-reviewed journal article published in '*Alternative Law Journal*'
Findings	The authors outline that self-defence has not yet given credence to abused women who kill their violent intimate partners. The common law test for self-defence in *Zecevic v DPP* demands both a subjective and objective belief to be established: it must be an *honest* belief, and there must be *reasonable* grounds for that belief. While imminence and proportionality requirements have been abrogated, the authors consider the 'reasonableness' assessment the most significant barrier to a successful self-defence argument (see *R v Lavallee; R v Marlott*). The authors point out that the reasonable grounds requirement is not purely objective; the jury must consider whether, based on the circumstances perceived by the accused, the position was reasonable. On this basis, the authors make their main argument: '*If a battered woman honestly holds a belief that it is necessary in self-defence to kill, and the fact finder is asked to take into account all the situational and psychological circumstances that produced that belief, then an honest belief necessarily becomes a reasonable belief.*' In this light, they question whether BWS evidence, which pathologises a woman's actions, can undermine a self-defence argument by questioning the rationality of her belief. The authors consider that Victoria and WA require jurors to 'walk in the shoes' of abused women when determining self-defence. The s9AH Victorian evidential provisions were praised for their extensive instructions on what evidence is relevant where family violence is alleged. The authors consider that this requires jurors to understand 'what it is really like to live in a situation of ongoing violence' when assessing the reasonableness of self-defence. In WA, the provision for self-defence makes it clear that imminence is not required. Like Victoria, WA introduced excessive self-defence by legislating that if someone kills with an honest but unreasonable belief, they will be guilty of manslaughter. The authors critique the lack of a definition of what is 'reasonable' but note that it does direct attention to a consideration of the circumstances in which an abused woman kills. The authors are scathing of the Queensland position, remarking that it has done '*nothing to ensure that a battered woman's reality is taken into account where acquittal is sought on the basis of self-defence.*' They raise concerns about the overlap between s 304B and self-defence. However, 304B demands consideration of the history of family violence. Judicial directions explaining this, therefore, could lead jurors to believe that the accused's actions were only

	reasonable given the history of family violence. This could see a manslaughter conviction instead of a full acquittal. They further critiqued the lack of an extensive evidential provision (akin to Victoria's) to supplement the section and self-defence (note that we now have s103).
Summary of position	Section 304B may see reduced murder convictions and the avoidance of mandatory life sentences. However, it does not increase the prospects of acquittal and could undermine genuine self-defence claims.

INTERNATIONAL SOURCES

Title	Coercive Control: Transforming Partial Defences to Murder in England and Wales
Author/s	Amanda Clough
Year	2023
Jurisdiction	United Kingdom (England and Wales)
DOI/URL	https://doi.org/10.1177/00220183231165821
Source kind	Peer reviewed journal published in *Journal of Criminal Law*
Findings	Provocation was abolished in England, and the partial 'Loss of Control' defence was introduced. One 'qualifying trigger' for loss of control can be 'fear of serious violence,' which was specifically enacted to protect abused women. This defence is rarely successfully raised by women and has operated as a crutch for male defendants. The requirement of 'serious violence', impliedly requires a high level of physical abuse, which disadvantages women experiencing different forms of abuse to different degrees. The author argues that Loss of Control should capture a more expansive range of cases featuring IPV, including coercive control. The subjective test in the Loss of Control defence presents a significant obstacle. However, they referred to Sally Challen's case as one which highlights that coercive control *can* impact defences to murder through its impact on *mens rea*, despite not being formally recognised as a defence. Under *Criminal Justice and Immigration Act* (s 76), self-defence requires a *genuine belief* that acting defensively is necessary and that the conduct is *reasonable*. It does not protect non-imminent attacks. The reasonableness requirement means that self-defence may not capture attacks where women use weapons to face their abusers if their abusers have used physical attacks only. Further, with misconceptions surrounding 'why women don't just leave abusive relationships,' the reasonableness component remains a significant challenge. Using NZ's *Ruddelle* case as an example, the authors suggest introducing social entrapment evidence might bolster the ability of women to argue loss of control or self-defence successfully. Jarringly, the requirements are loosened for people defending their homes (with proportionate force not required), but such a suggestion was rejected in the context of abused women.
Summary of position	Loss of control and self-defence fail to protect abused women in IPH cases. The authors advocate for the expansion of the partial defences to include a) non-physical abuse and b) non-imminent threats.

Title	Women Who Kill Abusive Men: The Limitations of Loss of Control, Provocation and Self-Defence in England and Wales and Canada
Author/s	Susan Edwards and Jennifer Koshan
Year	2023
Jurisdiction	England, Wales and Canada
DOI/URL	https://doi.org/10.1177/00220183231165719
Source kind	Peer reviewed journal article published in *Journal of Criminal Law*
Findings	***England and Wales*** Defences to murder available in England and Wales include involuntary manslaughter, voluntary manslaughter loss of control, manslaughter 'fear of serious violence' and self-defence. Provocation was abolished in 2009, though it was largely unavailable to abused female IPH offenders during its operation (*R v Duffy 1949*). The *CJA* 2009 saw the introduction of a 'Fear of Serious Violence' defence (set out below for reference) under the 'Loss of Control' defence. While 'broadly welcomed,' the defence has been criticised as the threshold of fear of 'serious violence' impliedly requires proportionality. Feminist critics assert that 'loss of control' is aligned with male-centric anger and grouping the Fear of Violence defence under Loss of Control is inappropriate. Further, a 'reasonableness' element is imported into the defence with the language 'normal degree of tolerance and self-restraint.' The authors note that terrified women are seldom able to meet the standard of reasonableness, especially when jurors often consider weapon use to speak to calculation and pre-meditation. Perhaps the loudest critique is that the defence is a mere re-framing of provocation. Ultimately, the 'Fear of Serious Violence' defence is rarely used. They commend the criminalisation of coercive control and note that it can be used as a ground to argue diminished responsibility, particularly in appeals (see *R v Challen*). The authors consider self-defence to be widely unavailable to abused female defendants. This is due to the constructs of reasonableness and proportionality. They refer to a study of 92 cases of female IPH, in which only six cases saw a successful self-defence argument. 14 were unsuccessful and convicted of murder or manslaughter. Critique is made of the concessions for homeowners facing intrusion. ***Canada*** Canada has retained provocation. Murder carries a minimum life sentence. Post-2015 amendments, provocation in Canada requires the victim's conduct (the provocative conduct) to constitute an indictable offence punishable by five or more years imprisonment. The conduct must be capable of depriving an ordinary person of self-control (objective) and that the accused acted suddenly and in the heat of the passion (subjective). These amendments aimed to limit

	the situations in which unmeritorious male defendants could rely on provocation. However, Canada lacks any specific domestic violence criminal offences. Triggering conduct could include assault, sexual assault, uttering threats, but *not* coercive control. Similar to the UK and Welsh position, women in Canada have struggled to establish that they have killed their partner in the 'heat of passion' when they have done so using a weapon (see *R v Malott*). Importantly, after *R v Simard,* the 'indictable offence' required for provocation was severed, at least in British Columbia. In BC, there is now no requirement for a wrongful act, insult or indictable offence; there must be '*conduct of the victim sufficient to derive the person of self-control with the accused acting suddenly…'* No cases since have relied on this broadened defence, and it remains controversial amongst scholars. The authors consider that provocation has not assisted abused women in Canada. Provocation may be beyond redemption, and where its only utility is to avoid a maximum penalty, the sentencing range itself could be reformed. Self-defence will be made out if the accused (1) believed on reasonable grounds that force or a threat of force was being used against them or another person, (2) the act that constituted the offence was committed for the purpose of defending or protecting themselves or the other person from that use or threat of force and (3) the act committed was reasonable in the circumstance. The section includes a list of factors to be considered relevant to the determination of 'reasonableness.' This includes imminence, proportionality, size, age, gender, physical capabilities, and the relationship between the parties, including prior use or threat of force. While the factors have been commended, the introduction of 'imminence' and 'proportionality' and the omission of systemic factors have been critiqued. Similar to the UK and Welsh, Canadian abused women are more likely to accept plea bargains rather than risk conviction for murder if self-defence fails (*Naslund*). This is augmented by the legal profession's lack of understanding of family violence and the continued use of BWS narratives.
Summary of position	The reforms in these jurisdictions, despite initial enthusiasm, have achieved little. Loss of control and fear of serious violence defences are problematic. They ought to be abolished, but only if the mandatory minimum sentences for murder are also repealed. The authors hesitantly recommend that a similar approach could be taken in Canada. These recommendations are tempered by concerns that judicial discretion in sentencing may not actually benefit abused women. They recommend that Canada criminalise coercive control. Self-defence ought to remain a complete defence but should be expanded to recognise individual and systemic factors that may impact an abused woman. Finally, they identify ongoing education as critical.

Title	Do Russian Women Have the Right to Self-defense against Domestic Violence?
Author/s	Davtyan Mari Davitovna
Year	2021
Jurisdiction	Russia
DOI/URL	https://www.proquest.com/scholarly-journals/do-russian-women-have-right-self-defense-against/docview/2594716019/se-2?accountid=14723
Source kind	Peer reviewed journal article published in *Journal of International Women's Studies*
Findings	Russia lacks legislative regulation of domestic violence. In 2018, Putin decriminalised certain kinds of domestic violence (battery). One-third of women in Russia face domestic violence. The UN and ECHR have consistently recognised that Russia fails to fulfil its legal obligations to prevent DV. In a review of cases between 2016-2018, approximately 2,500 women were convicted of murder; 80% of these cases featured DV perpetrated by the deceased. Only 5% of those charged were acquitted. The majority of the cases involved stereotypical self-defence situations. Self-defence is legislated under Article 36 of the *Criminal Code of Russia*. Specifically, "*it shall not be deemed a crime when harm is inflicted in the state of justifiable defense against a person who is attacking (i.e. the defense applies in cases of protecting the person and the rights of defendant or of other persons if the attack involves violence that threatens the life of the defendant or another person or there is an immediate threat of such violence).*" This has been interpreted to include non-imminent threats, but the means of force must be equal. The authors note that abused women's use of self-defence is complicated by the pervasive stereotypes surrounding DV in Russia (i.e. women often provoke the DV, they consented to the violence, and does not *look* like the ideal victim). While the overturning of Galina Katorova's conviction hinted at a more liberal approach being adopted in these cases, the author expresses reticence that such progressiveness will continue. Regarding the reasonableness/equality of the force, the authors note that Russian courts have refused to acknowledge DV as a life-threatening situation. Often, the courts failed to or even *refused* to consider the violence against the woman preceding the fatal attack.
Summary of position	Russia has an entirely ineffective legal approach to DV and defences to female-perpetrated IPH. It should not be used as a comparator.

Title	Legal change and legal inertia: Understanding and contextualising Scottish cases in which women kill their abusers
Author/s	Rachel McPherson
Year	2021
Jurisdiction	Scotland
DOI/URL	https://www.proquest.com/scholarly-journals/legal-change-inertia-understanding/docview/2582583657/se-2?accountid=14723
Source kind	Peer reviewed journal article published in *Journal of Gender-Based Violence*
Methodology	Feminist and qualitative analysis of 62 female IPH cases
Findings	Scotland has had a delayed response to both DV and women who kill their abusers. Their most significant case (at the time of the article) was *Galbraith,* which the authors consider to have 'introduced BWS into the legal and social vernacular in Scotland.' The authors reflect upon the dearth of policy and media conversation surrounding abused women's access to defences in homicide cases. This research analyses 62 cases of IPH in Scotland between 1990 and 2018. The authors acknowledged that a corpus of cases exists, which have gone unreported legally. In all the analysed cases, a background of DV was identified. Seven of the homicides occurred in non-confrontational settings, 48 homicides occurred in confrontational circumstances (seven unsure). Half of the women pled guilty to 'capable homicide,' 45.1% proceeded to trial either for murder or capable homicide. Most were convicted of culpable homicide (74.2%) and 12.9% were convicted of murder, 9.7% were acquitted. The most common defence was provocation. Self-defence was brought up in 11 cases – three were acquitted. Three were convicted of murder, and five were guilty of culpable homicide. **NOTE:** The authors continually refer to a Scottish review of homicide defences being undertaken. Perhaps further research could be conducted to ascertain exactly what the review suggested.
Summary of position	This analysis largely reflects the trends seen in Australian research. Women who kill in Scotland typically do so in response to DV and in confrontational situations. Most women plead guilty to reduced offences, and self-defence appears similarly difficult to make out (the authors do not go into the mechanics of the Scottish self-defence provision).

Title	Discussion Paper on the Mental Element in Homicide
Author/s	Scottish Law Commission
Year	2021
Jurisdiction	Scotland
DOI/URL	https://www.scotlawcom.gov.uk/files/9716/2254/8710/Discussion_Paper_on_the_Mental_Element_in_Homicide_-_DP_No_172.pdf
Source kind	Discussion Paper
Findings	This Discussion Paper which considers, among other things, reform options for defences to homicide in Scotland, and whether a new partial defence should be created for people who kill following prolonged domestic abuse. The Final Report for this review is yet to be published.[2] I have summarised key points from the most relevant chapters of the Discussion Paper below. However, my view is that **the reform suggestions were not particularly unique.** The defences available in Scottish homicide trials include self-defence, necessity, coercion, provocation and diminished responsibility.[3] Under Scottish law, self-defence requires: (1) imminent danger to life or limb, or that the accused reasonably believed him or herself to have been in such danger; (2) no reasonable opportunity to escape; and (3) a proportionate response.[4] The Commission notes that in the UK and Canada, the element of 'imminence' is downgraded to a relevant factor to be considered.[5] The review is contemplating the **introduction of a partial defence of excessive self-defence**, where the accused kills with excessive force in a mistaken but reasonably held belief that the force was necessary to repel the attack.[6] This course has been taken up in India and Ireland, and some Australian states.[7] An alternative view is that Scotland's current defence of provocation is sufficient to cover these situations.[8]

[2] See https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[3] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 27 May 2021) 5 [16].
[4] Ibid 5 [18], 97-8 [7.5].
[5] Ibid 98 [7.10], citing J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) [3.09]; *Shaw v R* [2001] UKPC 26; *R v Lavallee* [1990] 1 SCR 852.
[6] Scottish Law Commission (n 2) 5 [21].
[7] Ibid 103-104 [8.8]-[8.9].
[8] Ibid 5 [21].

	Provocation is a partial defence in Scotland, reducing murder to 'culpable homicide'.[9] Unlike self-defence, it requires an immediate loss of self-control by the accused, and a proportionate response to a physical attack or threat of such attack.[10] Somewhat uniquely, Scotland does not recognise verbal abuse as provocation and allows for provocation by sexual infidelity.[11] The review is considering updating these aspects of the defence,[12] or abolishing the defence entirely and replacing it with a 'loss of control' type defence, like in the UK.[13] Notably, the Commission recognises that the current iteration of the provocation defence may not operate satisfactorily where victims of prolonged psychological abuse kill their abuser.[14] However, the Commission also notes that abolishing provocation entirely without any replacement defence might cause difficulties, citing what has occurred in New Zealand as a 'dislocation between the law and what jurors considered to be justice'.[15] The review is considering whether self-defence, provocation and diminished responsibility provide a satisfactory framework for victims of prolonged abuse who kill their abuser.[16] It is contemplating whether a new complete or partial defence should be created for killings occurring in this context, and the possible role of jury directions about the social, psychological and behavioural context of an abused partner.[17] The Commissions suggests that existing defences are deficient in offering legal protection to victims of domestic abuse who kill their partners, as the strict requirements of the defences are not well suited to these circumstances.[18] For example, the Commission discusses how self-defence is rarely of assistance to an accused who has suffered a prolonged course of abusive behaviour due to

[9] Ibid 6 [27].
[10] Ibid 97 [7.3], 104 [8.11].
[11] Ibid 6 [27], 140 [10.3], 142 [10.7], 143 [10.12]. On the verbal provocation point, cf *Coroners and Justice Act 1009* s 55(4) which specifically provides that the loss of self-control may be attributable to things done **or said.** On the sexual infidelity point, cf *Crimes Act 1900* (NSW) s 23(2)(b), which requires the deceased's conduct to have been a serious indictable offence.
[12] See, eg, Scottish Law Commission (n 2) 143 [10.11], 144 [10.17], 147 [10.30].
[13] Ibid 6-7 [27]-[28], 153 [10.47].
[14] Ibid 147-8 [10.31], 174-5 [12.33]; SSM Edwards, "'Loss of Self-Control': The Cultural Lag of Sexual Infidelity and the Transformative Promise of the Fear Defence" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 82.
[15] Scottish Law Commission (n 2) 152 [10.45].
[16] Ibid 7 [31].
[17] Ibid 7 [31]-[32].
[18] See, eg, ibid 179 [12.55].

	the requirements of imminence and reasonable force, and the rule of retreat.[19] As such, the Commission cites suggestions to expand the concept of imminence, or to alter the assessment of reasonableness to require consideration of the subjective characteristics of the abused woman's perspective.[20] In terms of a new domestic abuse defence, the Commission suggests it could extend beyond the 'immediacy' of the threat of harm, it need not be gender specific, and could act as a partial defence.[21] It also suggests allowing evidence from a broader range of sources to help establish the wider context and history of abuse.[22]

[19] Ibid 173-4 [12.26]-[12.29].
[20] Ibid 174 [12.30], citing Lady Scott, "Women Who Kill" (2019) 19.
[21] Scottish Law Commission (n 2) 185 [12.72].
[22] Ibid 185 [12.73].

Title	Securing fair outcomes for battered women who kill in self-defence: A critical analysis of self-defence law in Canada
Author/s	Robin Bansal
Year	2019
Jurisdiction	Canada
DOI/URL	https://pureadmin.qub.ac.uk/ws/portalfiles/portal/527698464/Securing_fair_outcomes_for_battered_women_who_kill_in_self_defence_a_critical_analysis_of_self_defence_law_in_Canada.pdf
Source kind	Juris doctoral thesis
Methodology	Analysis of legislative documents, case law, and legal commentary
Findings	Prior to this thesis, there was little academic or judicial commentary on the 2013 amendments to self-defence provisions in Canada. Bansal positions her paper as a 'gap-filling' one, analysing the changes arising out of these amendments and any new or enduring weaknesses in self-defence law in the context of battered women. Bansal opens by arguing that traditionally, self-defence law in Canada has been insufficient to accommodate situations in which battered women have killed abusive partners. She traces the criticisms of the 1985 provision and the substance of the 2013 amendments. Bansal analyses how the provision has moved from a model of 'unlawful assault' to a context-driven objective standard of 'reasonable belief' in the existence or threat of force, which has unique implications in the contact of domestic violence. Under the new provisions, 'Reasonableness' is now to be assessed with reference to a non-exhaustive list of contextual factors. Herein, argues Bansal, lies the inherent flexibility of the new laws. Furthermore, Bansal praises the downgrading of imminence and proportionality from being elements of the defence to now being contextual factors, with the weight to be given to these factors liable to change depending on the facts of each case. Bansal also praises the inclusion of specific contextual factors which capture situations of domestic violence, eg, directing the courts to consider the parties' gender and physical capabilities, the relationship between the parties, including any history of force or threat, and previous interactions and communication between the parties. In terms of weaknesses of the amendments, Bansal cites uncertainty around the weight that may be afforded to each contextual factor in any given case, and the role of expert evidence in assessments of the accused's reasonableness. She suggests that broad expert evidence on the effects of BWS should be led before juries, but not extend to any kind of diagnosis of the accused. Bansal also raises issues with the

	'defensive purpose' element of the provision, as negative stereotypes about BW acting out of revenge 'may hinder the ability for the courts to see the defensive purpose of their response'. Here, Bansal notes that it will be important for courts to continue to allow accuseds to hold other motives, so long as the defensive one is dominant. Bansal argues in favour of two further amendments to the defence: (1) the introduction of a 'strong retreat rule', wherein the availability of alternatives to the accused becomes an element of the defence rather than a contextual factor. This, according to Bansal, shows 'greater concern for the right to life of all parties', and (2) the inclusion of systemic factors attending BWS in the list of contextual factors in s 34(2). Finally, Bansal notes that factors such as the approach lawyers take to highlighting contextual factors and the persistence of stereotypes about domestic violence may continue to play a role in the efficacy of the defence for BW.
Summary of position	Ultimately, Bansal contends that the 'new' (2013) self-defence provisions represent an improvement on the previous position, particularly owing to their increased simplicity, flexibility, and objectivity. At the same time, says Bansal, the provisions continue to suffer from certain weaknesses.

Title	Domestic violence and the gendered law of self-defence in France: The case of Jacqueline Sauvage
Author/s	Kate Fitz-Gibbon and Marion Vannier
Year	2017
Jurisdiction	France
DOI/URL	https://doi.org/10.1007/s10691-017-9358-8
Source kind	Peer reviewed journal article published in *Feminist Legal Studies*
Methodology	An analysis of the judgments in *Sauvage* to assess the adequacy of France's legal framework for abused female IPH offenders
Findings	In *Sauvage*, the defendant shot her husband in the back after 47 years of psychological, physical, and sexual abuse. In the first instance, Sauvage was convicted of murder and sentenced to 10 years imprisonment. This was upheld on appeal. Later, after a petition signed by 400,000, Sauvage received a presidential pardon. Self-defence is justified when a person, faced with an unjustified attack on themselves or a third person, simultaneously commits an act necessary to legitimate defence, which is proportionate to the seriousness of the attack. Immediacy is strictly required by courts. Proportionality is narrowly construed. Abused women are rarely able to make out self-defence successfully. Provocation and loss of control remain relevant at the sentencing stage. In the Sauvage case, the defence (on appeal) argued that self-defence, specifically the imminence requirement, ought to be interpreted more broadly, placing the homicide in the context of decades of abuse and an attack earlier in the day. They contended the killing was proportionate to the risk posed by Sauvage's husband both to herself and her children. The appeal jury confirmed the conviction, and the court held that self-defence had not been made out, primarily because that it was not proportionate. Particularly in the French inquisitorial system, the authors identified the ability to establish DV to be a significant obstacle (here, there were no police complaints or prior convictions, though there were hospital records). Most of the questioning focussed on *why* she had not reported the abuse to the police. Both the judge and prosecution doubted the severity of the abuse. The authors note that only abused women who conform to gendered stereotypes are typically eligible for a more lenient treatment under the law, including self-defence. They commend Victoria's evidential provisions and detailed juror instructions. They consider that akin evidential provisions in France could overcome some of the difficulties faced by Sauvage.
Summary of position	The French self-defence and evidential framework should be reformed. This article is interesting, though not directly comparable, given that France operates under an inquisitorial system.

Title	**Battered women and mandatory minimum sentences*** **
Author/s	Elizabeth Sheehy
Year	2001
Jurisdiction	Canada
DOI/URL	http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss2/13
Source kind	Peer reviewed journal article published in *Osgoode Hall Law Journal*
Methodology	Analysis of trial transcript in *Kondejewski*
Findings	The mandatory minimum sentence distorts the way in which defences to murder are perceived by abused female IPH offenders. While the author acknowledges the symbolic and practical benefits of reforms to self-defence, she considers that none have increased acquittals. The abolition of the mandatory minimum is the only criminal law reform that '*can shift the power balance so effectively as to ensure a fair opportunity to have their legitimate claims to self-defence adjudicated.'* The author commends reforms which have allowed BWS evidence to be adduced. However, this reform has not equated to greater acquittals. While *Lavallee* was certainly a step in the right direction, the author notes that most accused women continue to plead guilty to manslaughter rather than proceed to trial, despite self-defence evidence available. Reforms, according to the author, are undermined by the discretion of the police, prosecutors, judges, and defence lawyers who frame these cases in particular ways. The author expresses support for a recommendation in the *Final Report for the Self-Defence Review* of Crown guidelines encouraging them to pursue only a manslaughter charge if they would be willing to accept a guilty plea to manslaughter. Looking at provocation, Sheehy suggests that the high stakes associated with mandatory minimum sentences sees the distortion of defences such that they begin to stray from their doctrinal origins. Sheehy considers that self-defence is distorted by the mandatory minimum sentence in three ways. First, it means self-defence is often abandoned due to the enormity of the consequences of an unsuccessful trial. Second, when self-defence *is* asserted, it is assessed as a 'syndrome' (through BWS evidence) rather than an objectively tested defence of justification. This individualised deficit-framing and focus on syndromes and perceptions rather than the deceased's violence, according to Sheehy, distorts the defence. A woman's credibility can further be limited due to trauma responses which can make it difficult to convey evidence chronologically. Finally, Sheehy suggests that self-defence may have to be reframed to be more palatable to a jury where women's lives have been historically held in lower esteem to men's lives.

	Using *Kondejewski* as a case example, Sheehy asserts that mandatory minimum sentences create a power imbalance in favour of the Crown through which they can leverage guilty pleas. This incentivises the Crown to prosecute.
Summary of position	The mandatory minimum life sentence for murder should be abolished as it distorts perceptions of defences. It creates power imbalances between the prosecution and the accused. The mandatory sentence, according to Sheehy, prevents plea fair bargaining.

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1 December 2024

Summary of research

Criminal defences available to abused women who kill

Prepared for Sisters Inside

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Criminal Defences for Women Who Kill:

Summary of Research

Introduction

Women accused of intimate partner homicide (IPH) are often victims of prolonged domestic and family violence. The criminal law has struggled to respond appropriately to these incidents. They do not fit neatly within a provocation framework as there is often no singular triggering assault, and they may not fall within the law of self-defence because the force used may seem disproportionate in the circumstances. For these women however, being victim to prolonged violence does inform a reasonable apprehension of death or grievous bodily harm, and use of force may well be reasonably necessary to protect them against that harm. As such, their culpability is reduced.

Self deference – built around men's violence. Law is inherently patriarchal and cannot respond to gendered violence and prolonged violence experienced by women in domestically violent relationships.

Several defences have been created that attempt to address the special circumstances of women who commit IPH. They include defensive homicide, excessive self-defence, and 'loss of control' defences.

In Queensland, the specific offence of 'killing for preservation in an abusive domestic relationship' was introduced in 2009 to provide protection to victims of seriously abusive relationships who kill their abusers. The offence is cast in gender-neutral terms. In fact, the defence has been used far more often by men than women to excuse homicide, and several women accused of IPH in the context of abusive domestic relationships have been found guilty of murder, despite its existence.

The 'defence of killing for preservation in an abusive domestic relationship' is only a partial defence – that is, it reduces murder to manslaughter. This is important because, in Queensland, murder attracts a mandatory sentence of life imprisonment.[1] Self-defence is a complete defence to murder, however it is difficult to establish self-defence in circumstances where there was no imminent physical threat. Often, women commit IPH against abusive partners in non-confrontational circumstances – they may wait until they have a relative physical advantage, so they may find it difficult to frame their conduct as self-defence under the relevant Queensland provision.

In this area of law, Queensland is unusual in several respects:

(1) Queensland has the unique partial defence of 'killing for preservation in an abusive domestic relationship'.

[1] *Criminal Code 1899* (Qld) s 305(1).

(2) There is a mandatory life sentence for murder in Queensland.

(3) It is difficult to establish self-defence in the absence of an imminent physical threat.

This combination does not exist in any other jurisdiction, in Australia or elsewhere. The question, therefore, is whether the laws are achieving its intended effects; if not, whether the laws should be changed; and if so, how.

Defences to murder

The law in Queensland

Queensland is the only jurisdiction with a specific domestic violence defence to homicide. This defence supplements pre-existing defences in the Queensland *Criminal Code*, most relevantly, self-defence and provocation.

Self-defence

The law on self-defence causing death is encompassed in sections 271 (for 'unprovoked assault') and 272 (for 'provoked assault') of the Queensland *Criminal Code*.

These provisions establish the following key aspects of self-defence in Queensland:

(1) self-defence is a complete defence to murder – if made out, it excuses the defendant from all criminal liability for his or her act or omission causing death;
(2) self-defence requires a triggering assault, causing reasonable apprehension of death or grievous bodily harm; and
(3) the force used must be reasonably necessary to protect the defendant against the perceived harm.

The literature characterises Queensland as having a strict self-defence framework.[2] As the law stands, the requirement of a triggering assault is a significant obstacle to establishing self-defence where abused women have killed their partners in non-confrontational circumstances.[3] Queensland is the only jurisdiction to require a specific and objectively dangerous threat before self-defence becomes available.[4]

[2] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged With Homicide: Analysing Defence Lawyering in "R v Falls"' (2014) 38(2) *Melbourne University Law Review* 66; Kerstin Braun, '"Till Death Do Us Part" Homicide Defenses for Women in Abusive Relationships – Similar Problems, Different Responses in Germany and Australia' (2017) 23(10) *Violence Against Women* 1177; Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39(3) *Monash Law Review* 864; Michelle Edgely and Elena Marchetti, 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues To Ignore Reality' (2011) *Flinders Law Journal* 126.
[3] Sheehy, Stubbs and Tolmie (n 2); Edgely and Marchetti (n 2).
[4] Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia, and Queensland' (2010) 35(3) *Alternative Law Journal* 132. See also Sheehy, Stubbs and Tolmie (n 2); Edgely and Marchetti (n 2).

Furthermore, while aspects of sections 271 and 272 are framed subjectively, in practice, abused women are required to establish that the force they used was *objectively* necessary.[5] Establishing the objective necessity of the force can be difficult for the following reasons:

(1) in non-confrontational settings, juries may be less likely to consider the force as strictly necessary for preservation;
(2) jurors and legal professionals, without sufficient domestic violence education, have been historically distracted by the misconception that 'she should just leave' the relationship;[6] and
(3) abused women who kill their partners often use weapons,[7] which can be viewed by jurors as disproportionate and indicative of pre-meditation.[8]

Accordingly, in its 2008 report, the Queensland Law Reform Commission (QLRC) propounded that 'it is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser.'[9]

Provocation

Queensland is one of four Australian jurisdictions to maintain provocation as a partial defence to murder.[10] The defence is set out in section 304 of the Queensland *Criminal Code*, and applies where the act causing death is done 'in the heat of passion caused by sudden provocation' *and* 'before there is time for the person's passion to cool'.[11] The defence does not apply if the provocation is based on words alone (unless there are 'circumstances of an exceptional character',[12] which may include a history of violence).[13]

Relevant to this inquiry, section 304(3) clarifies that the provocation defence will generally not apply to killings within domestic relationships, where the deceased had done or threatened to do something to end or change the nature of the relationship.

Section 304 has attracted significant criticism from scholars and legal professionals: much of the literature characterises provocation as an inherently gendered defence, favouring male

[5] Edgely and Marchetti (n 2) 138.
[6] Amanda Clough, 'Coercive Control: Transforming Partial Defences to Murder in England and Wales' (2023) 87(2) *Journal of Criminal Law* 109; Victorian Law Reform Commission, *Defences to Homicide* (Options Paper, September 2003) [4.184]; Marion Whittle and Guy Hall, 'Intimate Partner Homicide: Themes in Judges' Sentencing Remarks' (2018) 25(6) *Psychiatry, Psychology and Law* 922.
[7] This is attributable to the size and strength imbalances often seen between partners involved in domestic violence: Danielle Tyson, Deborah Kirkwood and Mandy McKenzie, 'Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' (2017) 23(5) *Violence Against Women* 559.
[8] Susan Edwards and Jennifer Koshan, 'Women Who Kill Abusive Men: The Limitations of Loss of Control, Provocation and Self-Defence in England and Wales and Canada' (2023) 87(2) *Journal of Criminal Law* 75; *R v Silva* [2015] NSWSC 148.
[9] Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report, No 64, September 2008).
[10] Victoria, Tasmania, South Australia, the United Kingdom and New Zealand have all abolished the provocation defence.
[11] *Criminal Code 1899* (Qld) s 304(1).
[12] *Criminal Code 1899* (Qld) s 304(2).
[13] *Criminal Code 1899* (Qld) s 304(7).

defendants.[14] On the other hand, it is noted that the defence provides another avenue for women to account for what can be complex and idiosyncratic situations of abuse.[15]

'Killing for preservation in an abusive domestic relationship'

Section 304B was introduced into the Queensland *Criminal Code* in 2009, with the aim of providing legal protection to victims of seriously abusive relationships who kill their abusers.[16] The provision was preceded by a 2008 QLRC Report, which found that 'rather than distort the defence of provocation,' a separate defence for battered persons should be considered 'as a matter of priority'.[17] A subsequent report prepared by Mackenzie and Colvin echoed this recommendation.[18]

Section 304B provides a partial defence to murder and supplements existing defences. The elements of the defence are:

(1) the accused has killed a person;
(2) the person killed had committed acts of serious domestic violence[19] against the accused in the course of the abusive domestic relationship;
(3) at the time of the killing, the accused believed their acts were necessary for the accused's preservation from death or grievous bodily harm;[20] and
(4) there were reasonable grounds for this belief, having regard to the abusive relationship and all the circumstances of the case.[21]

The main differences between section 304B and the self-defence provisions are:

(1) section 304B is a partial defence;

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[14] Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2023) 30(9) *Violence Against Women* 2275; Danielle Tyson and Bronwyn Naylor, 'Reforming the Defences to Murder, An Australian Case Study' in Adrian Howe and Daniela Alaatinoğlu (eds) *Contesting Femicide: Feminism and the Power of Law Revisited* (Routledge, 1st edn, 2019) 27; Whittle and Hall (n 6); Tyson, Kirkwood and McKenzie (n 7); Braun (n 2); Crofts and Tyson (n 2); Kate Fitz-Gibbon and Sharon Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52(1) *British Journal of Criminology* 159.
[15] Nash and Dioso-Villa (n 14); Crofts and Tyson (n 2).
[16] Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (Cameron Dick) (s*304B Second Reading Speech*).
[17] Queensland Law Reform Commission (n 9) 11, 501 [rec 21-4], 491 [21.138].
[18] Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report, 9 July 2009) 11 [1.32], 35 [3.43].
[19] According to the Supreme Court of Queensland Benchbook, 'serious violence' is to be given its ordinary meaning, and must be considered in the context of the relationship and the history of domestic violence. See Supreme Court of Queensland, *Killing For Preservation In An Abusive Domestic Relationship Benchbook* (Supreme Court of Queensland Library, August 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/136497/sd-bb-99-killing-for-preservation-in-an-abusive-domestic-relationship-s-304b.pdf>. Note that in the UK, it has been suggested that 'serious violence' is a high threshold: Susan Edwards, 'Women Who Kill Abusive Partners: Reviewing The Impact of Section 55(3) "Fear Of Serious Violence" Manslaughter - Some Empirical Findings' (2021) 72(2) *Northern Ireland Legal Quarterly* 245, 252.
[20] See *R v Tracey* [2024] QCA 19, where the Court held that s 304B did not arise on the facts because, on the defendant's evidence, she did not believe the acts which caused her ex-husband's death were necessary for her preservation from death or grievous bodily harm.
[21] See s304B Second Reading Speech (n 16) 3669-70.

(2) section 304B has more limited application, being enlivened only where acts of serious domestic violence have occurred in the course of an abusive domestic relationship.[22] This is narrower than the (now repealed) defensive homicide provisions in Victoria (discussed further below);[23]
(3) section 304B is better tailored to non-confrontational killings, as it does not require the abusive actions of the deceased to have occurred immediately prior to the accused's acts or omissions.[24]

The critical response to the introduction of section 304B, and the nature of its use, has been mixed.

The provision has the following benefits for women who have killed abusive partners:

(1) It can operate as a 'halfway house' defence, encouraging abused women to proceed to trial and run both self-defence (complete) and section 304B (partial) arguments, rather than pleading out.[25] Indeed, a 2023 study found that Queensland, being the only state with this specific domestic violence defence, has the greatest rate of acquittals in the country for women who kill their abusive partners.[26] This is significant, as research suggests such women are frequently overcharged and reluctant to go to trial.[27]
(2) Downgrading the charge from murder to manslaughter enables judges to exercise greater sentencing discretion (instead of imposing a mandatory life sentence).[28]
(3) It is a 'fairer label' of the defendant, reflecting reduced moral culpability.[29]

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[22] See generally Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal consideration and informed imagining: Recognising and responding to the lived experiences of abused women who kill' (2018) 41(3) *Melbourne University Law Review* 1201; Julie Stubbs, 'Murder, Manslaughter, and Domestic Violence' in Kate Fitz-Gibbon and Sandra Walklate (eds), *Homicide, Gender and Responsibility: An International Perspective* (Routledge, 2016) 36.
[23] See also Hopkins, Carline and Easteal (n 22).
[24] See generally Nash and Dioso-Villa (n 14). Although, *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010) suggests this may not be strictly necessary for self-defence either. In that case, the defendant sedated and killed her abuser after he made a specific threat to kill their child. She was acquitted on the basis of self-defence. In directing the jury on both self-defence and s 304B, Applegarth J highlighted that an 'assault' for the purpose of self-defence can include an ongoing risk of death or serious injury. Other states have taken this one step further, by legislatively enshrining that self-defence in the context of family violence can be available to defendants, even where the threat being responded to is not immediate: see, eg, *Crimes Act 1958* (Vic) 322M(1)(a).
[25] See, eg, Crofts and Tyson (n 2); *R v Irsigler* (2012) QSC (28 February 2012) (female accused was found not guilty of murdering her husband, with both s 304B and self-defence being raised); *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010). Although, some have suggested that the defendants in these cases fell within the category of 'good victims', being (variously) young, white, mothers, without criminal histories, and no history of drug or alcohol abuse: Heather Douglas, 'A Consideration Of The Merits Of Specialised Homicide Defences For Battered Women' (2012) 45(3) *Journal of Criminology* 367, 377.
[26] See generally Nash and Dioso-Villa (n 14).
[27] Ibid 2278, 2283. See also Charlotte King, Lorana Bartels and Patricia Easteal, 'Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis' (2016) 42(1) *Monash University Law Review* 138; Hopkins, Carline and Easteal (n 22); Tyson, Kirkwood, McKenzie (n 7); Sheehy, Stubbs and Tolmie (n 2); Edgely and Marchetti (n 2).
[28] Cf Edwards and Koshan (n 8), who note that judicial discretion in sentencing may not always benefit abused women.
[29] Mackenzie and Colvin (n 18) 35 [3.44].

(4) Section 304B may have some normative influence on prosecutorial practice and judicial attitudes.[30] This is important as the literature has tended to criticise the legal profession's ignorance of both the nature of family violence, and of the provisions introduced specifically to protect women in these situations.[31]

On the other hand, criticisms of section 304B include:

(1) The defence is only partial (unlike self-defence).[32]
(2) The section is underused, and published case law suggests that it is predominantly raised by men.[33] This outcome is not consistent with the purpose of the section.[34]
(3) There is a complex overlap between self-defence and section 304B because raising self-defence could trigger section 304B, requiring jury directions on both defences. It has been argued that this is confusing for juries and places defendants in a tactically awkward position.[35] Note, however, that a model jury direction was given in the case of *R v Falls* by Applegarth J which provided considerable clarity in relation to this issue.[36] (This is discussed further below.)
(4) The availability of section 304B and its specific application to situations of abusive domestic relationships may result in juries erring on the side of caution and convicting the accused of manslaughter rather than acquitting them for self-defence.[37] This is problematic, as research

[30] See, eg, *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010), see also Hopkins, Carline and Easteal (n 22); Bronwyn Naylor and Danielle Tyson, 'Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question' (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 72.
[31] See, eg, Australia's National Research Organisation for Women's Safety, *Women Who Kill Abusive Partners: Understandings of Intimate Partner Violence in the Context of Self-defence, Key Findings and Future Directions* (Report, 2019); Tyson, Kirkwood and McKenzie (n 7), citing comments from the sentencing judge in *R v Black* [2011] VSCA 152, the prosecution's disputing of whether the defendant being forced to have sex with another man in the deceased's presence was an instance of family violence in *R v Creamer* [2012] VSCA 182, and various other failures by defence counsel to raise family violence provisions or lead expert evidence on the impacts of such violence.
[32] Queensland Law Reform Commission, *Review of Particular Criminal Offences - Killing for Preservation in an Abusive Domestic Relationship* (Information Sheet, November 2023) 3. See also Mackenzie and Colvin (n 18) 31 [3.29]; Sheehy, Stubbs and Tolmie (n 2).
[33] Although, rarely successfully. See, eg, *R v Robbins* (2023) 13 QR 433 (man convicted of murdering his brother); *R v Jones* [2015] QCA 161 (man convicted of murdering his mother); *R v Gaskell* [2016] QCA 302 (man convicted of murdering his former wife).
[34] See, eg, s304B Second Reading Speech (n 16) 3670. See also Queensland Law Reform Commission (n 9) 3; Victorian Law Reform Commission (n 6) [4.188]. However, the defence is not gender specific, so its apparent overuse by men may be due to the different homicide rates between men and women.
[35] Hopkins and Easteal (n 4); Edgely and Marchetti (n 2). In the Victorian context, see Fitz-Gibbon and Pickering (n 14); Victorian Law Reform Commission (n 6) [4.158]-[4.159].
[36] *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010).
[37] Hopkins and Easteal (n 4); *R v Sweeney* (Unreported, Supreme Court of Queensland, Henry J, 3 March 2015), cited in Nash and Dioso-Villa (n 14). Although, see *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010), where Applegarth J made clear that s 304B only becomes relevant once the jury are convinced beyond a reasonable doubt that the defendant was guilty of murder and that self-defence could not be made out. For discussions of this point in the context of defensive homicide provisions, see Stubbs (n 22); Naylor and Tyson (n 30); Crofts and Tyson (n 2); Fitz-Gibbon and Pickering (n 14). For examples of convictions for defensive homicide in circumstances of domestic violence, see *R v Middendorp* [2012] VSCA 47; *R v Creamer* [2012] VSCA 182 and *R v Black* [2011] VSCA 152, all cited in Hopkins, Carline and Easteal (n 22).

suggests that Aboriginal and Torres Strait Islander accused are more likely to plead guilty to manslaughter even where self-defence arguments are available.[38]

(5) Section 304B is limited to the accused being abused and does not capture circumstances in which the defendant has killed the abuser to protect another (such as the accused's child).[39]

Victoria's (repealed) defence of 'defensive homicide'

Victoria introduced the defence of 'defensive homicide' in 2005 but abolished it in 2014. The effect of the provision was that a defendant would be guilty of murder unless he or she had reasonable grounds for believing his or her conduct was necessary to defend him or herself from death or really serious injury.[40] The provisions were not specific to situations of domestic abuse, but they were introduced with the protection of 'battered women' in mind.[41]

It eventually became clear that defensive homicide was not operating as intended in Victoria. In particular, it was predominantly relied upon by men who killed other men in violent confrontations.[42] In this way, defensive homicide was viewed as benefitting male defendants by filling a gap left after the abolition of the provocation defence.

The abolition of the defence was not universally welcomed. Some academics suggested that defensive homicide provided a 'safety net' which encouraged women to proceed to trial rather than plead guilty (similar to Queensland's section 304B).[43] Others argued that the provisions provided a feasible alternative for women who genuinely believed their lives were in danger.[44] It was said that the repeal of the defence was hasty and lacked proper scrutiny.[45]

The common law of self-defence was codified and expanded in Victoria. Current sections 322K and 322M of the *Crimes Act 1958* (Vic) are similar, but not identical, to provisions in New South Wales,[46] Western Australia,[47] and South Australia,[48] that revolve around the concept of 'excessive self-defence'. In Victoria, self-defence will be successfully raised under section 322K if it is established that:

(1) the defendant believed the conduct was necessary in self-defence of him or herself or another person; and

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[38] Stubbs (n 22).
[39] Queensland Law Reform Commission (n 9) 3. See also Mackenzie and Colvin (n 18) 37 [3.52], 45 [4.29]; Hopkins, Carline and Easteal (n 22).
[40] See *Crimes Act 1958* (Vic) previous ss 9AC, 9AD. See also Tyson and Naylor (n 14).
[41] See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 3 September 2024, 3146 (Mr Southwick).
[42] Ibid 3139 (Mr Morris); Victoria, *Parliamentary Debates*, Legislative Council, 25 June 2014, 2128 (EJ O'Donohue). See also *R v Middendorp* [2012] VSCA 47, cited in Hopkins, Carline and Easteal (n 22); Naylor and Tyson (n 30); *Sherna v R* [2011] 32 VR 668; King, Bartels and Easteal (n 27); Fitz-Gibbon and Pickering (n 14).
[43] King, Bartels and Easteal (n 27); *DPP v Williams* (2014) VSC 304.
[44] Naylor and Tyson (n 30) 80.
[45] Ibid.
[46] *Crimes Act 1900* (NSW) ss 418, 421.
[47] *Criminal Code Act Compilation Act 1913* (WA) s 248.
[48] *Criminal Law Consolidation Act 1935* (SA) s 15(2).

(2) the defendant's conduct was a reasonable response in the circumstances as the defendant perceived them.[49]

Section 322M further provides that in the context of family violence, self-defence can be raised successfully even if the harm is not immediate, or the force is in excess of the force involved in the harm or threatened harm.[50] It also allows for evidence of family violence to be admitted to determine the elements of the defence.[51]

These provisions are superior to Queensland's law on self-defence in the following ways:

(1) there is no need to prove an imminent attack;

(2) there is no need for the defendant's force to be proportionate; and

(3) the focus is on whether the conduct was a reasonable response in the circumstances as the defendant perceived them, rather than whether reasonable grounds existed for the defendant's belief.[52]

Victoria's self-defence provision, along with its inclusive definition of family violence, detailed jury directions and wide evidential provisions, make it one of the more progressive jurisdictions when it comes to the operation of self-defence for battered women.

Criminal defences in New South Wales: 'excessive self-defence'

Defences in NSW offer accused women a range of options.[53] Unlike other Australian jurisdictions, NSW has maintained a wider range of partial defences (namely, extreme provocation and excessive self-defence) which give abused women who kill more alternatives.[54] These defences are set out in the *Crimes Act 1900* (NSW), which supplements and sometimes supplants the common law.

Self-defence is a complete defence to murder. Importantly, there is no mandatory life penalty for murder in NSW, unlike in Queensland. In terms of partial defences to murder, NSW offers: extreme provocation,[55] excessive self-defence,[56] and mental impairment.[57]

[49] *Crimes Act 1958* (Vic) s 322K(2).
[50] *Crimes Act 1958* (Vic) s 322M(1).
[51] *Crimes Act 1958* (Vic) s 322M(2).
[52] See Hopkins, Carline and Easteal (n 22).
[53] Crofts and Tyson (n 2).
[54] See generally ibid 871-4, 877.
[55] *Crimes Act 1900* (NSW) s 23.
[56] *Crimes Act 1900* (NSW) s 421.
[57] *Crimes Act 1900* (NSW) s 23A.

Excessive self-defence

Excessive self-defence is available as a defence in New South Wales,[58] South Australia[59] and Western Australia.[60] It is also available in in India[61] and Ireland.[62] Excessive self-defence operates such that:

(1) where a person has used force resulting in death; and

(2) the conduct was not a reasonable response in the circumstances as the person perceived them; then

(3) the person will be partially excused from murder if he or she believed the conduct was necessary to defend him or herself;[63] and

(4) the person may believe that his or her conduct is necessary and reasonable in the circumstances even if the threat of harm is not immediate, and the response involves force that is in excess of the force involved in the harm or threat of harm.[64]

Victoria, Western Australia and South Australia have additional provisions clarifying that evidence of family violence may be relevant in determining whether the elements of self-defence have been met.[65] As discussed, Victoria has specified in its legislation that, in family violence contexts, imminent harm is not required before self-defence can be raised.[66]

Excessive self-defence regimes have been criticised in similar terms to Queensland's section 304B. In particular, these regimes have been described as legally complex,[67] and a means of preventing women from being acquitted of killing their abusive partners.[68] These laws, it is argued, have had the effect of normalising manslaughter convictions as an appropriate outcome for abused women who commit IPH.[69]

Loss of control: United Kingdom

The closest international comparator to Queensland's position is arguably the United Kingdom's partial defence of 'loss of control' in sections 54 and 55 of the *Coroners and Justice Act 2009* (UK). This defence applies when a person 'loses control' by virtue of a 'qualifying trigger' in circumstances where a person with a 'reasonable degree of tolerance and self-restraint' might have acted the same

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[58] *Crimes Act 1900* (NSW) s 421.
[59] *Criminal Law Consolidation Act 1935* (SA) s 15A(2).
[60] *Criminal Code Act Compilation Act 1913* (WA) s 248(3).
[61] Indian Penal Code s 300, exception 2.
[62] *The People (AG) v Dwyer* [1972] IR 416; *The People (DPP) v Barnes* [2007] 3 IR 130; *Criminal Law (Defence and the Dwelling) Act 2011* s 2.
[63] Note that the Western Australian legislation requires that there be reasonable grounds for those beliefs: see *Criminal Code Act Compilation Act 1913* (WA) s 248(4)(c).
[64] *Crimes Act 1900* (NSW) s 421(1); *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Criminal Code Act Compilation Act 1913* (WA) s 248(3)-(4).
[65] See, eg, *Crimes Act 1958* (Vic) ss 322M(2), 322J(1). See also Queensland Law Reform Commission (n 9) 3; Hopkins, Carline and Easteal (n 22) 1227-8; Nash and Dioso-Villa (n 14).
[66] *Crimes Act 1958* (Vic) s 322M(1)(a), cf *Criminal Code Act Compilation Act 1913* (WA) s 248(4)(a) which removes the imminence requirement for **all** self-defence claims (as in, not only in family violence contexts).
[67] Victorian Law Reform Commission (n 6) [4.190].
[68] Ibid [4.192].
[69] Sheehy, Stubbs and Tolmie (n 2).

way.[70] One qualifying trigger is 'fear of serious violence from the deceased against the defendant or another identified person'.[71]

This provision was enacted with abused women in mind, and is now referred to as the 'fear of serious violence' defence.[72]

The main criticisms of this defence are the implicit requirements of reasonableness and proportionality, and that it represents a reframing of provocation defence (previously abolished in the UK).[73] Importantly, this defence has rarely been successfully raised by women.[74]

Self-defence in Canada

Section 34 of the *Canadian Criminal Code* provides for the defence of self-defence. It requires that:

(1) the accused believed on reasonable grounds that force or a threat of force was being used against them or another person;
(2) the act was committed for the purpose of defending or protecting the accused or the other person from that use or threat of force; and
(3) the act was reasonable in the circumstances.[75]

Section 34(2) lists factors relevant to the determination of 'reasonableness,' including imminence, proportionality, size, age, gender, physical capabilities, and the relationship between the parties, including prior use or threat of force.

This provision has been commended for its flexibility[76] and its emphasis on the subjective elements of self-defence.[77] It has been praised for considering imminence and proportionality alongside other contextual factors,[78] and allowing for different weight to be afforded to these factors in each case.[79] The inclusion of specific contextual factors which capture situations of domestic violence has also been met with approval.[80] However, it has been noted that systemic factors are missing from the list.[81] The 'defensive purpose' element of the provision has also been criticised.[82]

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[70] See *Coroners and Justice Act 2009* (UK) s 54(1), (3) and 55(3). See also Clough (n 6).
[71] *Coroners and Justice Act 2009* (UK) s 55(3).
[72] See Edwards and Koshan (n 8).
[73] Ibid.
[74] Clough (n 6). See also *R v Dawes* [2013] EWCA Crim 322.
[75] See also *R v Poucette,* 2021 ABCA 157.
[76] *R v Poucette,* 2021 ABCA 157; *R v Khill,* 2020 ONCA 151 [63]; Robin Bansal, *Securing Fair Outcomes for Battered Women Who Kill in Self-defence: A Critical Analysis of Self-defence Law in Canada* (Juris doctoral thesis, 2019).
[77] Sheehy, Stubbs and Tolmie (n 2), citing *R v Lavallee* [1990] 1 SCR 852 and *R v Malott* (1998) 106 O.A.C. 132 (SCC).
[78] *Lavallee* (n 67).
[79] *R v Khill,* 2020 ONCA 151 [63]; *R v Poucette,* 2021 ABCA 157; Bansal (n 66).
[80] Bansal (n 66).
[81] Edwards and Koshan (n 8).
[82] Bansal (n 66).

Scottish Law Commission Review of Homicide Crimes

A review of homicide is currently being conducted in Scotland.[83] The Final Report for this review is yet to be published,[84] however, the Scottish Law Commission has published a Discussion Paper which considers, among other things, reform options for defences to homicide, and whether a new partial defence should be created for people who kill following prolonged domestic abuse.

The defences currently available in Scottish homicide trials include self-defence, necessity, coercion, provocation and diminished responsibility.[85]

Under Scottish law, self-defence requires:

(1) imminent danger to life or limb, or that the accused reasonably believed him or herself to have been in such danger;
(2) no reasonable opportunity to escape; and
(3) a proportionate response.[86]

This differs from the law in the UK and Canada, where the element of 'imminence' has been downgraded to a relevant factor to be considered.[87]

The review is contemplating the introduction of a partial defence of excessive self-defence.[88] An alternative view is that Scotland's current defence of provocation is sufficient to cover these situations.[89] Provocation is a partial defence in Scotland, reducing murder to 'culpable homicide'.[90] Unlike self-defence, it requires an immediate loss of self-control by the accused, and a proportionate response to a physical attack or threat of such attack.[91] Somewhat uniquely, Scotland does not recognise verbal abuse as provocation and allows for provocation by sexual infidelity.[92] The review is considering updating these aspects of the defence,[93] or abolishing the defence entirely and replacing it with a 'loss of control' defence, as in the UK.[94]

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[83] Note that the UK Law Commission is also in the pre-consultation phase of a review of defences for victims of domestic abuse who kill their abusers: <https://lawcom.gov.uk/project/defences-for-victims-of-domestic-abuse-who-kill-their-abusers/>.
[84] See https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/.
[85] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 27 May 2021) 5 [16].
[86] Ibid 5 [18], 97-8 [7.5].
[87] Ibid 98 [7.10], citing J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) [3.09]; *Shaw v R* [2001] UKPC 26; *R v Lavallee* [1990] 1 SCR 852.
[88] Scottish Law Commission (n 85) 5 [21].
[89] Ibid 5 [21].
[90] Ibid 6 [27].
[91] Ibid 97 [7.3], 104 [8.11].
[92] Ibid 6 [27], 140 [10.3], 142 [10.7], 143 [10.12]. On the verbal provocation point, cf *Coroners and Justice Act 2009* s 55(4) which specifically provides that the loss of self-control may be attributable to things done or said. On the sexual infidelity point, cf *Crimes Act 1900* (NSW) s 23(2)(b), which requires the deceased's conduct to have been a serious indictable offence.
[93] See, eg, Scottish Law Commission (n 85) 143 [10.11], 144 [10.17], 147 [10.30].
[94] Ibid 6-7 [27]-[28], 153 [10.47].

Notably, the Commission has recognised that the current iteration of the provocation defence may not operate satisfactorily where victims of prolonged psychological abuse kill their abuser.[95] The Commission has also noted that abolishing provocation entirely without any replacement defence might result in a 'dislocation between the law and what jurors considered to be justice'.[96]

The review is considering whether self-defence, provocation and diminished responsibility provide a satisfactory framework for victims of prolonged abuse who kill their abuser.[97] It is contemplating whether a new complete or partial defence should be created for killings occurring in this context, and the possible role of jury directions about the social, psychological and behavioural context of an abused partner.[98]

Importantly, the Commission has suggested that existing defences are deficient in offering legal protection to victims of domestic abuse who kill their partners, as the strict requirements of the defences are not well suited to these circumstances.[99] For example, self-defence is rarely of assistance to an accused who has suffered a prolonged course of abusive behaviour due to the requirements of imminence and reasonable force, and the rule of retreat.[100] As such, the Commission is considering expanding the concept of imminence, or altering the assessment of reasonableness to require consideration of the subjective characteristics of the abused woman.[101]

In considering a new domestic abuse defence, the Commission has suggested it could extend beyond the 'immediacy' of the threat of harm, it need not be gender specific, and could act as a partial defence.[102] It has also discussed allowing evidence from a broader range of sources to help establish the wider context and history of abuse.[103]

Conclusions regarding defences to murder

Self-defence is the best defence for abused women who commit IPH because it provides a complete defence to murder.[104] This is important in Queensland because a mandatory penalty of life imprisonment applies for murder. However, women who kill their abusive partners may be unable to establish that there was a 'triggering assault'. Research suggests that partial defences provide additional defence options for women who kill and may reduce the number of murder convictions.[105]

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[95] Ibid 147-8 [10.31], 174-5 [12.33]; SSM Edwards, "'Loss of Self-Control': The Cultural Lag of Sexual Infidelity and the Transformative Promise of the Fear Defence" in A Reed and M Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (2019) 82.
[96] Scottish Law Commission (n 85) 152 [10.45].
[97] Ibid 7 [31].
[98] Ibid 7 [31]-[32].
[99] See, eg, ibid 179 [12.55].
[100] Ibid 173-4 [12.26]-[12.29].
[101] Ibid 174 [12.30], citing Lady Scott, "Women Who Kill" (2019) 19.
[102] Scottish Law Commission (n 85) 185 [12.72].
[103] Ibid 185 [12.73].
[104] Sheehy, Stubbs and Tolmie (n 2). Note that the Northern Territory, Australian Capital Territory, Tasmania and New Zealand have self-defence provisions but no partial defences. *Criminal Code 2002* (ACT) s 42; *Criminal Code Act 1983* (NT) s 43BD; *Criminal Code Act 1924* (TAS) s 46. Note that, in New Zealand, murder carries a presumptive, not mandatory, life sentence. Judges are afforded some discretion in sentencing where a life sentence would be manifestly unjust: New Zealand Law Commission, *Understanding Family Violence: Reforming The Criminal Law Relating to Homicide* (Report, May 2016) <https://lawcom.govt.nz/assets/Publications/Reports/NZLC-R139-Summary.pdf>.
[105] Nash and Dioso-Villa (n 14).

In the interests of fairness, it seems important that a range of possible defences are available to accused persons. As Crofts and Tyson state, this approach:

> stands to more appropriately recognise the fact that not all situations in which a person kills in response to family violence are the same and that a person may not always be killing for self-preservation. It has the advantage of ensuring that there are varied defences which can appropriately reflect different circumstances in which a person kills and different levels of culpability. It reduces the chances that a defendant misses out on an appropriate defence altogether because she either does not fit the paradigm case for that defence or she has to remould her story to fit an existing defence. It also minimises the dangers that claims that would have fallen transparently under provocation are reshaped to fit newly formulated defences or defences.[106]

Queensland should remove the mandatory penalty of life imprisonment for murder to ensure that the circumstances of the offence can always be taken into account in sentencing.

Evidential provisions

The difficulty with having a range of possible defences to murder is that they may overlap. This may make it difficult for accused persons to decide which defence is most appropriate in their case and may confuse jurors.

These issues can be addressed through evidential provisions and jury directions. Victoria has received particular praise in the literature for its broad evidential provisions,[107] which have been said to require 'judges and jurors to walk in the shoes of battered women who kill in order to evaluate the reasonableness of their actions'.[108]

The introduction of Part 6A to the *Evidence Act 1997* (Qld) will see Queensland moving in a similar direction, allowing a wider range of evidence to be admitted in domestic violence cases. Furthermore, Victoria's mandatory jury directions, which are to be given when family violence is in issue in the context of domestic violence, have been commended.[109] Justice Applegarth's model direction to the jury in *R v Falls* may address some of the concerns raised in relation to overlapping defences and complexity for jurors. (Jury directions are discussed further below.)

Victoria's evidential provisions: Part IC of the *Crimes Act 1958* (Vic)

Victoria first introduced special evidential provisions related to family violence in 2005.[110] They have since been replaced by similarly broad provisions, now found in Part IC of the *Crimes Act 1958* (Vic).

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[106] Crofts and Tyson (n 2) 877.
[107] Hopkins, Carline and Easteal (n 22) 1227-8; Stubbs (n 22); Sheehy, Stubbs and Tolmie (n 2).
[108] See generally Hopkins and Easteal (n 4) 132.
[109] Nash and Dioso-Villa (n 14); *Jury Directions Act 2015* (Vic) s 58. See also *Evidence Act 1906* (WA) s 38; *Evidence Act 1929* (SA) s 34W. Cf in Queensland, a judge 'may' give such a direction upon request: *Evidence Act 1997* (Qld) s 103T.
[110] See previous *Crimes Act 1958* (Vic) s 9AH.

Part IC of the *Crimes Act 1958* (Vic) enables evidence of family violence to be adduced in relation to any offence where self-defence, duress, sudden emergency or intoxication is raised. Section 322J(1)[111] provides that evidence of family violence includes evidence of:

(a) the history of the relationship, including violence within the relationship or directed at other family members;
(b) the cumulative effect, including the psychological effects, of the violence on the person or a family member;
(c) social, cultural and economic factors that impact on the person or a family member who has been affected by family violence;
(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;
(f) the social or economic factors that impact on people in such relationships.

These provisions allow the accused to call expert witnesses to adduce 'largely unchallenged' evidence on the general nature of family violence and the ways it can manifest, and why leaving may not have been an option for the defendant in particular.[112]

Section 322J(2) of the *Crimes Act 1958* (Vic) sets a broad and inclusive definition of family violence, encapsulating physical, sexual, and psychological abuse, which may include intimidation, harassment, damage to property, threats, and allowing a child to see, or putting them at risk of seeing, their parent being abused.[113]

Another important evidential provision in the Victorian legislation is section 322M(2),[114] which clarifies that evidence of family violence may be relevant to determine whether:

(a) a person has carried out conduct believing it to be necessary in self-defence; or
(b) the conduct is a reasonable response in the circumstances as the person perceives them.

Despite the breadth of these provisions, some suggest they have been underutilised, and that misconceptions about family violence persist within the Victorian legal profession.[115] For example, in a plea hearing for the matter of *R v Black*, the prosecuting counsel labelled a husband's repeated criticisms of the defendant, consistent pressure to have sex with him, and eventual cornering of her

[111] This is nearly identical to the previous *Crimes Act 1958* (Vic) s 9AH(3), which features in the literature and case law.
[112] *R v Williams* [2014] VSC 304 (27 June 2014) 7 [33]. Note, however, that the defendant in that case was not acquitted. See further King, Bartels and Easteal (n 27) 150
[113] This is nearly identical to the previous *Crimes Act 1958* (Vic) s 9AH(4), which features in the literature and case law.
[114] This provision captures the spirit of the previous *Crimes Act 1958* (Vic) s 9AH(2).
[115] Crofts and Tyson (n 2) cite *R v Black* [2011] VSCA 152 and *R v Creamer* [2012] VSCA 182 as examples of this.

in their kitchen, to be '*limited* to threats, intimidation, harassment and jabbing and prodding'.[116] The sentencing judge similarly considered the violence to be 'limited', and as such, the defendant's lethal force in response was held to be 'disproportionate to the threat'.[117] The defendant was sentenced to nine years in prison.[118]

At the same time, there have been successful uses of these provisions which have highlighted their potential for women who kill abusive partners.[119] For example, an application of the previous iteration of section 322J led a magistrate to discharge a woman who had suffered physical and psychological abuse from her husband over the course of their 30-year marriage.[120] The magistrate found that there was overwhelming evidence of family violence such that she doubted the ability of the prosecution to make out any charge or disprove self-defence.[121]

Queensland's new evidential provisions: Part 6A of the *Evidence Act 1977* (Qld)

Queensland now has similar provisions to Victoria, which broaden the types of domestic violence evidence which may be relevant and admissible in criminal proceedings. In particular, the amendments seek to address findings from the Women's Safety and Justice Taskforce that 'the full context of victim experiences of coercive control is not being consistently admitted in court proceedings in Queensland.'[122]

Queensland's evidential provisions were modelled on similar Western Australian laws, introduced in 2020. Sections 38 to 39A of the *Evidence Act 1906* (WA) provide the same broad definition of what may constitute evidence of family violence and contain the same provisions as to expert evidence of family violence. The only difference with the latter provisions is that there is no express abrogation of the ultimate issue and common knowledge rules.

Division 1A was introduced into Part 6A of the *Evidence Act 1977* (Qld) in 2023.[123] These provisions replaced and expanded upon section 132B, which allowed for evidence of the history of a domestic relationship between the parties to be admitted in proceedings for homicide and other serious violent offences.[124] The new provisions have a wider application than section 132B.[125]

Section 103CB(1) renders evidence of domestic violence admissible in any criminal proceedings. This is the case whether the evidence relates to the defendant, the person against whom the offence was committed, or another person connected with the proceeding.[126] Section 103AB clarifies that

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[116] See *DPP v Karen Dianne Black*, Plea Hearing, 2011, 5 (emphasis added), quoted in Crofts and Tyson (n 2) 569.
[117] *R v Black* [2011] VSC 152 [22].
[118] *R v Black* [2011] VSC 152 [3].
[119] See discussion in Kellie Toole, 'Self-defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36(1) *Melbourne University Law Review* 250, 253, 267-9.
[120] This was the case of Freda Dimitrovski; cited in ibid 268-9.
[121] Ibid.
[122] Explanatory Notes, Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld) 12 (*Explanatory Notes*).
[123] See *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) cl 64.
[124] *Explanatory Notes* (n 122) 11.
[125] Ibid.
[126] See *Evidence Act 1977* (Qld) s 103CB(2).

references in the *Evidence Act 1977* (Qld) to domestic violence include 'associated domestic violence', as in, violence committed against another person (such as the victim's child). This means that evidence of violence against other people may be admitted to illustrate the wider context of abuse preceding the offence. This, in turn, may go towards the subjective or objective elements of self-defence.

Section 103CA provides a non-exhaustive list of what may constitute evidence of domestic violence. This list is identical to the one in section 322J(1) of the *Crimes Act 1958* (Vic), except for the following additional examples:

(d) responses by relatives, the community or agencies to domestic violence, including further violence that may be used by an intimate partner or family member to prevent, or in retaliation for, any help-seeking behaviour[127] or use of safety options by the person;

(e) ways in which social, cultural or economic factors have affected any help-seeking behaviour, or the safety options realistically available to the person;

(f) ways in which domestic violence, or the lack of safety options, was exacerbated by inequities, which may be associated with race, poverty, gender identity or expression, sex characteristics, disability or age of the person.

Section 103CC allows the admission of expert evidence in criminal proceedings about the nature and effects of domestic violence, either generally or on a particular person. This section was introduced to 'aid juries and judicial officers in understanding and evaluating evidence from victims of coercive control in context'.[128]

Section 103CC(3) defines an expert on the subject of domestic violence as someone who can demonstrate specialised knowledge, gained by training, study or experience, of a matter that may constitute evidence of domestic violence.

Section 103CD expressly abrogates common law rules of expert evidence, including that experts cannot express opinions about the ultimate facts in issue or about matters of 'common knowledge'. This is significant, as it means that a domestic violence expert may make statements regarding whether, and why, the force used was considered necessary and reasonable by the person.

These new evidential provisions, that allow women to adduce expert evidence on domestic violence, may address the concern that judges, magistrates and jurors do not understand the impacts of family violence, and maintain the belief that the woman should have left the relationship instead of using violence.

[127] 'Help-seeking behaviour' is defined as action taken by a victim of domestic violence to address, or attempt to address, any aspect of the domestic violence, including (a) reporting the domestic violence to the police; (b) obtaining a domestic violence order; (c) separating from an intimate partner who is the perpetrator of the domestic violence; (d) finding alternative accommodation, including accommodation in a refuge; (e) seeking counselling or support: *Evidence Act 1977* (Qld) s 103A.
[128] Explanatory Notes (n 122) 12.

Jury directions

Queensland

Evidence Act 1977 (Qld) Part 6A, Division 3

Part 6A, Division 3 of the *Evidence Act 1977* (Qld) is titled 'Jury directions related to domestic violence' and was enacted in 2023 and 2024 in response to recommendations from the Women's Safety and Justice Taskforce.[129] Queensland's new provisions on jury directions on domestic violence were (also) modelled on the 2020 amendments to the *Evidence Act 1906* (WA), in accordance with the Taskforce's recommendation.[130]

The provisions give courts discretion to deliver jury directions addressing 'misconceptions and stereotypes of domestic violence' in proceedings where domestic violence is in issue.[131] The directions available include general directions about domestic violence, and specific directions about self-defence in response to domestic violence.

Sections 103SA and 103T respectively allow judges to independently decide whether to give a general direction about domestic violence, or for parties to request that a direction be made. Similarly, sections 103U and 103V enable the defence to request a direction about self-defence in response to domestic violence, or for judges to do so of their own accord.

Where a direction is requested, the relevant provisions (with one exception, discussed below) provide that the judge '*may*' give the direction 'unless there are good reasons for not doing so'.[132] This is distinct from the Victorian and Western Australian provisions, under which requested directions are mandatory unless there are good reasons for not giving the direction.

Directions on domestic violence may be given at any time in the proceedings, including before evidence is adduced, and may be repeated.[133]

Subdivision 2 sets out the possible content of general directions about domestic violence, with section 103Z(1) enabling judges to inform juries that domestic violence:

(a) is not limited to physical abuse and may include sexual, psychological or financial abuse;
(b) may amount to violence against a person even though it is immediately directed at another person;

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[129] Ibid.
[130] See equivalent provisions in *Evidence Act 1906* (WA) ss 39C-39G; See also Explanatory Notes (n 122) 12; Supreme Court of Queensland, *Directions about Domestic Relationships and Domestic Violence Benchbook* (Supreme Court of Queensland Library, October 2023) 52A.7-52A.8 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/778383/chapter-52-a.pdf>.
[131] Ibid. See also *Krutskikh v Director of Public Prosecutions* [2022] WASC 130, where Hall J said of the equivalent WA provisions, '[t]he evident purpose of these provisions is to ensure that common misconceptions about the way in which victims of family violence may behave, for example that they will promptly report family violence to the police or will not remain with the perpetrator of violence, are dispelled and not taken into account in the reasoning process.'
[132] See, eg, *Evidence Act 1977* (Qld) ss 103T(3), 103U(3) (emphasis added).
[133] *Evidence Act 1977* (Qld) s 103W.

(c) may consist of a single act;
(d) may consist of separate acts that form part of a pattern of behaviour, even though some or all of those acts may, when viewed in isolation, appear minor or trivial.

Section 103Z(2) additionally provides that judges *may* inform the jury that experience shows that:

(a) people may react differently to domestic violence and there is no typical response;
(b) it is not uncommon for a person who has been subjected to domestic violence to stay with an abusive partner, or to leave and then return;
(c) it is not uncommon for a person who has been subjected to domestic violence not to report it to police or seek assistance;
(d) decisions made by a person subjected to domestic violence about how to address, respond to or avoid it may be influenced by a variety of factors;
(e) it is not uncommon for a decision to leave an intimate partner who is abusive, or seek assistance, to increase apprehension about, or the actual risk of, harm.

Building on s 103Z(2)(d), section 103ZC outlines the factors which may influence how a person addresses, responds to or avoids domestic violence, about which the judge may direct the jury.[134] According to section 103ZC(2), these factors might include:

(a) the domestic violence itself;
(b) social, cultural, economic or personal factors, or inequities experienced by the person, including those associated with race, poverty, gender, disability or age;
(c) responses by family, the community or agencies to the domestic violence or to any help-seeking behaviour or use of safety options by the person;
(d) the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the person's perceptions of how effective those options might have been to prevent further harm;
(e) further violence, or the threat of further violence, used to prevent, or in retaliation for, any help-seeking behaviour or use of safety options.

Section 103ZA(1) provides that where a judge is directing the jury about self-defence in response to domestic violence, the judge may inform the jury that:

(a) self-defence is, or is likely to be, an issue in the proceeding;
(b) as a matter of law, evidence of domestic violence may be relevant to determining whether the defendant acted in self-defence;
(c) evidence in the trial is likely to include evidence of domestic violence committed by the victim against the defendant or another person whom the defendant was defending.

Section 103ZA(2) goes on to say that the judge may also inform the jury that, as a matter of law, evidence that the defendant assaulted the victim on a previous occasion does not mean the defendant could not have been acting in self-defence in relation to the offence charged.

[134] *Evidence Act 1977* (Qld) s 103ZC(1).

Furthermore, section 103ZB provides a non-exhaustive list of examples of behaviours, or patterns of behaviour that may constitute domestic violence, about which the judge may direct the jury. These examples include:

(a) placing or keeping a person in a dependent or subordinate relationship;
(b) isolating a person from family, friends or other support;
(c) controlling, regulating or monitoring a person's day-to-day activities;
(d) depriving a person of, or restricting a person's, freedom of movement or action;
(e) restricting a person's ability to resist violence;
(f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence;
(g) compelling a person to engage in unlawful or harmful behaviour.

Similarly, section 103ZD outlines the possible content of a jury direction about a person's failure to complain, or delay in doing so, when experiencing domestic violence. These directions *must* (not 'may') be made when evidence is led or questions asked on this subject.[135] Under section 103ZD(2), these directions *must* specify that:

(a) the absence of complaint or delay in complaining does not, of itself, indicate that the allegation that the domestic violence offence was committed is false; and
(b) there may be good reasons why a complainant of domestic violence may hesitate in making, or refrain from making, a complaint

> *Examples of good reasons–*
> 1 The person was overborne by the abuse of a relationship of authority, trust or dependence.
> 2 The person has employed strategies to cope such as suppression or disassociation from the offence.
> 3 The person has a fear of ostracism from their community.

In turn, the judge *must not* direct the jury that the absence of complaint or delay in complaining is relevant to the complainant's credibility, without sufficient evidence.[136]

Directions on self-defence: *Falls* and Supreme Court of Queensland Benchbook

The Supreme Court of Queensland Benchbook states, in relation to directions for self-defence against an unprovoked assault where there is death or grievous bodily harm:

> In domestic violence cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death…Equally, the actual history

[135] *Evidence Act 1977* (Qld) ss 103ZD(1), 103ZD(2).
[136] *Evidence Act 1977* (Qld) s 103ZD(2)(c).

> of the relationship may require direction as going to the existence of reasonable grounds for any belief.[137]

Significantly, the suggested direction on the partial defence of killing for preservation in an abusive domestic relationship provides:

> You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder.[138]

This is essentially what Applegarth J said in *Falls*: **the partial defence in section 304B only arises for consideration once the complete defence of self-defence cannot be made out. If self-defence has been made out, the killing is no longer considered 'unlawful'.**[139]

Victoria: Jury Directions Act 2015 (Vic) Part 6

Part 6 of the *Jury Directions Act 2015* (Vic) applies in criminal proceedings in which self-defence or duress in the context of family violence is raised.[140] It has a similar effect to the regimes in Queensland and Western Australia.

Like the Western Australian legislation, and unlike the Queensland legislation, where a request for a direction on family violence has been made, the judge **must** give the direction unless there are good reasons for not doing so.[141] Victorian judges maintain a discretion to give such a direction of their own accord if they consider it is in the interests of justice to do so, and if the accused is unrepresented.[142]

The content of these directions are set out in ss 59-60 in the *Jury Directions Act 2015* (Vic), and largely mirror the Western Australian and Queensland provisions.
Effective directions to the jury may ameliorate concerns that (1) having multiple defences available is confusing to jurors and (2) judges and juries may apply a partial defence instead of self-defence. Legislation and case law in Queensland now provide for effective directions to be made to juries on these matters.

The effectiveness of jury directions in relation to domestic violence in criminal proceedings in Queensland could be enhanced by making them mandatory.

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[137] Supreme Court of Queensland, *Section 271(2) – Self-defence Against Unprovoked Assault Where There is Death or GBH* (Supreme Court of Queensland Library, September 2023) 95.2 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/86099/sd-bb-95-self-defence-s-271-2.pdf, citing *Osland v The Queen* (1998) 197 CLR 316 at 337.
[138] See Supreme Court of Queensland, *Killing for Preservation in an Abusive Domestic Relationship S 304B Benchbook* (Supreme Court of Queensland Library, August 2024) 99.3 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/136497/sd-bb-99-killing-for-preservation-in-an-abusive-domestic-relationship-s-304b.pdf> (emphasis added).
[139] *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010).
[140] *Jury Directions Act 2015* (Vic) s 55.
[141] *Jury Directions Act 2015* (Vic) s 58(2).
[142] *Jury Directions Act 2015* (Vic) s 58(3).

Conclusion

Self-defence is the preferred defence for abused women who commit IPH because it provides a complete defence to murder. This is important because murder attracts a mandatory penalty of life imprisonment in Queensland. The problem with self-defence in Queensland is that it requires an imminent attack, which is often missing in cases where abused women kill violent partners. Victoria's self-defence provision is better adapted to the situation of abused women who commit IPH because it does not require an imminent attack, and the response does not have to be 'proportionate'.

> *Recommendation 1: That murder no longer attract a mandatory penalty of imprisonment for life.*

> *Recommendation 2: That Queensland's self-defence provision be amended to reflect the Victorian provision.*

Partial defences, which reduce murder to manslaughter, are important in this context because they recognise the reduced culpability of abused women who kill, and they allow the court to impose a sentence other than life imprisonment. There are concerns that partial defences can normalise manslaughter convictions for abused women who commit IPH. It has also been observed that partial defences, which are gender-neutral, are frequently raised by accused men.

Section 304B of the Queensland *Criminal Code*, 'killing for preservation in an abusive domestic relationship', is an example of a partial defence to murder.

A key criticism of section 304B is that judges and juries may apply this partial defence instead of the defence of self-defence. It has also been argued more often by men than women, which seems to detract from its purpose.

Despite these criticisms, we submit that as many defences as possible should be available to accused persons. This ensures that defences reflect the different circumstances in which a murder charge may arise, as well as the different levels of culpability of offenders.

> *Recommendation 3: That section 304B of the Criminal Code be retained.*

> *Recommendation 4: That the Queensland Parliament consider introducing a defence of excessive self-defence.*

Some of the concerns about the under-utilisation of section 304B by abused women who commit IPH may be ameliorated by the new evidential and jury direction provisions introduced in Queensland in 2023/24. The new evidential provisions allow expert evidence related to domestic violence to be admitted in criminal proceedings. The new jury direction provisions allow judges to give directions to a jury that emphasise partial defences should only be considered after self-defence has been ruled out.

> *Recommendation 5: That the Queensland Parliament consider making jury directions about domestic violence mandatory for judges rather than discretionary.*

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Comparative Tables

Prepared for Sisters Inside

OVERVIEW TABLE: DEFENCES TO MURDER

Jurisdiction	Law	Self-defence	Provocation	Domestic violence defence?
Commonwealth of Australia	*Criminal Code Act 1995* (Cth)	S 10.4		
Queensland	*Criminal Code Act 1899* (Qld)	Ss 271(2)-272(1)	S 304	'Killing for preservation in an abusive domestic relationship' - s 304B
New South Wales	*Crimes Act 1900* (NSW) + common law	S 418	S 23(1) for 'extreme provocation'	
Victoria	*Crimes Act 1958* (Vic) + common law	S 322K	Abolished 2005	
Tasmania	*Criminal Code Act 1924* (Tas)	S 46	Abolished 2003	
South Australia	*Criminal Law Consolidation Act 1935* (Tas) + common law	S 15	Abolished 2020 (see s 14B)	
Western Australia	*Criminal Code Act Compilation Act 1913* (WA)	S 248	S 246	
Northern Territory	*Criminal Code Act 1983* (NT)	S 43BD	S 158	
Australian Capital Territory	*Criminal Code 2002* (ACT)	S 42	S 13	
United Kingdom	*Criminal Law Act 1967* (UK) (***CLA***) *Coroners and Justice Act 2006* (UK) (***CJA***)	S 3(1) *CLA* (replaces common law)	Abolished, replaced by ss 54-56 *CJA* 'loss of control' defence	

New Zealand	*Crimes Act 1961* (NZ) + common law	S 48	Abolished 2009	
Canada	*Criminal Code 1892*	S 34	S 232	
Norway	*Penal Code* + case law	S 18	Mitigating circumstance only	Battered woman syndrome may be used as an affirmative defence
Sweden	*Criminal Code*	Ch 24, s 1		

COMPARATIVE TABLE

JURISDICTION	LAW	THE PROVISION	NOTES
Queensland	*Criminal Code Act 1899,* s 304B, 'Killing for preservation in an abusive domestic relationship'	(1) A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if— (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and (b) the person **believes that it is necessary** for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and (c) the person has **reasonable grounds for the belief** having regard to the abusive domestic relationship and all the circumstances of the case (2) An abusive domestic relationship is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other. (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation. (4) Subsection (1) may apply even if the act or omission causing the death (the response) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response. (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship. (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence. (7) In this section— domestic violence see the Domestic and Family Violence Protection Act 2012, section 8.	Introduced in 2009. This is a partial defence. Currently up for review.

Victoria	*Crimes Act 1958* (Vic) s 9AC	Murder—"self-defence" A person is not guilty of murder if he or she carries out the conduct that would otherwise constitute murder while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury.	Repealed and replaced with section 322K which now allows self-defence to be raised in all crimes.
	Crimes Act 1958 (Vic) s 9AD, 'Defensive Homicide'	A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she **did not have reasonable grounds** for the belief referred to in that section.	Introduced in 2005 after a VLRC report. A partial defence. Abolished in 2014.
	Crimes Act 1958 (Vic) s 9AH, 'Evidence of family violence'	(1) Without limiting section 9AC, 9AD or 9AE, for the purposes of murder, defensive homicide or manslaughter, in circumstances where family violence is alleged a person may believe, and may have reasonable grounds for believing, that his or her 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— even if— (c) he or she is responding to a harm that is not immediate; or (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm. (2) Without limiting the evidence that may be adduced, in circumstances where family violence is alleged evidence of a kind referred to in subsection (3) may be relevant in determining whether— (a) a person has carried out conduct while believing it to be necessary for a purpose referred to in sub-section (1)(a) or (b); or (b) a person had reasonable grounds for a belief held by him or her that conduct is necessary for a purpose referred to in sub-section (1)(a) or (b); or (c) a person has carried out conduct under duress. (3) Evidence of— (a) the history of the relationship between the person and a family member, including violence by the family member towards the	s9AH supplemented s9AD, allowing extensive family violence evidence to be introduced in contemplating s9AD. s9AH has been repealed and replaced with s322J which allows family violence evidence to be adduced in relation to any offence where self-defence, duress, sudden emergency or intoxication is raised.

		person or by the person towards the family member or by the family member or the person in relation to any other family member; (b) the cumulative effect, including psychological effect, on the person or a family member of that violence; (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence; (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser; (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence; (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.	
New South Wales	*Crimes Act 1900* (NSW) s 418 'Self-defence – when available'	(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence. (2) A person carries out conduct in self-defence if and only if the person **believes** the conduct is **necessary**-- (a) to defend himself or herself or another person, or (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or (c) to protect property from unlawful taking, destruction, damage or interference, or (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass, and the conduct is a **reasonable response in the circumstances as he or she perceives them**.	Partial defence (see s 421(2) ***below***). Introduced in 2001 as a codification of the common law of self-defence, and unamended since that time.

	Crimes Act 1900 (NSW) s 419 'Self-defence – onus of proof'	In any criminal proceedings in which the application of this Division is raised, **the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence**.	Introduced in 2001 and unamended since that time.
	Crimes Act 1900 (NSW) s 421 'Self-defence – Excessive force that inflicts death'	(1) This section applies if-- (a) the person uses force that involves the infliction of death, and (b**) the conduct is not a reasonable response in the circumstances as he or she perceives them,** **but the person believes the conduct is necessary**-- (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person. (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.	Introduced in 2001 and unamended since that time.
	Crimes Act 1900 (NSW) s 23(1) 'Trial for murder – partial defence of extreme provocation'	(1) If, on the trial of a person for murder, it appears that the act causing death was in response to **extreme provocation** and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter. (2) An act is done in response to extreme provocation if and only if-- (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and (b) the conduct of the deceased was a **serious indictable offence**, and (c) the conduct of the deceased caused the accused to **lose self-control**, and	Partial defence. Amended in 2014 to alter language of 'provocation' to 'extreme provocation', and remove references to 'grossly insulting words or gestures', loss of self-control so as to 'form an intent to kill or inflict gbh', and conduct occurring 'immediately before' the killing.

		(d) the conduct of the deceased could have caused an **ordinary person** to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased. (3) Conduct of the deceased does not constitute extreme provocation if-- (a) the conduct **was only a non-violent sexual advance** to the accused, or (b) the accused incited the conduct in order to provide an **excuse** to use violence against the deceased. (4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur **immediately before** the act causing death. (5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account. (6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negatived merely because the act causing death was done with intent to kill or inflict grievous bodily harm. (7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation. (8) This section does not exclude or limit any defence to a charge of murder.	The pre-2014 provisions also provided that provocation would not necessarily be negatived if there was a lack of reasonable proportionality between the provocation and the killing, a lack of immediacy between the provocation and the killing, or a lack of intent.

		(9) The substitution of this section by the *Crimes Amendment (Provocation) Act 2014* does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act. (10) In this section-- **"act"** includes an omission to act.	
Canada	*Criminal Code 1892* s 34 'Defence of person' 'Defence – use or threat of force'	34 (1) A person is not guilty of an offence if (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person; (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and (c) the act committed is **reasonable in the circumstances**. (2) In determining whether the act committed is **reasonable in the circumstances**, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but **not limited to**, the following factors: (a) the nature of the force or threat; (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force; (c) the person's role in the incident; (d) whether any party to the incident used or threatened to use a weapon; (e) the size, age, **gender** and physical capabilities of the parties to the incident; (f) the **nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat**; (f.1) **any history of interaction or communication between the parties to the incident**; (g) the nature and proportionality of the person's response to the use or threat of force; and	Complete defence. Amended in 2013 from a more limited defence for 'self-defence against unprovoked assault'. That defence required: (1) that the initial assault be (a) unlawful and (b) unprovoked, (2) that the force used to repel the assault is not intended to cause death or gbh, (3) that the force was no more than necessary to 'enable him to defend himself'. Where death or gbh was caused in repelling the assault, this was justified if: (1) there was reasonable apprehension of death

		(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.	or gbh, and (2) there was a reasonable belief that self-preservation from death or gbh could not otherwise be achieved.
	Criminal Code 1892 s 232 'Murder reduced to manslaughter'	(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the **heat of passion caused by sudden provocation**. (2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to **deprive an ordinary person of the power of self-control** is provocation for the purposes of this section, if the accused acted on it on the **sudden and before there was time for their passion to cool**. (3) For the purposes of this section, the questions (a) whether the conduct of the victim amounted to provocation under subsection (2), and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.	Classical iteration of provocation defence, introduced in its current form in 2015. The current version of the provision was amended from the 2003 version, which provided in subsection (2): 'a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.'

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AUSTRALIA

Case Law

Criminal defences available to abused women who kill

Prepared for Sisters Inside

CASE LAW

Queensland

Case name	*R v Tracey* [2024] QCA 19
Jurisdiction	Queensland Court of Appeal
Charge	Murder
Keywords	Appeal and new trial
Facts	Ms Tracey was convicted of the murder of her ex-husband. Ms Tracey and the co-accused (her ex-boyfriend) went to the ex's house unannounced; she fought with him and the co-accused stabbed him multiple times. Ms Tracey had not wielded the knife, but the Crown argued that she had aided and abetted the murder. Tracey was planning to take her and the ex-husband's child and run away to avoid exposure to his abuse. On appeal, Ms Tracey argued that the trial judge failed to direct himself to the partial defence in s 304B, which caused a miscarriage of justice. The Crown argued that s 304B only applies to the person who actually commits the act that constitutes the offending. Ms Tracey relied on text messages between her and her ex-boyfriend (co-accused) about the abuse of her ex-husband (murder victim). At trial, Tracey had given evidence that she did not know her ex-husband would get hurt but that she wanted to speak to him, brought her ex-boyfriend for her own protection, did not know her ex-boyfriend had a knife, etc. Ms Tracey also gave evidence of DV throughout her relationship with her ex-husband when he used drugs and alcohol. Tracey had provided an outline of the abuse she had suffered from her ex-husband, which was not challenged at trial.
Held	Appeal dismissed.
Reasoning on section 304B	s 304B is capable of application to a person in the position of Ms Tracey who did not do the act that caused the death of the deceased but is liable for the offence of murder for another person's act that killed the deceased. The defence under s 304B was not raised by the evidence adduced in the trial, and there was no error on the part of the learned primary judge in not directing himself on that defence. That was so even on the most favourable view on the evidence to Ms Tracey (that she was subject to serious DV in the recent past, she went to talk to her ex-husband about his behaviour, she did not know her ex-boyfriend intended to do harm to the ex-husband, etc.). There was no question of a defence under s 304B arose because, on Ms Tracey's version of events, she did not believe that the acts that caused her ex-husband's death were necessary for her preservation from death or GBH. If that conclusion were wrong, on a consideration of all the relevant evidence, there was no miscarriage of justice - that is confirmed by the findings of fact made by the primary judge that were inconsistent with the defence under s 304B. For example,

	the trial judge had found that the ex-husband had calmed down, that Ms Tracey was no longer scared the ex-husband would 'bash' her, the texts between Ms Tracey and her ex-boyfriend suggested she was not concerned that she might be harmed, etc. Ms Tracey had also disavowed reliance on s 304B during the trial - Mullins P thought it was unnecessary to have regard to this position [4]. However, Morrison JA thought this confirmed no miscarriage of justice had occurred.

Case name	*R v Robbins* (2023) 13 QR 433
Jurisdiction	Queensland Court of Appeal
Charge	Murder
Keywords	Appeal against conviction
Facts	Robbins (male) was convicted of murder after killing his brother. On the day in question, an argument developed between Robbins and his brother over comments made about their mother and the relationship the brother had with his daughter. The argument escalated to verbal abuse, and Robbins packed his brother's bag for him and told him to 'fuck off.' Robbins asserted that his brother had threatened his fiancé. A physical confrontation followed where the brothers punched each other, and Robbins grabbed a knife and stabbed his brother several times. Emergency services were called, but the brother died in hospital hours later. At trial, Robbins gave evidence about his brother assaulting his father, the physical altercation in which the stabbing occurred and that they had been drinking all day. The jury was instructed on self-defence, compulsion, and provocation. On appeal, Robbins argued that the trial judge erred in law in not giving a direction about s 304B. The trial judge had ruled that, as a matter of law, there was no evidence of an 'abusive domestic relationship' between the brothers, so they declined to make the direction.
Held	Appeal dismissed. It was held that the partial defence was not one which fairly arose on the evidence -the trial judge was right not to direct the jury as to the possible application of s 304B.
Reasoning on section 304B	Whether the operation of the partial defence under s 304B was fairly raised on the evidence such that it should be left to the jury to determine on the version of events most favourable to the accused suggested by the evidence. There was a domestic relationship between the brothers – the question then arose as to whether the evidence fairly raised a case that the relationship was one with a history of serious acts of DV committed by either of them against the other. The evidence in this case did not have this effect. If the relationship between R and his brother were to be characterised as an abusive domestic relationship, the existing relationship between them would have to be one in which there had been a previous tendency either to engage in acts of serious domestic violence repeatedly or habitually against the other. The definition of 'domestic violence' in s 8 of the DFVPA requires that the conduct must be behaviour by the first person towards the second person, in this case, behaviour by the brother towards Robbins. Actual or threatened violence to a third person may be regarded as DV only if the circumstances of violence to the third person were such that it could be regarded as emotional or psychological abuse to the second person or threatening to them. While there was some evidence of acts or incidents with their father, they were many years in the past and did not amount to

	DV against Robbins. Otherwise, the evidence was limited to R's suggestion that he was never that verbally abusive towards his brother before but that his brother was quite verbally abusive to their father, to him and their other brother - that was not enough for s 304B. Oral statements repeatedly or habitually made by one person to another could amount to domestic abuse if they amounted to behaviour that was emotionally or psychologically abusive, threatening or coercive of the other but the bare statement that there was verbal abuse in the past was insufficient. This statement also did not characterise the abuse as 'serious' as required by s 304B.

Case name	***R v Peniamina (No 2)* [2021] QSC 282**
Jurisdiction	Supreme Court of Queensland
Charge	Murder
Keywords	Sentencing; murder; provocation
Facts	The defendant (male, 35 years old) killed his wife (29 years old) and the mother of his four children, aged between six and ten. The victim had allegedly been unfaithful to him recently before the killing and previously. On the day he killed his wife, the defendant took the victim's second phone (he had already taken her first phone) and called the man he suspected was romantically involved with his wife, and he referred to her as 'leftovers'. The defendant confronted his wife and accused her of being unfaithful. The victim dismissed his concerns, and he struck her in the face. The victim moved to the kitchen to get a knife, and the defendant pursued her. The defendant tried to take the knife off her, and she cut him across his palm; the jury accepted that this was when the defendant formed murderous intent. He stabbed the victim multiple times. She fled outside and attempted to hide behind a car, but the defendant pursued her and continued to stab her, removed a cement bollard from the garden and smashed it into her head, killing her. The defendant was charged with murder and successfully raised provocation at trial. The jury accepted that the defendant, at least, believed his wife had been unfaithful to him and that that belief was not unreasonable
Held	The defendant was sentenced to 16 years' imprisonment. At the time of the killing, he had temporarily lost the power of self-control. [52]: '*violence of any kind must be deterred and denounced. This violence was extreme and was inflicted in a domestic violence situation initiated by your reaction to your wife not doing what you wanted her to do'*
Reasoning on section 304B	*In the lead up to the killing you were investigating your wife's alleged infidelity. That is concerning. Many a suspicious and/or paranoid husband or partner has inflicted violence upon suspicion of infidelity. However, as earlier observed, the jury must have accepted that there was some reasonable basis upon which you could have formed a view about your wife' alleged infidelity, whether it was or was not in fact true'* [25] s **304B only mentioned in the context of s 9(10A) of the Penalties and Sentences Act, which provides that DV is an aggravating factor in sentencing unless it is not reasonable to treat it as such in the circumstances of the case.**

Case name	*R v Cooktown* [2020] QSCSR 58
Jurisdiction	Queensland Supreme Court
Charge	Manslaughter; killing for preservation
Keywords	Sentencing
Facts	Ms Cooktown (Indigenous identifying) was charged with the murder of her partner, Furber. Ms Cooktown offered to plead guilty to manslaughter at the start of the trial, but it ultimately proceeded. Throughout their relationship, Furber was violent towards Ms Cooktown, inflicting bruises, scratches and black eyes. On occasion, Ms Cooktown would reciprocate the violence, though this was predominantly in response to Furber's own violence. A mere five days before the offending, Ms Cooktown complained to the police about Furber's domestic violence. A few days before the event, Furber sexually harassed and anally raped Ms Cooktown. When Furber made it known that he wanted to return to their previous hometown of Mount Isa, Ms Cooktown surreptitiously left the premises at night, fearful of what he would do if he knew she was leaving. Ms Cooktown expressed suicide ideation. The following morning, and despite her telling them of his sexual abuse, Ms Cooktown's siblings located Ms Cooktown and returned her Ferber. Once home, Ferber threatened to do violence to Ms Cooktown after her family had left. In fear for her life, Ms Cooktown grabbed a knife and hid it in her pocket. The pair went for a walk and stopped at a bench. When Ferber threatened to rape her again, Ms Cooktown yelled and then stabbed him four times. After stabbing him, Ms Cooktown said, '*I told you I'd send you home in a box…*' The jury found Ms Cooktown not guilty of murder but guilty of manslaughter, either by virtue of section 304B or 304 (provocation).
Held	Henry J concluded ("not without hesitation") that the basis of the manslaughter conviction was section 304B. This was determined with reference to the history of domestic violence and the recent rape. In sentencing Ms Cooktown, Henry J considered the mitigating factors to be her troubled upbringing featuring sexual and physical abuse, her PTSD and major depressive disorder and the guilty plea. The domestic violence in this case was viewed as less severe than that seen in *R v Sweeney* (see above). Ms Cooktown was sentenced to eight years' imprisonment with parole eligibility at the one-third mark.
Reasoning on section 304B	*However, not without hesitation, I ultimately prefer the view that while your stabbing of him was clearly causally connected with his threat to anally rape you, 45 your reaction was driven not by a loss of control in the heat of passion, but rather by a desire to preserve yourself from him committing such an act upon you. I have to say, in reaching that conclusion, the fact that you had chosen to already arm yourself supports that conclusion. His threat to commit another act of anal rape with a bottle upon you was made*

	more credible by the background of domestic violence, and I accept that you, against that background, did form a belief that he may cause you 5 grievous bodily harm, and that it was necessary for you to preserve yourself from him doing grievous bodily harm to you. *Section 304B does not stipulate in terms that the harm from which the defendant seeks preservation is immediate, though, of course, the less immediate the harm, the less pressing the risk to preservation. While the harm threatened may not, on an objective view, have been about to be inflicted then and there, the jury evidently accepted that the prosecution could not exclude that you believed on reasonable grounds you had to act for your own preservation. It was a belief doubtless grounded in the history of serious domestic violence, although I think the emotional state you were in on the fatal day, as well as your partial intoxication, likely further diminished your ability to recognise other ways of dealing with Mr Furber other than stabbing him.*

Case name	***R v Jones* [2015] QCA 161**
Jurisdiction	Queensland Court of Appeal
Charge	Murder
Keywords	Appeal on evidence; psychiatric opinion evidence
Facts	Jones was convicted of his mother's murder, having stabbed her multiple times. During the trial, Jones gave evidence of his upbringing with his mother and in periods of foster care, including his mother's drinking to excess, witnessing her sexual activity with others, and her violence towards him. Evidence from a psychiatrist was excluded in a voir dire. The psychiatrist was going to offer the opinion that the mother suffered from borderline personality disorder, possibly bipolar and most likely alcohol abuse/dependence. The psychiatrist was also going to offer the opinion that Jones did not have a major personality disorder, mood disorder, anxiety, or psychotic disorder but was someone who had grown up with someone who had a personality disorder. According to the psychiatrist, this impacted J's emotional state and resultant behaviour, therefore bearing on the matters in s 304B. The evidence was excluded because a properly instructed jury could understand these matters. Jones raised defences of provoked assault under s 272, self-defence under s 271, partial defence of provocation under s 304, and killing in an abusive domestic relationship under s 304B. Jones raised s 304B because he was coping with a violent, abusive, aggressive alcoholic mother and lived in fear of another outburst. However, the Crown argued that there was no history rising to this level of an abusive domestic relationship or there being serious acts of violence; only two acts of physical contact or discipline towards him could be established from when he was a child. He appealed his conviction on the ground that a miscarriage of justice occurred as a consequence of a ruling by the trial judge that the evidence of the psychiatrist was inadmissible.
Held	The appeal was dismissed. The evidence could not be allowed under s 132B of the Evidence Act 1977 (Qld) because it was not evidence of the history of the domestic relationship between Jones and his mother.
Reasoning on section 304B	The admission of expert evidence on patterns of behaviour of human beings, even in abnormal situations, is fraught with danger [18]. The situation of the habitually battered woman has been held to be so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations, because such insights would not be shared or shared fully by ordinary jurors [18]. But, it is not part of the law in this country to recognise a 'battered wife' or 'battered child' defence in the context of fatal attacks [19]. In this case, the court considered that no insight would be gained from study or special experience or training was

	needed to evaluate the evidence and give effect to it when considering the matters raised by s 304B [21]. The Court ultimately concluded that the matters the psychiatrist spoke about were not the subject of difficult or complex scientific inquiry; the jury could appreciate the likely effect upon J of the effect of his mother's behaviour without the psychiatrist's evidence [21].

Case name	***R v Gaskell* [2016] QCA 302**
Jurisdiction	Queensland Court of Appeal
Charge	Murder
Keywords	Appeal on verdict
Facts	The applicant admitted to killing his former wife in the house which they previously shared. The marriage was characterised by 'years of discord'. In 2009, a violent altercation occurred in which the victim sustained a fractured rib. The applicant and victim separated in 2008 and divorced in 2010; they were still negotiating property settlement at the time of the murder. The applicant's evidence was that the victim was often violent towards him. They each had DVOs against the other. At the time of the murder, the pair had reached a consensus as to the division of assets, save that the wife required a payment of around $30k- $40k, to which the applicant would not agree. On the day of the killing, the victim went to retrieve some of her items at the house. Witnesses heard a thudding, slapping noise from inside and a scream from a female voice, including the words 'help, somebody please help me'. The applicant rang 000, saying his former wife had attacked him and that he had been forced to hit her with a hammer to defend himself. The victim died two days later of severe brain injuries. After a trial, the applicant was convicted of murder. Gaskell appealed, arguing that the prosecution had not excluded self-defence under ss 271-2 and the defence under s 304B relating to killing a person for preservation in an abusive domestic relationship
Held	The appeal was dismissed.
Reasoning on section 304B	There were difficulties with the applicant's evidence which appeared under cross-examination (e.g., there was no sensible explanation for his escape route). The applicant's version of events did not account for defensive wounds on the wife's arm and fingers, nor the evidence of a passer-by regarding athudding, slapping sound [79]. But, the verdict demonstrates that the jury was satisfied beyond reasonable doubt that the defences were excluded and the killing was unlawful [81].

Unreported Decisions

***The following decisions are unreported. Please note that the facts have been gathered from secondary sources. Each case name has been linked with the source from which most of the information has been taken.

Case name	*R v Sweeney*, Henry J on 3 March 2015
Jurisdiction	Queensland Supreme Court
Charge	Manslaughter
Keywords	Sentence; partial defence
Facts	Ms Sweeney (Aboriginal identifying) was charged with the murder of her *de facto* partner. The deceased had been extensively abusive to Ms Sweeney throughout their relationship, and on some occasions, she physically retaliated. On the day in question, the deceased grabbed Ms Sweeney by the throat, dragged her on the ground and urinated on. Ms Sweeney told the court that the deceased had made comments suggesting that '*she has to go.*' To protect herself, Ms Sweeney grabbed a knife and stabbed her partner, killing him.
Held	Ms Sweeney used the killing for preservation partial defence to plead guilty to manslaughter. She was sentenced to seven years' imprisonment with a non-parole period of one-third of the sentence.
Reasoning on section 304B	In the literature, this case has been used to highlight that partial defences could undermine genuine self-defence claims. This is particularly true against the mandatory penalty of life imprisonment for murder.

Case name	*R v Irsigler* (2012) QSC (28 February 2012)
Jurisdiction	Queensland Supreme Court
Charge	Murder, interfering with a corpse
Keywords	Trial; Acquittal
Facts	Michele Irsigler was charged with the murder of her husband and interfering with a corpse, along with two co-accused. At trial, Ms Irsigler provided detailed evidence about the 18 years of abuse she had faced prior to the incident. The abuse included physical abuse (with many broken bones over the years), sexual abuse (rape) and repeated threats. Ms Irsigler had contacted the police several times and tried to leave several times. This abuse extended to sexual and physical abuse of their daughter. In the days preceding the killing, the deceased had taken the accused and their daughter hostage for three days. The accused escaped and obtained a gun. She returned and shot her husband twice. Together with a co-accused, she drove the body out of town and set fire to both it and the gun used. The second co-accused used a bulldozer to spread the remains. The accused did not dispute that she had killed the deceased. Instead, the defence ran a self-defence argument, but they used section 304B as a 'safety net' of sorts. Expert evidence was led about battered wife syndrome (namely that it is not an *actual* diagnosis that discounts psychiatric defences).
Held	Justice Mullins directed the jury on both self-defence and section 304B. After two days of deliberation, the jury found the accused not guilty of murder (due to self-defence) but guilty of interfering with a corpse. Ms Irsigler was sentenced to 18 months, wholly suspended.
Reasoning on section 304B	I have not been able to access the sentencing remarks from this case. This case was discussed in some detail in Heather Douglas's (2012) article. It could be suggested that this case suggests that section 304B *does* work well: Ms Irsigler had the 'safety net' of section 304B, so she may have been encouraged to run the case to trial with a self-defence argument. However, in the literature, academics have commented that Ms Irsigler was a 'benchmark' battered woman; she was white, in a monogamous relationship, smaller than her partner, suffered abuse for decades and had sought support, and the deceased had previously threatened her child (see Douglas (2012) for further discussion on this point).

Case name	*R v Ney* [2011] QSC Indictment No 597 of 2008
Jurisdiction	Queensland Supreme Court
Charge	Murder; Manslaughter
Keywords	Trial; Plea deal
Facts	Emma Ney was charged with the murder of her partner, Graham Haynes. Ney had struck her partner with an axe, and he died in hospital a few days later. Ney described their relationship to be one marked by abuse and ongoing violence. At first instance, Ney pleaded not guilty on self-defence grounds or otherwise by virtue of section 304B. During the trial, however, the jury was discharged as matters discussed in deliberations were disclosed to others outside of the jury room.
Held	When the matter returned to court, a plea to manslaughter based on diminished responsibility was accepted. Ney was sentenced to nine years' imprisonment (non-parole three years). Due to time served in pre-sentence custody, Ney could immediately apply for parole.
Reasoning on section 304B	While Dick AJ was not convinced of the violent nature of the relationship (as suggested by Ney), the use of psychiatric reports to explain Ney's feelings of entrapment mitigated penalty. Douglas (2012, p.35 of annotated bibliography) posits that Ney's self-defence argument may have been stymied by her inability to meet the 'benchmark battered woman' standard. Ney was Indigenous, larger than the deceased, and had a criminal history and ongoing substance abuse issues. Douglas provides: *'while not all homicide cases where battered women kill should result in an acquittal on the basis of self-defence, it may be that certain stereotypes about battered women continue to inform the choices made by prosecution authorities and juries and sometimes these stereotypes may continue to obscure structural and racial disadvantage.'*

Case name	*R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 3 June 2010)
Jurisdiction	Queensland Supreme Court
Charge	Murder
Keywords	Trial; Acquittal
Facts	Susan Falls was charged with murder after she drugged her husband and then shot him while he was asleep. After, Falls disposed of his body and maintained that she did not know of his whereabouts for four weeks. Eventually, the body was discovered, and Falls was charged. In the trial, Falls gave evidence about the physical (including sexual) and emotional abuse she had been subject to for some 20 years prior to the killing. The jury heard evidence surrounding the power imbalance between the pair (he rarely left her, spoke to her in a derogatory fashion, required her to ask permission for everything and that she had been socially isolated). The defence counsel adduced several witnesses who corroborated her account through indirect corroborating evidence (including a landlord, day care director, hairdresser etc.). They further brought evidence surrounding the deceased's abusive behaviour towards other people and animals. The defence highlighted that the violence had been escalating and that the victim was entrapped in the relationship. Applegarth J directed the jury in relation to both self-defence and section 304B. In these directions, Applegarth emphasised that self-defence *can* include cases featuring historical abuse and that self-defence *can* be available to wives who kill their husbands. The directions on self-defence were considerably broader than the strict interpretation previously adopted in Queensland. Specifically, Applegarth J emphasised that the *endurance* of a threat can be a form of violence, and it can continue even when a person is unable to follow through with the threat (i.e. if they are asleep).
Held	Falls was acquitted on the basis of self-defence.
Reasoning on s304B	Similar to the critiques of academics in the *Irsigler* case, some suggest that Falls was a 'good victim.' Falls was white, a mum, relatively young, did not have a criminal history, had not previously injured the deceased, and had no history of drug or alcohol abuse. However, Sheehy further commends the lawyering in the case, which comprised of 'conceptual, evidential, therapeutic, expert, and normative dimensions' (p.9). Per Applegarth J: *"[I]t doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that*

	there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present."

Victoria

Cases considered after the abolition of defensive homicide

Case name	***R v Payne* [2023] VSC 286**
Jurisdiction	Supreme Court of Victoria
Charge	Murder
Keywords	Sentence
Facts	Ms Payne was charged with the murder of her husband and found guilty by a jury. Ms Payne laced a biscuit with several sleeping tablets before serving it to the deceased. After he passed out, Ms Payne wrapped his body in a blanket and sealed it, placing it into a chest freezer. Ms Payne proceeded to lie about her husband's whereabouts to conceal his death. A few days later, the body was discovered by Ms Payne's neighbours. At no stage did Ms Payne assert that she was acting in self-defence. However, significant evidence was adduced to establish that the deceased had been extensively abusive towards Ms Payne. Over the years, the deceased would physically and sexually abuse Ms Payne and coercively control her. The judge details the abuse from [47]-[67].
Held	The sentencing judge took into account the victim impact statements, Ms Payne's tumultuous upbringing (featuring family violence), the extensive family and sexual violence she faced from the deceased, her good character and her mental health at the time of the offending. Ms Payne's exposure to family violence at a young age was considered to reduce her moral culpability (at [72]). Further, the sentencing judge considered Ms Payne's limited criminal history, excellent rehabilitative prospects, guilty plea to manslaughter, remorse and the impacts of COVID-19. Considering all these factors, the offending was considered to be on the lower end of objective seriousness. Given the context of significant domestic violence, the judge considered that 'significant mercy' ought to be afforded in sentencing. Ms Payne was ultimately sentenced to 16 years' imprisonment with a non-parole period of 10 years. [68] *I have had regard to a written report by Dr Carroll, psychiatrist, dated 1 December 2022. Dr Carroll described the family violence you were subjected to as '**intolerable and inescapable**'. I accept Dr Carroll's description of the extent of the family violence.* [79] *Your case is unique in that it has occurred in the context of you being a victim of family violence at the hands of the person you killed but not in the context of self-defence which provides a legal excuse for the killing.*

	[94] *You were subjected to repeated acts of abuse, violence and humiliation at the hands of your husband. The fact that you murdered Mr Payne rather than flee can only be understood through the lens of the sustained family violence you had experienced. This was not an ordinary example of murder. This was not a dispassionate execution by a practised killer.*

Case name	*R v Donker* [2018] VSC 210
Jurisdiction	Supreme Court of Victoria
Charge	Manslaughter
Keywords	Sentence
Facts	Ms Donker was charged with the murder of her abusive partner, Powell. From early in the relationship, Powell would exert considerable control over Ms Donker and subject her to serious violence, particularly after using ice. While Ms Donker's life turned around when Powell was incarcerated for drug trafficking, it soon began to spiral again after his release. After becoming homeless, their children were taken into State care, and Ms Donker slept in a car near the home of the deceased's parents in order to maximise her time with them. The deceased would occasionally accompany her in her car and continued to abuse her. While homeless, the pair smoked ice together a few times. On the day in question, the couple were returning the children to his parent's custody. When Ms Donker went to put the pram in the boot of the car, Powell surged backwards towards her. After she got in the car, he punched and choked Ms Donker. Neighbours who witnessed the event called the police, but Ms Donker refused to make a statement. Powell proceeded to drink with his brother in the evening and then found Ms Donker sleeping in her car in the morning. He dragged her out of the car and hit her repeatedly. She managed to get into the car and attempted to taunt him by driving the car at him a few times. While she only wanted to frighten him, Ms Donker struck a pole that bent such that the edge of the sign hit and killed Powell. Ms Donker immediately called for help. The DPP accepted a guilty plea to manslaughter.
Held	Croucher J considered the aggravating factors of the offending to include the use of a weapon (the car), her intention to frighten him, that she had tried to taunt him a few times and the 'excessiveness and unlawfulness' of her behaviour. Mitigating factors included her lack of intention to harm Powell, the foreseeability of the injury, the reasonableness of the belief that he may harm her further, that the 'trouble came to her', the lack of pre-meditation and the provocation. Further mitigating factors included her turbulent upbringing (featuring abuse from her mother), early plea of guilty, remorse, limited criminal history, the hardship of any further imprisonment (given her baby) and her very good rehabilitative prospects. Taken together, Croucher J considered that the offending was of a substantially lower level of gravity and moral culpability. Ultimately, Ms Donker was sentenced to five years' imprisonment with a non-parole period of two years.

Case name	*R v McLaughlin* [2016] VSC 189
Jurisdiction	Supreme Court of Victoria
Charge	Manslaughter
Keywords	Sentence
Facts	Ms McLaughlin pleaded guilty to manslaughter after stabbing her partner with a piece of broken glass. The Judge described their relationship as 'volatile' and 'complex,' featuring two-way abuse and substance use. On the day in question, Ms McLaughlin and her partner were arguing. He hit Ms McLaughlin, slapped her, kicked her and then threw glass tubing at her, which broke. At some stage, he applied pressure to her neck. Ms McLaughlin picked up a piece of broken glass and pointed it at the deceased as if to hit him. When the deceased flinched, she struck him in the upper back with the glass.
Held	When sentencing Ms McLaughlin, the judge considered a) her background, which featured ongoing amphetamine use and child loss, b) the lack of criminal history, c) her PTSD and major depressive disorder, and d) the domestic abuse context of the offending. Further considerations included her guilty plea, remorse, presentence custody (537 days) and deterrence factors. Ultimately, the sentencing judge found that Ms McLaughlin deserved a 'measure of leniency' and that further time in custody was not called for in the circumstances. It was ordered that Ms McLaughlin be subject to a Community Corrections Order. The nature of that order was that Ms McLaughlin perform 100 hours of community service, undergo drug/alcohol testing and mental health assessments, attend relevant courses and be appropriately supervised. *Having said that, I consider that this is a case that demands a measure of leniency. On any view, you were the victim of a sustained physical assault carried out by a man almost 20 years your junior. You were entitled to be angry, you were entitled to be distressed, but you were not entitled to stab him. There was no aspect of self-defence to your conduct and, as I have said, I consider your conduct was the product of anger. It certainly was not premediated, and the anger was the inevitable consequence of Mr Stevens' attack upon you. In my view, these factors operate substantially to reduce your moral culpability and blameworthiness for this offending.*

Cases considering section 9AD – Defensive Homicide

Case name	***Sawyer-Thompson v R* [2018] VSCA 161**
Jurisdiction	Victorian Court of Appeal
Charge	Defensive homicide, section 9AD
Keywords	Appeal against sentence
Facts	The applicant (19 years old, female) pleaded guilty to defensive homicide and appealed the sentence of 10 years' imprisonment (non-parole of 7 years) as excessive. The applicant was originally charged with murder and intended to run a duress defence. Her abusive partner, Mifsud, threatened the applicant that he would kill her family should she not kill an associate of his, Mr Nankervis. Mifsud had 'subjected Sawyer-Thompson to serious violence and humiliation. She had witnessed his violence to others. She believed him to be dangerous and took this threat seriously.' The applicant killed the victim when Misfud was absent. On the second day of the trial, the applicant entered a guilty plea to defensive homicide. 'The agreed basis for the plea was that at the time she killed Mr Nankervis, the applicant believed it was necessary to kill him in order to defend her immediate family from being killed, in circumstances where she did not have reasonable grounds for that belief' [68]. The question on appeal was whether the sentence was excessive relative to the severity of the offending.
Held	The Court (2:1) found that the judge erred in finding that the offending 'fell towards the upper end of the range of seriousness' [43]. The sentence was set aside, and the applicant was resentenced to six years' imprisonment (five years non-parole period). First, they considered that the applicant's conduct (which was described as 'merciless, grisly and disturbing') must be viewed in its context. This context included the cumulative effect of Mifsud's controlling behaviours coupled with a) the threat and b) the applicant's vulnerability to the threat. The Court agreed that the applicant *genuinely* believed that her family would be killed, such that the sentencing judge was incorrect in finding that her decision not to run away or contact the police made the conduct more serious. The Court considered that the victim's innocence in the situation did not affect the severity of the offending – the focus, in the

	Court's view, should be on the applicant's belief in the threat made by Misfud (Beach JJA, dissenting at 121). Other mitigating factors included her assistance with the prosecution of Misfud (insufficient weight originally given), the guilty plea, remorse, her youth (insufficient weight originally given), rehabilitative prospects and impaired mental functioning.
Reasoning on section 9AD	[46]: *When the prosecutor objected on the plea that the defence of duress (to murder) had been abandoned, counsel for the applicant submitted — and the judge accepted — that the applicant had to be judged on the basis of her operative belief at the time of the killing.* ***As the judge recognised, the outcome of the plea negotiations was that a duress case had had to be fitted — rather artificially — into the defensive homicide provisions, to which it did not properly belong.*** [113]: *Section 9AD, like all statutory provisions, fell to be considered by reference to its text, context and purpose. While the text of s 9AD may literally have encompassed the fact situation of the present case, when considered by reference to its context and purpose — and noting the enactment of s 9AG* ***— one might take leave to doubt whether s 9AD had any real application in the present case.*** [115]: *While the Crown was prepared to accept a plea to defensive homicide, in my view, a contextual and purposive application of ss 9AB to 9AJ, as they were at the time of the applicant's offending, would likely have seen the issue in the case as being one of duress and whether s 9AG (or perhaps, but less likely, s 9AI) applied. That said, no party before this Court sought to impugn the plea deal and I see no basis now upon which the plea deal might be set aside.*

Case name	*Re Kumar* [2017] VSC 81
Jurisdiction	Supreme Court
Charge	Civil claim relating to forfeiture, considering s 9AD.
Keywords	Forfeiture decision
Facts	This case concerned forfeiture, where the deceased was killed by his wife, leaving no children. Questions arose surrounding entitlement to the deceased's estate, and the Court considered whether the murder had been an act of defensive homicide against the background of a seriously abusive relationship. The deceased husband had previously been charged with intentionally causing injury, unlawful assault and assault with a weapon against his wife, and an IVO was in place. The deceased husband controlled the deceased wife's income and bank account. After the IVO was revoked, the deceased husband returned to the matrimonial home, where they continued to have a relationship marked by violence. After a trip from the deceased wife's parents, she expressed to them that she feared what would happen. The following day, the police attended to find the husband deceased with multiple stab wounds and the wife deceased by suicide.
Held	The Court considered that the wife's conduct constituted defensive homicide. Forfeiture questions are irrelevant for our purposes.
Reasoning on section 9AD	The Court stepped through the section 9AD principles from [82], summarising that '*in effect, a person's conduct will amount to defensive homicide if he or she carried out conduct causing death, with an intention to kill or cause really serious injury, believing the conduct to be necessary to defend him or herself or another from death or really serious injury, but where he or she did not have reasonable grounds for that belief*' [86]. The evidence (including both physical and psychological abuse) supported an inference that the wife believed the force to be necessary to defend herself. While the injuries sustained by the deceased husband did not indicate a struggle, the Court considered the broader context of family violence (under section 9AH) and commented on the nature of female intimate partner killings, which are often in response to ongoing rather than immediate threats. Taking the physical and psychological abuse, the triggers in the week preceding (family visits, threats of divorce) and the deceased wife's emotional state, the Court was satisfied that she genuinely believed she needed to attack her husband for her safety [97].

Case name	*DPP v Preston* [2015] VSC 402
Jurisdiction	Supreme Court
Charge	Section 9AD
Keywords	Sentencing
Facts	The defendant (male) pleaded guilty to defensive homicide nine days into the murder trial. The victim and the defendants were criminal associates; the deceased was a drug trafficker, and the defendant was part of his circle. The prosecution case (at trial) was that the defendant attended the apartment of the deceased with the intent to kill the deceased; he had brought gloves and a gun with him, set up a false alibi and told his partner that he needed to sort the deceased out. The circumstances of the plea deal tell a different story (agreed on by both parties); the defendant attended the apartment to discuss another matter, and the deceased produced a gun. A scuffle ensued in which the defendant used that gun (not his own) to kill the victim, believing it necessary for his safety. The defendant was aware that the deceased was planning to plant an explosive in his car and was concerned that he would have similarly armed himself for the meeting.
Held	The defendant was sentenced to 7.5 years' imprisonment. This was to be served somewhat concurrently with another count, leading to a total of 11 years' imprisonment. The key mitigating factors in sentencing the defendant were: • The gravity of the offending was described as 'mid-range seriousness'; • Some rehabilitative prospects, less weight placed on specific deterrence; • Guilty plea (accorded some favour); • Onerous conditions to be faced in protective custody; and • Offending took place while on bail.
Reasoning on section 9AD	On sentence, the judge only considered the circumstances relevant to the plea deal (i.e. not the initial arguments made during the trial). In taking these matters into account, the sentencing judge determined on the balance of probabilities that the defendant believed (albeit unreasonably) that the killing was necessary to protect himself from injury.

Case name	*DPP v Williams* (2014) VSC 304
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	Angela Williams (female) was charged with murder, having killed her partner, Douglas Kally (male). The pair had been married for 23 years. However, the relationship featured family violence. The deceased would verbally abuse the accused and physically abuse and threaten both the accused and their children. The accused was under the control of the deceased; she was required to drive him around while he drank and to take 'the rap' when he was facing a drug conviction. On the day in question, the deceased began yelling and screaming abuse at the accused. He physically assaulted the accused (pushing, shoving, hitting, hair pulling). The accused grabbed a pickaxe, and the deceased began taunting her, encouraging her to kill him using derogatory language. The accused struck the deceased several times and later returned to wrap his body up and bury him in the backyard. For four years, the accused told her family and friends that the deceased had left town, and she pretended to have telephone conversations with him and sent gifts to the children on his behalf. When police re-investigated the matter, the accused confessed and co-operated. The jury found the accused not guilty of murder but guilty of defensive homicide. At sentencing, the prosecution asserted that the offending was in the middle-upper range of severity. During the trial, the defence adduced evidence from Professor Patricia Esteal, who discussed the dynamics of family violence, entrapment in family violence and women's use of weapons [32]-[37]. The sentencing judge considered this evidence and gave it considerable weight. Aggravating features included the accused hiding the body for some years, and the lies told to cover the killing. The accused was considered to have positive rehabilitative prospects and good character.
Held	Williams was sentenced to eight years' imprisonment with a non-parole period of five years.
Reasoning on section 9AD	Hollingworth J considered that in sentencing people convicted of defensive homicide, regard is often had to the proportionality between the response of the accused and the actual/perceived threat posed by the deceased. Drawing upon Professor Esteal's evidence, Hollingworth J takes issue with this approach in cases of family violence: *Given Professor Esteal's evidence, it may not be appropriate in a case such as this one to assess the objective seriousness of the offence primarily by reference to the degree of disproportion between the perceived threat or violence from the male partner and the woman's response to it.*

	In a case of violence between men, particularly between men with little or no prior history, the infliction of 16 blows with an axe in response to a verbal and minor physical attack by an unarmed attacker may rightly be seen to be so totally disproportionate as to make it a very serious example of the offence. That may not necessarily be the right conclusion in a case involving family violence, particularly with a female offender. *It does not appear that evidence or arguments such as these were considered in the other defensive homicide cases which involved female offenders and their male victims, in a family violence context.*

Case name	***Moustafa v R* [2014] VSCA 270**
Jurisdiction	Supreme Court
Charge	Defensive homicide; aiding and abetting defensive homicide
Keywords	Appeal against conviction
Facts	The two applicants (both male) killed two victims in the context of a financial dispute. The applicants suspected that the victims had been stealing money from them and had not been working on their cars as promised. The applicants arrived at an office to discuss these matters, and a disagreement occurred. The first applicant engaged in a struggle in which he received a bullet wound and fatally injured one victim. It was impossible to establish the order of the shots fired (one of the victims also fired shots) and who produced which gun. The applicants were acquitted concerning one victim. The first applicant (Kassab) was convicted of defensive homicide for the other victim, and the second applicant (Moustafa) was convicted on the basis that he had aided and abetted the first applicant. Kassab asserted that the jury verdict was unsafe and satisfactory (application dismissed). Moustafa further challenged his conviction of aiding/abetting defensive homicide and that the jury directions miscarried in this regard.
Held	Kassab's application was dismissed. Considering the forensic evidence, the Judge found that he had '*ample opportunity to disengage from the victim'* despite having a genuine belief that the killing was required for his safety. Defensive homicide was open to the jury. Moustafa's application was allowed, and a verdict of acquittal was entered.
Reasoning on section 9AD	The Judge steps through elements of defensive homicide, requiring the accused to have a) carried out the conduct causing death, b) with the intention to kill or cause serious injury, c) believing the conduct to be necessary for their safety, d) but without reasonable grounds for that belief. Ultimately, the Judge concludes that it is impossible to aid and abet defensive homicide [106]. Such a conclusion would require "the aider and abettor to have intentionally participated in the principal offence, and, as part of that participation, have knowledge of the physical elements which make up defensive homicide, including the principal's intention." [57] *Since its introduction, defensive homicide has created many practical difficulties for trial judges and juries. Thus, in a typical case where both murder and manslaughter are open, trial judges have been required to direct on self-defence for murder under s 9AC (with the possible verdict of defensive homicide arising under*

	s 9AD) but direct differently for self-defence as it applies to manslaughter under s 9AE.

Case name	***Ball v R* [2014] VSCA 226**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Appeal against sentence
Facts	The applicant had a hostile relationship with his neighbours. Multiple intervention orders existed between the involved parties, and police were frequently called to intervene. On the day in question, the police had attended the premises multiple times, being called to respond to threats, tense relations and verbal abuse hurled between the parties. The situation continued to escalate with pushing and shoving between the applicant and three men. After continued argument, the applicant stabbed one of the men, who died (basis of the second defensive homicide charge). The applicant stabbed another man (basis of recklessly causing serious injury charge). Finally, the applicant stood behind the third man who had been clipped by the applicant's mother's car. He repeatedly stabbed the man until his death (the first defensive homicide charge). The applicant told the 000 operator that someone had been trying to murder him. The applicant initally maintained that he acted entirely in self-defence and had been approached by eight men, some of whom wielded firearms. The applicant was charged with murder and attempted murder. On the first day of the trial, the prosecution accepted guilty pleas to two charges of defensive homicide, one of recklessly causing serious injury. The applicant was sentenced to 20 years with a non-parole period of 17 years. The applicant asserted that this was manifestly excessive, with regard to his mitigating factors, including significant and untreated mental illness and also the misapplication of the principle of totality.
Held	The Judge explored the applicant's mental illnesses in depth, finding that there was a causal link between the offending and his mental illness. Had the applicant proceeded to trial, he would have likely had a defence of mental impairment available. The Judge further found that the guilty pleas not only had '*utilitarian value, but demonstrated remorse'* [55]. The sentence was considered to be manifestly excessive and was substituted with a sentence of 17 years and six months imprisonment with non-parole for 14 years. The sentence for the first defensive homicide charge was 10 years' imprisonment (base cumulation). and the sentence for the second charge was 8 years (5 years cumulation).
Reasoning on section 9AD	The Judge at first instance considered that the '*applicant acted in the genuine belief that it was necessary to do what he did to defend himself…although he did not have reasonable grounds for that belief*' [49].

Case name	***R v Copeland* [2014] VSC 39**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant (female, aged 24) pleaded guilty to defensive homicide. The defendant, while drug-affected (ice, Valium and heroin), attended a drug dealer's residence hoping to purchase further drugs. After banging on the door and yelling, police were called and took the defendant to hospital. Having been released from the hospital, the defendant went to a tram stop, where she fell over and continued to scream. She boarded the tram alongside the victim and his daughter. The daughter offered the defendant their seats as she continued to stumble around the train. The victim exited the tram at the same time as the defendant. They walked together to his apartment, where they discussed how much she would charge to have sex with him. They argued about the terms of payment. The victim asked the defendant to leave, and she proceeded to stab him once. The victim called 000, but the defendant took the phone from him. The victim was found on the ground surrounded by a few meat cleavers (not used by the defendant). While she attempted to leave (after having taken his money), she was shortly caught by the police. In a police interview, the defendant asserted that the victim had pulled a knife on her, causing her to fear being raped or injured. The Crown did not accept this version of events but could not definitively rule out that no threat was posed by the victim, given the unexplained meat cleavers. It was 'common ground in the plea' that it was impossible for the Crown to discern exactly what happened at the time of the killing with respect to the allegedly defensive conduct. The applicant had a long history of substance abuse and suffered from chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood.
Held	The offending could not be categorised as being the most serious in character given the uncertainty surrounding the circumstances of the killing. On the other hand, '*this case [was] distinguished from those in which an immediate threat is made more serious because of a preceding history of violence or of domestic violence'* [57]. Mitigating factors included the lack of criminal history, expressions of remorse, young age, strong rehabilitative prospects and guilty plea. The defendant was sentenced for defensive homicide to eight years' imprisonment with a non-parole period of five years.
Reasoning on section 9AD	The Judge did not go into the mechanics of section 9AD in any great detail. Strangely, however, the defendant originally offered

	to plead guilty to manslaughter and this was not accepted. Rather, the prosecution was willing to accept the defensive homicide plea.

Case name	***Creamer v R* [2012] VSCA 182**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentence; domestic violence
Facts	The appellant (female) was married to the deceased for 11 years at the time of the killing. The relationship featured several affairs (from both parties), and the appellant was repeatedly concerned that her partner wanted her to engage in group sex. The appellant returned home after a weekend with a lover to find her husband agitated. An argument ensued in which the appellant believed that he was attempting to arrange for her to have sex with two other men in her presence (rejected by the sentencing judge). The appellant apparently awoke to being hit with a stick by her husband (rejected by the sentencing judge). The deceased left the home and later returned, forcing her to smell his semen-stained sheets and eventually said something that led the appellant to believe he was going to attack her. A struggle ensued, with the appellant hitting the deceased with the stick, him threatening her with a knife, smacking her, urinating on her and attempting to rape her. At this point, the appellant says that she stabbed him as he allegedly told her that he would 'finish her off.' The appellant allegedly heard him showering to wash off the blood and ultimately discovered him deceased the following morning. She called emergency services shortly after. This entire account was rejected by the sentencing judge. The appellant was initially charged with murder but found guilty of defensive homicide at trial. The appellant was sentenced to 11 years' imprisonment with non-parole period of seven years. The offending was categorised as 'serious.' The appellant asserted that the sentence was manifestly excessive given the history of domestic violence, the offer to plead guilty to defensive homicide prior to the trial, her remorse, good character, rehabilitative prospects, the extent of isolation she faced in prison and the sentencing practices.
Held	The Judge had regard to a comparable cases table (useful to look at, similar to the Victorian DJAG one provided below). The sentencing judge initially struggled to determine a scale by which to measure DV and disregarded any violence perpetrated by the deceased. The Crown contended that the level of DV faced by the defendant was at the lower end of the scale of severity. Ultimately, the Court concluded that the sentence was not manifestly excessive; the defensive homicide was 'serious' only 'narrowly' falling outside the parameters of murder. There was little evidence to support the finding that she believed the force necessary (even in light of the family evidential provisions). The belief was categorised as being wholly unjustifiable, almost to the point of being fanciful. The force used was described as disproportionate to any threat. The appeal was dismissed.

Reasoning on section 9AD	This case is curious in the sense that the CoA seemed incredibly critical that a charge of defensive homicide was found: [48]. *The sentencing judge was entitled to characterise this as a serious example of defensive homicide. Insofar as it fell outside the parameters of murder, it did so only by a narrow margin. There was very little, in the objective evidence, and particularly in the judge's findings, to support the appellant's claim that she believed that she was under threat of 'death or really serious injury' within the meaning of that expresision…that is so even when one has regard to the broader family violence provisions contained in s 9AH.*

Case name	***Middendorp v R* [2012] VSCA 47**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Appeal against conviction; Appeal against sentence
Facts	The applicant (male) was charged with murder after he killed his de facto partner (female). The couple often had drug-fuelled arguments featuring violence from both parties. In the trial, tendency evidence was led that established that the applicant had previously cut the deceased's throat, hit her with a frying pan, strangled her, hit her, kicked her, threatened to kill her and committed other acts of violence against her. It was a relationship marked by domestic violence. On the day in question, the deceased attended her home with a male companion, and the applicant refused her entry, threatening her with a knife. Using the knife, the applicant chased off the man and then returned to the deceased, who allegedly stood brandishing a knife. A confrontation ensued in which the applicant stabbed the deceased four times and wrestled her knife out of her grip. She stumbled down the street, with the applicant verbalising her as she did so, and died shortly after. The applicant was acquitted of murder and convicted of defensive homicide. He appealed the conviction on the basis that a) the tendency evidence was inadmissible to the defensive homicide charge and b) the judge's description of the applicant as a 'man of a certain type' allowed the jury to pursue an impermissible line of reasoning. The applicant further argued that the sentence took into account irrelevant considerations (such as the taunting during the deceased's death and parts of a victim impact statement) and was manifestly excessive.
Held	The Court dismissed the appeal against conviction. They discussed the scope of tendency evidence and the probative value of that evidence in determining whether the applicant had a reasonable belief in the need for the fatal force. The Court considered that the trial judge had appropriately warned the jury about the use to which the tendency evidence could be put. The Crown conceded that the sentencing judge erred by taking into account the taunting and aspects of the victim impact statement. However, the Court of Appeal ultimately found that the sentence handed down was not outside the range reasonably open to the sentencing judge. While leave to appeal the sentence was granted, it was dismissed on the basis that they were not convinced a different sentence ought to be imposed.
Reasoning on section 9AD	[38]: *According to research by the Sentencing Advisory Council published in September 2011, there have only been about 13 convictions on the charge of defensive homicide. The median sentence for that offence is in the order of nine years' imprisonment, with the lowest recorded sentence being in the*

	order of seven years and the highest in the order of 12-13 years. While these statistics only provide a very broad guide, they are somewhat illuminating of the entire sentence range for the offence given the relatively small number of defensive homicide sentences.

Case name	*R v Edwards* [2012] VSC 138
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant (female) pleaded guilty to defensive homicide after killing her husband. The deceased had a history of violence, having abused his previous wife, his child and his late mother. The deceased abused the defendant for a number of years, and an ITO was in place at the time of the killing. The defendant had a history of psychiatric illness and one previous conviction for assault occasioning in bodily harm after stabbing the deceased on a previous occasion. In the days leading up to the killing, the defendant mentally deteriorated. The night prior, the defendant and deceased had a serious argument, with neighbours overhearing screaming. The next morning, the defendant called an ambulance to report that her husband had been stabbed, blaming it on an offender who purportedly fled the scene. While she initially maintained that two others had killed her husband, the accused ultimately confessed. At the sentencing hearing, the contents of that confession were challenged. The defendant asserted that the deceased had been abusing her and threatening to kill her at the time of the incident. When the deceased turned around, she shot him with a spear gun, fearing for her life. The deceased then equipped himself with a knife. The defendant was able to disarm him and used this knife to inflict multiple injuries. The Crown contested that, the deceased had approached her with a knife and that instead, she stabbed him in his sleep. In the Crown's view, this would be an aggravating factor in sentencing.
Held	The sentencing judge had regard to the relatively early guilty plea, remorse, history of abuse, spontaneity of the offending, positive rehabilitative prospects, prior conviction and initial lies told to the police. The defendant was sentenced to seven years' imprisonment with non-parole for four years and nine months.
Reasoning on section 9AD	*[35]: I have serious reservations about the accuracy of your account in the course of your record of interview. There are some aspects of your description of what took place on the morning in question that simply cannot be reconciled with the forensic and other evidence at the scene. Moreover, your account of having been attacked by the deceased whilst he was armed with a knife, and having disarmed him in the way you described, itself strikes me as somewhat improbable, at least in the circumstances of this case. [36] Nonetheless, I will proceed to sentence you, as I must, on the basis that you genuinely believed that you were in danger of being killed or seriously injured when you stabbed your husband to death. Of course, your plea of guilty means that you*

	acknowledge that you intended to kill him, or at least to cause him really serious injury, at the time.

Case name	***R v Jewell* [2011] VSC 483**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant (male, 24 years old) pleaded guilty to defensive homicide after stabbing the victim (male), believing it necessary to do so to protect his father. The defendant had been attending his sister's 18th birthday party. While the defendant was waiting for a taxi (he was drunk), he saw the victim and a group of his friends throwing bottles and snapping pickets off his parent's fence. The defendant told his father, and they decided to confront the victim. An argument ensued with pushing and shoving. The defendant believed that his father had been hit (though his father made it known that he had not been hit). In response, the defendant stabbed the victim twice. The victim died at the scene. Factors pertinent to sentencing included his young age, early guilty plea and remorse, strong rehabilitative prospects, isolation in prison and lack of criminal history. The Crown contended that the offending was in the mid-range for severity; the defendant stabbed the victim despite the victim and his friends being entirely unarmed and despite the fact that he knew they had not hit his father (proportionality argument).
Held	The sentencing judge agreed that the offending fell in the mid-range of severity. Taking into account all the circumstances, the defendant was sentenced to eight years' imprisonment with a non-parole period of five years.
Reasoning on section 9AD	[14]: *Your guilty plea to the crime of defensive homicide indicates that you acted as you did because you thought your acts were necessary to defend your father from death or really serious injury but did not have reasonable grounds for your belief. I am not satisfied that you acted to punish Dylan Casey or to wound him for any other reason than to defend your father*.

Case name	*R v Black* [2011] VSC 152
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant, Karen Black, pleaded guilty to defensive homicide after killing her *de facto* partner. The defendant had been subject to ongoing harassment, intimidation, verbal abuse, sexual harassment and physical abuse from her *de facto* partner. On the day in question, the defendant and the deceased went out for a few drinks and returned home. An argument ensued in which the deceased pinned the defendant in a corner and was jabbing her body and 'egging her on' even after she grabbed a knife. The defendant stabbed the deceased twice and immediately told her son, who attempted first aid. The defendant made full and frank confessions to the attending police. While the defendant was initially charged with murder, the prosecution accepted a guilty plea to defensive homicide.
Held	The sentencing judge had regard to the defendant's difficult upbringing, which involved both physical and sexual abuse from family members, her genuine and immediate remorse, excellent rehabilitative prospects, the spontaneity of the attack and the history of domestic violence. Nonetheless, the sentencing judge considered this case to fall in the middle range of the spectrum respecting severity. This was because the defendant was verbally intimidating the defendant and poking her; he was not armed. The defendant was sentenced to nine years' imprisonment with a non-parole period of 6 years.
Reasoning on section 9AD	*Mr Carter further relied upon an analysis of sentence imposed in previous cases concerning defensive homicide. The offence of defensive homicide has attracted head sentences which have ranged between seven to twelve years, and non parole periods which have ranged between four to eight years. Sentencing considerations included the nature of the attack and the offender's conduct after it, including whether it was indicative of remorse or otherwise.* *In these circumstances, where the family violence was limited to threats, intimidation, harassment, jabbing and prodding as it was on this occasion, the Crown contend, and again it is acknowledged by your plea, that the belief that the knife could have been turned on you or that you had to get him first, or that you yourself were at risk of really serious harm if you did not act was not based on reasonable grounds.* *Nonetheless, by your plea you acknowledge that such grounds as you had for that belief, were not reasonable, and that must be so when one considers that although Mr Clarke had you cornered in*

	the kitchen and, indeed, was intoxicated, he was not armed, and it was in those circumstances to have stabbed him twice may be said to be disproportionate to the threat he then posed to you. *I accept that your moral culpability is reduced by the family violence you have endured and the spontaneous nature of the stabbings, and I accept that this case is different from other cases of defensive homicide, but that does not, in my opinion, of itself place it at the lower end of the spectrum. Given that the offence requires an intention to kill or to cause really serious injury (one is no less than the other) and that the maximum penalty is 20 years' imprisonment, thus defensive homicide is to be regarded as a serious offence.*

Case name	***Babic v R* [2010] VSCA 198**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Appeal against conviction; Appeal against sentence
Facts	The applicant (male, 43 years old) attended a retail store operated by the victim. The applicant and his friend entered a private part of the premises and were confronted by the victim, who was only wearing trousers. What unfolded from that point was unable to be determined by the court and trial judge. The trial judge acted on the basis that the victim punched the applicant at least once. The applicant beat the victim with a fire poker (causing some 55 injuries) and wrapped electrical flex around his neck, body and legs. At trial, defence counsel raised questions about whether the victim had committed suicide, whether the applicant played any role in the death or had acted in self-defence. While the applicant's friend gave evidence to the effect that the victim initiated the fight, he had suffered a TBI prior to the trial, such that his evidence was ultimately unclear. The applicant was charged with murder but found guilty of the alternative offence of defensive homicide. He sought to appeal the conviction asserting that: a) the judge misdirected the jury with respect to self-defence (by suggesting the statutory self-defence abolished the common law self-defence). Specifically, the applicant asserted that the defence case was that the applicant killed the victim in response to *a* threat (a defence to murder at common law) rather than a threat to which the defendant believed self-defence was necessary to prevent death or serious injury (section 9AC, not protected by the common law defence). The applicant further asserted that the Trial Judge erred in her directions on defensive homicide. Specifically, the applicant argued that the effect of the directions was such that the jury may have believed it necessary that the *applicant* prove that he had a self-defence belief before they should consider whether there were reasonable grounds for holding it. '*The question was whether section 9AD should be interpreted literally so that the section is inapplicable where the jury acquits an accused of murder because it is not satisfied beyond reasonable doubt that the Crown has negated the existence of a self- defence belief, but applicable if the jury considers that such a belief existed but there were no reasonable grounds for it.'* Finally, the applicant appealed against the sentence.
Held	The Court of Appeal held that Subdivision 1AA of the Act codified and replaced the common law defence of self-defence such that the trial judge did not err in their directions to the jury. The trial judge was not required to direct the jury on common law self-

	defence. The Court found that section 9AD should be interpreted '*as applying where an accused is acquitted of murder either because the jury considers that the accused had a self-defence believe or because the Crown did not persuade the jury beyond reasonable doubt that the accused did not have a self-defence belief.* The trial judge's directions were considered to be consistent with this interpretation. The appeal against sentence was described as 'hopeless' – he had been released on parole for a separate murder only six months prior to the defensive homicide killing.
Reasoning on section 9AD	*Similarly, s 9AD applies where the accused does not have reasonable grounds for the belief referred to in s 9AC. But this does not take account of the fact that an accused's acquittal of murder may not be based on the jury finding that the applicant had such a belief, but rather on the failure of the Crown to disprove the accused's claim that such a belief was held.* The Court takes time to discuss the 'difficulties' which arise in applying section 9AD, particularly whether the alternative verdict ought to be left to the jury when an accused is charged with attempted murder.

Case name	***R v Parr* [2009] VSC 468**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant (male, aged 29) lived in a Ministry of Housing flat with other tenants. On the day in question, the defendant came home, and another tenant refused him entry. The defendant became angry and banged on the windows and doors. The victim (male) arrived at the flat, and the tenant let both the victim and the defendant in. The victim told the defendant that he had to leave, and an argument ensued. The tenant and her son came outside to find the defendant and the victim leaning against the balcony railing; the victim had been stabbed by the defendant with a knife obtained from the flat. The defendant fled, and the victim was taken to hospital but died later that night. The defendant was arrested and had minor abrasions to his face and neck. The defendant was charged with murder but was found guilty of the alternative offence of defensive homicide.
Held	The Court considered the following factors in sentencing the defendant: a) his age, b) history of drug addiction, c) extensive prior convictions, d) slight mental illness associated with poly-substance abuse, e) the pre-trial offer to plead guilty to defensive homicide, f) some rehabilitative prospects, and g) the severity of the offending (described as 'a most serious one'). Taking these matters into account, the defendant was sentenced to 10 years' imprisonment with a non-parole period of eight years.
Reasoning on section 9AD	Interestingly, the Crown submitted that the courts to date had not Appropriately taken into account the maximum penalty for defensive homicide.

Case name	***R v Spark* [2009] VSC 374**
Jurisdiction	Supreme Court
Charge	Defensive homicide
Keywords	Sentencing
Facts	The defendant (male, 39 years old) had a complicated family history, having been raised by his maternal grandparents after his biological parents were unable to raise him. After the death of his grandparents, the defendant and his two children temporarily moved in with the deceased, the defendant's uncle, at the grandparent's rental address. The deceased was on a disability pension and often argued with the defendant in regard to a number of matters. The day prior to the killing, the defendant returned home without a key, and the deceased had left the house locked such that the defendant had to climb through the window to gain access. The following morning, an altercation occurred where the deceased threatened to sexually abuse the defendant's children the same way he had abused the defendant. The defendant punched the deceased and then returned with a baseball bat. He beat the deceased, took the corpse and dismembered it, scattering body parts around a nearby creek. The deceased pocketed $8000, which he had put towards accommodation. Some months later, the deceased confessed to the killing after forensics found bloodstains in the deceased's residence. The defendant was charged with murder, but once evidence was adduced that corroborated the child sexual abuse he suffered as a child, the prosecution accepted a guilty plea to defensive homicide.
Held	The sentencing judge took into account: a) victim impact statements, b) the guilty plea and demonstrable remorse, c) prior convictions, d) numerous positive character references, e) the severity of the crime and the hiding of the body, and f) positive rehabilitative prospects. The defendant was sentenced to seven years' imprisonment with a non-parole period of four years and nine months.
Reasoning on section 9AD	Not considered in any great depth.

Case name	***R v Carrington* [2007] VSC 422**
Jurisdiction	Supreme Court
Charge	Attempted murder alternatively intentionally causing serious injury
Keywords	Directions hearing
Facts	The accused (male) pleaded not guilty to attempted murder. It was uncontested that the accused shot the victim (female) four times. However, he ran a two limbed defence relying on a) a lack of intent and b) self-defence. The accused asserted that the victim brandished a loaded sawn-off shotgun. The judge does not provide much detail on the circumstances of the offending. The question for the Court at this juncture was whether the exceptions to homicide offences (including defensive homicide) applied to a charge of *attempted* murder. The Crown submitted that the provisions did not apply to attempted murder (meaning that common law self-defence would apply).
Held	The Court held that the exceptions to homicide provisions did apply to attempted murder. The effect of such a finding is that 9AC governs self-defence, and the possibility of defensive homicide under section 9AD arises. The Judge decided against leaving common law self-defence with the jury to avoid an 'unreal complication.' Defensive homicide was held to arise in this case.
Reasoning on section 9AD	The Court considered that if self-defence arises, then defensive homicide also has to be considered. Accordingly, the judge found that defensive homicide was open on the facts and ought to be left to the jury. *The jury have to consider s 9AD which for murder creates the alternative of defensive homicide "if he or she did not have reasonable grounds for the belief …". Proportionality is one of the matters which will have to be taken into account in assessing reasonable grounds but the test for defensive homicide is broader and easier for a jury both to understand and apply.*

Case name	***R v McAllister* [2007] VSC 315**
Jurisdiction	Supreme Court
Charge	Attempted murder
Keywords	Directions hearing
Facts	The accused was charged with attempted murder, and the question for the Court was whether the exception to homicide provisions apply to such a charge.
Held	The Court, following *Pepper,* held that the provisions of the new Act as to self-defence did apply to attempted murder. Accordingly, the jury was directed as to attempted defensive homicide in conjunction with the self-defence directions.
Reasoning on section 9AD	No great detail provided.

Case name	***R v Pepper* [2007] VSC 234**
Jurisdiction	Supreme Court
Charge	Attempted murder
Keywords	Reasons for ruling
Facts	The defendant (male) was charged with attempted murder and causing serious injury intentionally. He pleaded not guilty and was acquitted on all charges. Prior to the trial, counsel raised the issue of the applicability of the exceptions to homicide provisions to the charge of attempted murder. The judge directed the jury that those provisions did apply and undertook to provide reasons for such a decision at a later date.
Held	Whelan J first stepped through the common law position set out in *Viro,* which was later altered by *Zecevic.* Whelan J then turned to the new provisions drawing upon the VLRC work and second reading speeches in some detail. Rejecting the submissions of both the Crown and the defence, Whelan J held that the new provisions (regarding self-defence and defensive homicide) did apply to the charge of attempted murder. The primary reason for such a conclusion was that murder and attempted murder share nearly all the same elements: '*a person cannot be guilty of attempted murder if the circumstances are such that he or she would not have been guilty of murder had death resulted.*' Accordingly, where the new provisions altered the position on murder, Whelan J held that they also altered the position on attempted murder. Accordingly, Whelan J charged the jury on both self-defence under the Act and defensive homicide. Whelan J considered that the new Act codified the law of self-defence such that jurors need not be directed on both common law and statutory self-defence.
Reasoning on section 9AD	*The final issue raised was whether the alternative of attempted defensive homicide ought to be left to the jury. Prior to Zecevic, where an accused on a charge of attempted murder, or wounding with intent to murder, held the requisite belief concerning the threat, but the force used was disproportionate, and the accused was proved not to have believed that the force used was reasonably proportionate, the accused was acquitted. When the charge was wounding with the intent to commit murder that may have been simply because there was no such offence as wounding with intent to commit manslaughter. McManus and Bozikis suggest that prior to Zecevic on a charge of attempted murder there was no room for a finding of guilt of any lesser charge as a consequence of excessive self-defence. The position under the new Act is different to that which existed before Zecevic in that the new Act does create the distinct and separate offence of defensive homicide. Whilst it is true that the new Act in many respects creates a position somewhat similar to that which pertained under Viro, it does seem to me that this is one significant*

	difference. As the Attorney-General indicated in the Second Reading Speech, the new offence of defensive homicide is a substantive offence in its own right as well as a lesser alternative offence to murder.

Table of Section 9AD Convictions - Victorian Department of Justice, Defensive Homicide Consultation Paper

NOTE: These tables have been directly copied and pasted from the Victorian Department of Justice Consultation Paper on Defensive Homicide published in 2013. I have directly reproduced it here as it usefully highlights all of the cases where a defensive homicide conviction occurred between 2005-2013, including those reached through plea deals.

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
R v Smith (Michael Paul) [2008] VSC 87	Offender: male, 34 Victim: male, 34	None, attended same gathering in St Kilda.	Knife-stabbing (5 stab wounds)	Conflict at gathering. Victim left and returned in aggressive state. Fight ensued and offender stabbed victim. Victim was also using knife against offender.	Offender intoxicated and drug affected at time of offence. Offender had substance abuse problems for many years. Number of prior convictions for violence.	Plea	**7 years imprisonment** and non-parole of 5 years. Note: sentence reduction for guilty plea not specified.
R v Edwards [2008] VSC 297 *DPP v Edwards* [2009] VSCA 232	Offender: male, 43 Victim: male (age not specified)	Partner of victim was former partner of offender. Offender and victim's partner share a son.	Table leg, bottle (and other implements) used to beat victim and repeated kicking.	Victim initially threatened to hit offender with table leg. Note: offender's attack continued after victim unconscious and occurred in presence of offender's son and victim's partner.	Trial Judge described offender's criminal history as 'shocking' – 23 of 28 years of his adult life spent in custody.	Plea	**9.5 years imprisonment** and non-parole of 7.5 years [but for guilty plea, 10 years and non-parole of 8].
R v Giammona [2008] VSC 376	Offender: male, 31 Victim: male, 29	Both in custody in the Scarborough North Unit, Port Phillip Prison.	Makeshift knife-stabbing (16 stab wounds)	Offender entered victim's cell, fight ensued (offender said at victim's instigation) and offender stabbed victim.	Significant criminal history (113 prior convictions, only 1 for unlawful assault).	Plea	**8 years imprisonment** and non-parole of 6 years [but for guilty plea, 9 years imprisonment and non-parole of 7 years].
R v Smith (Callum-Zane) [2009] VSC	Offender: male, 19 Victim: male	Offender and victim had been friends for a few weeks.	Knife-stabbing (50–60 stab wounds)	Fight between victim and offender. Offender said victim threatened him and said he was gay.	Offender had deteriorating mental state due to drug use. Was diagnosed with drug induced psychosis (2 prior	Plea	**7 years imprisonment** and non-parole of 4.5 years

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
							reduction for guilty plea not specified.
R v Taiba [2008] VSC 589	Offender: male, 32 Victim: male (age not specified)	Acquaintances of 20 years. Offender was friends with victim's brothers.	Knife-stabbing (3 stab wounds to chest)	Offender owed victim $2000 for the drug ice. Offender was armed with knife and tried to steal ice from victim. Victim woke during robbery. Offender thought victim was getting gun (knew victim owned semi-automatic weapon) and stabbed victim.	Ward of State from age 10–11. Addicted to ice, large number of prior convictions (91) including intentionally causing injury and recklessly causing injury.	Plea	**9 years imprisonment** and non-parole of 7 years [but for guilty plea, 11 years imprisonment and non-parole of 9 years].
R v Baxter [2009] VSC 178	Offender: male, 25 Victim: male (age not specified)	No relationship (offender residing in victim's previous residence)	Knife-stabbing (11 stab wounds).	Fight between offender and victim (unarmed). Victim confronted offender and threw first punch, offender stabbed and punched victim. Fight continued.	Offender had been using drugs prior to offence (had used drugs since 12 years old). Troubled upbringing (father convicted of double murder, subjected to and witnessed violence, placed in state care). Had a number of prior convictions (3 for violence).	Plea	**8.5 years imprisonment** and non-parole of 5.6 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
R v Trezise [2009] VSC 520	Offender: male, 21 Victim: male (age not specified)	Friends through a mutual friend of the offender's father.	Knife-stabbing (36 stab wounds to almost all parts of body)	Several inconsistent versions of events provided by offender. Sentencing judge noted offender should be sentenced on basis that victim did not do anything of substance that merited attack, but that in offender's alcohol fuelled state he had reasoned that he was under threat.	Highly intoxicated at time of offence. Very difficult upbringing, very low IQ (76). Diagnosed as suffering chronic adjustment disorder with mixed disturbance of emotions and conduct.	Plea	**8 years imprisonment** and non-parole of 4 years [but for guilty plea, 10 years and non-parole of 6].
R v Spark [2009] VSC 374	Offender: male, 39 Victim: male (likely in 60s)	Victim was uncle of offender	Baseball bat used to beat victim, also punching.	Altercation between victim and offender. Victim threatened to treat offender's children in same way he had treated offender (this was a reference to fact the victim had	Offender had been subjected to sexual abused by victim during his childhood. Offender had 5 prior convictions (1 for unlawful	Plea	**7 years imprisonment** and non-parole of 4 years and 9 months [but for

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				Doubleday subsequently struck victim again and killed him.			
R v Evans [2009] VSC 593	Offender: male, 25 Victim: male, 37	Victim known to offender, lived next door in same boarding house (St. Kilda)	Knife-stabbing (single stab injury to chest)	Confrontation between victim and offender in relation to money and stolen goods. Victim punched offender in face, offender retaliated. Fight ensued and offender stabbed victim and punched him.	Significant number of prior convictions, including a number that relate to causing injury. Has a history of serious drug and alcohol abuse.	Plea	**10 years imprisonment** and non-parole of 7 years [but for guilty plea, 11.5 years imprisonment and non-parole of 8.5 years].
R v Middendorp [2010] VSC 202.	Offender: male, 26 Victim: female, 22	Offender and victim were in relationship and had lived together (intermittently) since late 2007	Knife-stabbing (4 stab wounds to back)	Victim arrived at the house she shared with offender in Brunswick with a male companion. Offender was armed with a knife and chased male companion away. Offender said that victim came at him with knife and, in the struggle that ensued, offender stabbed the victim over her shoulder, in the back 4 times	Offender was affected by alcohol at time of offence. Troubled upbringing with history of drug abuse and a number of prior convictions. Evidence was led at trial as to the violent nature of the relationship between the victim and the offender. At time of victim's death the offender was under a Family Violence Order (requiring offender not to assault, harass, threaten or intimidate victim).	Verdict	**12 years imprisonment** and non-parole period of 8 years [624 days already served in pre-sentence detention]. Appeal against conviction and sentence dismissed. *Middendorp v The Queen* [2012] VSCA 47
Total cases: 13	Total offender/victim by gender: Offender M:13, F: 0 Victim M:12, F:1	Relationships – family v non family: Family – 2 (*R v Spark*: victim was uncle of offender; *R v Middendorp*: victim was girlfriend of offender) Non-family – 11	Weapon type: Knife – 10 Other – 3	NA	Total number of offenders with prior convictions: 12	Total: Plea: 10 Verdict: 3	Average head sentence: 8.8 years

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				sexually abused offender when he was aged 8–14).	assault and 1 for breaching an intervention order, others relate to driving).		guilty plea, 9 years and non-parole of 7].
R v Wilson [2009] VSC 431	Offender: male, 26 Victim: male, 32	Victim known to offender. Victim lived in same boarding house as a friend of the offender (St Kilda).	Knife-stabbing (7 stab wounds)	Victim struck offender earlier in day causing offender to bleed profusely. Offender returned to boarding house later in day to confront the victim. Victim produced knife which offender wrestled from victim and subsequently stabbed victim repeatedly in the course of a wrestle.	Offender was highly intoxicated at time of offence. Suffered severe drug and alcohol addiction and diagnosed as paranoid schizophrenic. Number of prior convictions and at the time of the offence was on, or had just completed, a Community Based Order.	Plea	**10 years imprisonment** and non-parole of 7 years [but for guilty plea, 12 years imprisonment and non-parole of 10 years]. Appeal on sentence dismissed. *Wilson v The Queen* [2011] VSCA 12
R v Parr [2009] VSC 468	Offender: male, 29 Victim: male (age not specified)	Victim known to offender, lived in same boarding house (Frankston).	Knife-stabbing (20 stab wounds)	Fight ensued between offender and victim. Victim was stabbed with kitchen knife. No account given by offender to police but made admissions to others that he had stabbed following attack from victim.	History of serious drug use (chronic poly-drug user), large number of prior convictions (including for violent offences).	Verdict	**10 years imprisonment** and non-parole of 8 years.
R v Croxford/ Doubleday [2009] VSC 516	Offender: (Croxford) male, 22 (Co-offender male, mid-30s) Victim: male, early 20s	Offenders loosely knew victim (from the same regional community).	Garden stake used to beat victim	Victim produced knife and belt (as weapon) in response to comment from offender. Croxford reacted and fight ensued between victim and Croxford and Doubleday attempted to break up fight. Croxford and Doubleday armed themselves with garden stakes as weapons. Croxford, Doubleday and victim fought. Victim approached Croxford and Doubleday with knife, Croxford struck victim with garden stake,	Offender had addiction to cannabis and was affected by alcohol at time of offence. Prior convictions dating back to when he was 16 (none of which involved violent offending).	Verdict	**9 years imprisonment** and non-parole of 6 years. (co-offender convicted of manslaughter).

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
R v Black [2011] VSC 152	Offender: female, 53 Victim: male, 56	Offender was the de-facto partner of the victim.	Knife-stabbing (2 stab wounds to the chest)	Offender and victim had an argument and victim was verbally harassing offender and acting in a physically intimidating manner. Offender grabbed knife and stabbed victim. Offender had been subject to long term family violence by victim.	Moderate depression, mild anxiety. No prior convictions.	Plea	**9 years imprisonment** and non-parole of 6 years [but for guilty plea, 11 years and non-parole of 8]. Appeal against sentence dismissed. *Black v The Queen* [2012] VSCA 75
R v Ghazlan [2011] VSC 178	Offender: male, 58 Victim: male, over 55 (age not specified)	Offender and victim lived in the same building.	Knife – repeated stabbing	Offender was tripped by victim causing offender to stumble (but not fall). Offender immediately produced knife and stabbed victim repeatedly.	Long term psychiatric illness (paranoid schizophrenia). Past criminal history of violent crimes (2 prior convictions).	Plea	**10.5 years imprisonment** and non-parole of 7 years and 6 months [but for guilty plea, 12 years imprisonment and non-parole of 9 years and 6 months].
R v Creamer [2011] VSC 196	Offender: female, 53 Victim: male, 52	Offender was the wife of the victim.	South African weapon and knife (repeated beating and stab wound to the abdomen)	Victim repeatedly pressured (but did not force) offender to engage in unwanted sex acts and had previously hit offender. Trial judge did not accept offender's account of the incident. Trial judge found that that there was a struggle between the offender and victim, and that offender beat and stabbed victim.	Depression. No prior convictions.	Verdict	**11 years imprisonment** and non-parole of 7 years. Appeal against sentence dismissed. *Creamer v The*

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
							Queen [2012] VSCA 182
R v Dennis James Martin [2011] VSC 217	Offender: male, 29 Victim: male, 79	Victim and offender became friends (for 6 months).	Knife-stabbing (7 stab wounds), repeated punching and kicking.	The offender and victim watched TV and drank for some hours. The victim allegedly made repeated sexual advances on offender and tried to rape offender. Offender proceeded to beat and stab victim.	Intellectual disability and alcohol intoxication (and dependency). 13 prior convictions, including for assault.	Plea	**8 years imprisonment** and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
R v Svetina [2011] VSC 392	Offender: male, 52 Victim: male, 74	Victim was the father of offender.	Tomahawk (10 wounds)	Victim hated offender and had told others that if offender came to his home he would cut him with a tomahawk. Offender went to victim's home, struggled with victim (who carried a tomahawk) and hit victim with the tomahawk.	Depressive mood disorder. No prior convictions.	Verdict	**11 years imprisonment** and non-parole of 7 years.
R v Scott Roy Jewell [2011] VSC 483	Offender: male, 22 Victim: male (age not specified)	Victim and offender attended the same party.	Knife-stabbing (2 stab wounds)	Fight between offender, victim, victim's father and others occurred after the party due to property damage. Offender believed victim hit offender's father and stabbed the victim (even though offender's father said that the victim had not hit him). Victim was unarmed.	None.	Plea	**8 years imprisonment** and non-parole of 5 years [but for guilty plea, 10 years imprisonment and non-parole of 7 years].
R v Monks [2011] VSC 626	Offender: male, 22 Victim: male, 42	Victim was the uncle of the offender.	Tomahawk – 2 blows to the head	Victim had been violent towards offender on numerous occasions since offender was a child. Victim initiated the assault that ended in his death, resulting in a fight involving the victim (who had a hammer), the victim's brother and	Family violence, borderline personality disorder, PTSD, depression, polysubstance dependence. Prior convictions including burglary, theft and false imprisonment.	Plea	**8 years imprisonment** and non-parole period of 5 years [but for guilty plea, 9 years imprisonment and

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
				the offender, all of whom had been drinking alcohol.			non-parole of 6 years].
R v Edwards [2012] VSC 138	Offender: female, 44 Victim: male (age not specified)	Victim was the husband of the offender.	Knife – multiple stabbing (around 30 injuries)	Offender alleged that the victim attacked offender and threatened to inflict serious harm on offender (including burning and cutting offender's eyes/ears). Offender alleged that the victim came at offender with knife. Offender stabbed victim multiple times killing him. Trial judge had serious reservations about the accuracy of the offender's account. Long history of domestic violence towards offender by victim. At the time of the victim's death, an intervention order was in place protecting the offender from the victim.	Significant history of psychiatric illness (diagnosed as bipolar and manic depressive). 1 prior conviction – offender stabbed victim with corkscrew/knife.	Plea	**7 years imprisonment** and non-parole of 4 years, 9 months [but for guilty plea, 9 years and non-parole of 6 years].
R v Talatonu [2012] VSC 270	Offender: male, 50 Victim: male, 33	The offender was friends with/known to the victim.	Knife – multiple stab wounds	Victim initiated argument by making remarks to offender, smashing bottles over offender's car and brandishing broken beer bottle in direction of the offender. Victim then punched offender in face three times. Victim then started to walk home and offender stabbed victim.	None	Plea	**8 years imprisonment** and non-parole of 5 years, 3 months [but for guilty plea, 10 years and non-parole of 6 years and 6 months]. Note: sentence also reduced due to forced isolation of prisoner as only Samoan speaking prisoner.

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
DPP v McEwan, Robb and Dambitis (Sentence) [2012] VSC 417	Offender (Dambitis): male, 40 Victim: male, 24	No previous relationship	Repeated beating with weapons (offender with lump of wood) and fists	Victim had machete and, with a friend, was intimidating a group of teenagers. Offender and 2 co-offenders intervened. There were various altercations between victim and offenders, and victim and innocent bystanders. Victim also caused property damage with machete. One of the co-offenders disarmed victim, and offender and co-offenders assaulted victim repeatedly around body and head.	Prior convictions in Latvia (not taken into account). Previous convictions in Victoria including assault. Severe depression, PTSD, suicide attempts. Offending in this case occurred 2 days after release from prison.	Verdict	**11 years imprisonment** and non-parole of 8 years.
R v Vazquez [2012] VSC 593	Offender: male, approx 25 Victim: male (age not specified)	Offender and victim had been friends, but had fallen out over a drug debt.	Shotgun – one shot to the head	Victim came to offender's father's office to discuss damage to the victim's car. Argument between victim and offender's father. Offender was waiting in next room, where the sawn-off shotgun had been hidden. Offender heard raised voices, entered the room and shot victim. Victim was unarmed.	PTSD resulting from kidnapping and torture in 2009 (note: this did not reduce his moral culpability to a significant degree given the planning involved in the offence). No prior convictions.	Plea	**10 years imprisonment** and non-parole of 7 years [but for guilty plea, 12 years and non-parole of 9 (note: sentence also reduced due to serious liver disease)].
R v [unknown] Reasons not published	Offender: male, 14 Victim: male, 37	*Unknown*	Pole or machete	Fist fight between offender's father and victim outside home. Offender intervened and struck victim repeatedly in the head with [a weapon].	Offender 14 years old at time of offence.	Plea	**3 years detention in youth justice centre**
DPP v Chen [2013] VSC 296	Offender: male, 28 Victim: male, 27	Offender bought a car from the victim one week before his death.	Knife (15 stab wounds)	Victim intimidated offender into buying car from him. A week later, offender approached victim at train station and stabbed him repeatedly.	Cognitive impairment caused by previous brain injury, which was linked to offending. No prior convictions. No remorse but unlikely to reoffend.	Verdict	**8 years imprisonment** (and non parole period of 5 years)

Case name and year	Gender/age of offender and victim	Relationship between offender and victim	Offence – weapon used	Offence – what induced fear of death/ serious injury	Characteristics of offender (prior convictions, mental illness)	Plea or verdict	Sentence imposed
R v Moustafa and Kassab [2013] VSC 379	Offender (Moustafa): male, 20 Offender (Kassab): male, 25 Victim (Taha): male, 34	Offender (Moustafa) was the cousin of the victim's friend (Mohamad).	Revolver	Moustafa believed Mohamad (who was his cousin) had stolen from him. Victim owned a panelbeaters business and was friends with Mohamad. Moustafa and Kassab confronted Mohamad at the victim's shop. Mohamad and the victim were both shot in a subsequent gunfight. Offenders were acquitted of Mohamad's murder.	Kassab: previously pleaded guilty to possessing prohibited weapon without approval and possessing dangerous article, 'very good' prospects for rehabilitation Moustafa: 'significant criminal history' (e.g. conviction for recklessly causing serious injury, various driving and drug offences)	Verdict	**8.5 years imprisonment** and non-parole period of 5 years and 6 months
Total cases:	Total offender/ victim by gender:	Relationships – family v non family:	Weapon type:	NA	Total number of offenders with prior convictions:	Total:	Average head sentence:
15	Offender M: 12, F: 3 Victim M: 14, F:0	Family – 5 *Black*: victim was male de facto *Creamer:* victim was husband *Svetina:* victim was father *Monks:* victim was uncle *Edwards:* victim was husband Non-family – 10	Knife – 7 Tomahawk – 2 Other – 6		7 (not including case involving 13 year old offender)	Plea: 9 Verdict: 6	8.4 years

New South Wales

Case name	*Stephen v DPP* [2018] NSWSC 1018
Jurisdiction	Supreme Court
Charge	Murder; Acquitted
Keywords	Self-defence; Application to award costs in criminal proceeding
Facts	Ms Stephen was charged with the murder of her partner, Chris Tiffin. On a number of occasions before the trial commenced, defence counsel submitted to the DPP a 'no bill application.' All submissions of this kind were rejected. The circumstances of the offending are as follows. For the year of their relationship, the deceased had subjected Ms Stephen to extreme violence. During the trial, evidence was led to suggest that the deceased had been similarly violent with a number of previous partners. On the day of the offending, Ms Stephen told the deceased that she wanted to end the relationship. The deceased proceeded to beat her over the head with a clothes iron three times. Ms Stephen grabbed a knife and stabbed him, causing his death. Initially, the Crown's case was that Ms Stephen had either murdered the deceased or killed him through excessive self-defence (i.e. being the alternative offence of manslaughter). Defence counsel adduced evidence to establish that Ms Stephen had a 'high risk of death' had she not stabbed the deceased and that, given her state of terror, her actions were more likely to be reflexive rather than thought out.
Held	At the end of the Crown case, it was evident that they were unable to disprove that Ms Stephen did not believe it was necessary to stab the deceased in order to save her life. Accordingly, the Judge directed a verdict of not guilty for murder, and the trial proceeded with a count of manslaughter. To establish excessive self-defence required Ms Stephen to exhibit the *mens rea* element of murder. At the conclusion of the defence case, a further submission was made that a directed verdict should be ordered. In light of the unchallenged evidence of the psychiatrists, the judge directed a verdict of not guilty on all counts. The Judge in this hearing determined that had the prosecution been in possession of evidence of all the relevant facts (being the evidence adduced by defence counsel in trial), it would not have been reasonable to institute the murder proceedings against Ms Stephens. A certificate for costs was granted.

Case name	*R v Silva* [2015] NSWSC 148
Jurisdiction	Supreme Court
Charge	Murder; Manslaughter
Keywords	Sentencing; Excessive self-defence
Facts	Jessica Silva (female) was charged with murder after stabbing her abusive partner, James Polkinghorne, to death. The deceased controlled Silva and physically abused her throughout their entire relationship. At the time of the killing, the pair had broken up, and the deceased was heavily influenced by ice. The deceased was upset about the breakup and sent the accused a series of abusive and threatening messages. Phone calls made by the deceased became increasingly threatening, with him saying he would 'cave her head in' 'bash the fuck out of [her]' and 'break her jaw.' The accused was aware that the deceased had access to a pistol. The accused spoke with both the deceased's mother and her brother, citing fears for her life and concerns that the police could not help her. She asked her brother whether they could find anyone to kill the deceased or 'fix him up' (beat him up). The deceased arrived at the accused's home, punched her and ripped her pants. He also punched and grappled with the accused's brother and father. The accused ran back inside and obtained a knife, which she used to stab the deceased as he struggled with her brother. The accused was found guilty of manslaughter, and at issue was on what basis the jury reached this conclusion for the purpose of sentencing principles.
Held	The sentencing judge was not satisfied that the accused genuinely believed that the accused would kill her. Further, the sentencing judge was not satisfied that the accused intended to kill the accused. However, the judge was satisfied that she had intentions of inflicting GBH with the belief that it was necessary to defend both herself and her family. Therefore, she was found guilty of manslaughter by way of excessive self-defence (at [38]). The judge considered that the accused killed the defendant as an 'outcome of her disturbed state of mind at the time and the events of the day' (at [48]). The accused was deemed to have very strong rehabilitative prospects, good character and family support. An aggravating factor was the use of a weapon. The judge refers to authorities that provide that when a life is taken (even in the context of DV), the courts will not be lenient unless there are exceptional circumstances to warrant a non-custodial sentence (at [54] citing *R v Bogunovich*). Ultimately, the judge considers the seriousness to be at the 'lower end of the range' [60], given the extreme circumstances. Accordingly, the accused was sentenced to 18 months of imprisonment, wholly suspended.

Case name	***R v Duncan* [2010] NSWSC 1241**
Jurisdiction	Supreme Court
Charge	Manslaughter
Keywords	Sentencing; Excessive self-defence
Facts	Ms Duncan (Aboriginal identifying) was charged with murder after she stabbed her husband to death. The Crown accepted a guilty plea to manslaughter in satisfaction of the indictment. From early in the relationship, the deceased physically and emotionally abused Ms Duncan on a sporadic basis. This (non-exhaustively) involved verbal abuse, threatening behaviour, and his attending her workplace unannounced to abuse her. On the day in question, the deceased drunkenly returned home at a party and then later woke up and pushed Ms Duncan off the bed, forcing her to leave the room. The deceased pushed Ms Duncan, and she fell to the floor. Afraid that the assault would continue, Ms Duncan grabbed a knife and stabbed him once in the abdomen. She and her son called 000 and she confessed on their arrival (some 15 minutes after the call). The deceased passed away in surgery.
Held	Hidden J had regard to Ms Duncan's relatively unblemished criminal history, her substance abuse disorder (in remission), depressive illness, position as an Aboriginal delegate in custody and excellent prospects of rehabilitation. The offending was considered to be at the lower end of the spectrum of severity. Ms Duncan was ultimately sentenced to three years' imprisonment with a non-parole period of 16 months. [27]: *As I have said, she did not intend to kill him or to cause him serious injury. While the basis of manslaughter in her case is not excessive self defence or provocation, there are elements of both in her arming herself with the knife and striking as she did. She acted quickly and impulsively in the heat of a violent incident which, as Mr Stratton put it, was not of her choosing.*

Case name	***R v Scott* [2003] NSWSC 627**
Jurisdiction	Supreme Court
Charge	Murder; Manslaughter
Keywords	Sentencing; Excessive self-defence
Facts	Ms Scott (female) was charged with murder and pleaded guilty to manslaughter through a plea deal. The basis of the manslaughter plea was that she had acted in excessive self-defence against her *de facto* partner. On the day in question, Wayne had been drinking and began verbally abusing Ms Scott about the whereabouts of his car and their children. The deceased grabbed a knife and began ranting and raving, telling Ms Scott that '[he] had fucking had it' before grabbing her around the throat and choking her. This account was accepted by the judge, despite the prosecution challenging the use of a knife by the deceased. Ms Scott picked up an iron and hit him on the head until he died. Afterwards, Ms Scott arranged for a bobcat operator to dig a trench at her home, asking it to be 'grave size.' Ms Scott then dragged the body into the ditch and buried it, telling neighbours, family and the police that it was two dead peacocks that her stepson had killed. A few months later, police executed a search warrant and excavated the trench, discovering the deceased's body.
Held	In sentencing, the judge outlined both the mitigating and aggravating factors. Ms Scott had a long history of alcohol and drug dependence and criminal activity. While the relationship between Ms Scott and the deceased was described as 'complex and troubled', the judge considered that this was mostly attributable to her drug and alcohol issues. Evidence from a doctor confirmed that Ms Scott had many features of a battered woman, suffered from depressive illness which impacted her capacity for control and had suffered 'many years of psychological trauma, not only because of the relationship with the deceased.' Ms Scott also suffered from significant trauma by virtue of eight unsuccessful pregnancies. The judge did not accept that the relationship was one marked by domestic violence. Rather, the judge considered that the deceased was violent towards his partner from time to time; this was not characteristic of the relationship. Ms Scott was considered to have reasonable prospects of success in rehabilitation. Whealy J found that a non-custodial sentence would not be appropriate given the 'markedly excessive' [85] use of force, the treatment of the body (demonstrating a lack of initial remorse) and concealment of the death from his family and the expectation of the community with respect to the punishment needed when someone has been killed. Taking all into account, Ms Scott was sentenced to five years' imprisonment with a non-parole period of two years six months.

	[71] *Secondly, I accept Dr Westmore's suggestion that at the time she was threatened by the deceased, the offender at that time had experienced acute and intense emotions of fear, anxiety and apprehension. In this context, her reactions, though markedly excessive, were not planned or premeditated.* [73]: *Moreover, I am not satisfied on the probabilities that the offender was at the relevant time exhibiting the responses and features of battered woman syndrome. There is a considerable body of evidence before me which deals with the relationship between the offender and the deceased. I accept that there were on occasions violent actions by the deceased towards the offender but I do not accept that this was generally the situation between them. Rather, I am satisfied that violent actions and behaviour on the part of the deceased towards the offender were rare occurrences.* [75] *It is true that the offender described herself as having been the subject of verbal and physical violence at the hand of the deceased in the history she gave to the psychiatrist and the history given to the clinical psychologist. The offender, however, gave no evidence before me. In my view, very little weight can be attached to these histories in the absence of either evidence from the offender or from other persons which corroborate the assertions.* [78]: *That said, there is no doubt that the deceased acted in a violent way towards the offender on the day he met his death. No doubt he was at the end of his tether just as she was so far as the extent of her depression was concerned.* [82]: *There are undoubtedly a number of cases where women especially have been spared the imposition of a custodial sentence in instances of a domestic dispute involving the death of a partner. On the other hand, I am well aware that there are many other cases where manslaughter has occurred during a domestic argument but where the Court has imposed sentences that have ranged from four to six year full-time custodial sentences.*

Case name	***R v Trevenna* [2003] NSWSC 463**
Jurisdiction	Supreme Court
Charge	Murder; Manslaughter
Keywords	Sentencing; Excessive self-defence
Facts	Initially, Ms Trevenna pleaded not guilty to the murder of her housemate. After two days at trial, she was re-arraigned. She pleaded guilty to manslaughter (on the basis of excessive self-defence), which was accepted by the prosecution in full satisfaction of the indictment. The circumstances of the offending were that Ms Trevenna came home to her partner, the deceased, who initiated an argument about her phone (being unable to track her), involvement with another man and her plan to leave the home for the night. The deceased grew increasingly agitated, threatening to kill Ms Trevenna, grabbing and throwing her and choking her. The deceased grabbed a cricket bat, and Ms Trevenna grabbed the deceased's shotgun and shot him once before leaving. She returned to try and remove any evidence of her involvement and denied her involvement until the trial's commencement. Evidence revealed that Ms Trevenna was under the influence of amphetamines at the time of the offending and had had little sleep. There was significant evidence to establish that the deceased had previously been violent to and controlling of other women in his life. The deceased was an active drug dealer at the time of his death, and Ms Trevenna had some involvement. The relationship between the pair had deteriorated after Ms Trevenna began to believe that the deceased had interfered with her son.
Held	Buddin J considered Ms Trevenna's background; she had been sexually abused as a child, her father had been convicted of murder, and she had been drug dependent for years. In pre-sentence custody, Ms Trevenna successfully completed a number of courses and weaned herself off methadone. The sentencing judge considered the principles of sentencing, a slight discount for the plea and her positive rehabilitative prospects. Ms Trevenna was sentenced to seven and a half years' imprisonment with a non-parole period of 4.5 years. [40]: *It may be accepted, however, that a jury may not have been persuaded in all the circumstances of the case that the Crown had negatived self-defence and that it may accordingly have acquitted the offender altogether.* [42]: *Clearly the plea recognises that the offender's conduct was not a reasonable response in all the circumstances notwithstanding the fact that the offender believed that the conduct was necessary in order to defend herself. That being so, it is apt to recall the remarks of Greg James J in R v Nguyen in*

	which His Honour said that the "exigencies of the moment were such that the offender simply resorted to what protective weapon was at hand."

Case name	***R v Yeoman* [2003] NSWSC 194**
Jurisdiction	Supreme Court
Charge	Manslaughter
Keywords	Sentencing
Facts	Ms Yeoman pleaded guilty to the manslaughter of her *de facto* husband. On the day in question, Ms Yeoman and her partner were significantly intoxicated. The deceased became increasingly agitated after Ms Yeoman refused to turn down her music. She hit him with an electric jug at that point. Later on, Ms Yeoman approached the deceased and placed a knife to his chest. The deceased slumped back, and Ms Yeoman did not realise that he was dead. The following morning, one of their children alerted Ms Yeoman that the deceased had collapsed on the floor. Ms Yeoman immediately sought assistance from the police and confessed at the scene. Her recollection of the situation was scarce due to her intoxication. Throughout the relationship, the deceased had been consistently violent towards Ms Yeoman. The deceased had previously hit her with a baseball bat, choked her, threatened to kill her, hit her in the face (causing extensive bruising and a chipped tooth), thrown objects at her, verbally abused her and taunted her to stab him. On one occasion, the deceased chased her around with a gun, threatening to kill her (she was unaware it was a replica). Often, the deceased was violent towards their children. Ms Yeoman gave evidence that she felt trapped and expressed fear that the deceased would harm himself if they left (as he previously had done). A social worker provided a report detailing the social isolation of Ms Yeoman, the emotional/psychological control and physical violence. She summarised: '*In my professional opinion the circumstances surrounding Mr Jones' death are best understood against the backdrop of chronic domestic violence. Twenty-five years of physical violence and verbal abuse have substantially eroded Ms Yeoman's personal autonomy.'*
Held	The sentencing judge took into account Ms Yeoman's a) lack of criminal history and her good character, b) immediate admissions, c) guilty plea, d) genuine remorse, e) abstinence from alcohol and excellent rehabilitative prospects, f) role as a mother to her youngest child, g) lack of pre-meditation, h) the domestic violence context to the offending, the impact of which 'cannot be underestimated' [45] and i) lack of awareness about the consequences of her actions due to intoxication. Taken together, the judge sentenced Ms Yeoman to a good behaviour bond for four years. This was not contested by the prosecution, who, according to the judge, adopted this position after 'due consideration by an experienced, responsible and capable Crown Prosecutor.' Pertinently, the sentencing judge considered that had Ms Yeoman contested the charge, **'***she may have been able*

	to resist the Crown case against her…in those circumstances her plea of guilty assumes particular significance'

Case name	***R v Melrose* [2001] NSWSC 847**
Jurisdiction	Supreme Court
Charge	Manslaughter
Keywords	Sentencing
Facts	Ms Melrose (Aboriginal identifying) was charged with the murder of her *de facto* husband, but a plea of manslaughter was accepted in satisfaction of the indictment. Over their fourteen-year relationship, the deceased repeatedly abused both Ms Melrose and her children, particularly when drunk or under the influence of drugs. The deceased had previously kicked Ms Melrose in the head, hit her with a vacuum when she was fearful he was molesting their child and hit her in the mouth and head several times, causing significant lacerations. After relocating, Ms Melrose became isolated from her family, from whom she frequently sought refuge. The deceased continued to physically, verbally and psychologically abuse Ms Melrose. On the evening of the offence, the deceased and Ms Melrose attended a function in support of their son, who was receiving a sports award. The deceased consumed a considerable amount of alcohol. After Ms Melrose commented about a woman who had approached the deceased, he dragged her outside, and punched her in the face and kicked her in the legs. Ms Melrose went to the local police station only to find it unattended. She returned home and tore through their home, throwing items, smashing things and equipping herself with a knife hidden in her sleeve. Ms Melrose went back to the function and was approached by the deceased. The deceased verbally and physically confronted Ms Melrose. The pair were both running, and the knife fell out of her sleeve. She collected the knife, and when the deceased stopped running, she stabbed him once in the shoulder. The deceased left the building, collapsed on the street, and died. Ms Melrose immediately re-attended the police station and confessed. Toxicology results showed that Ms Melrose had consumed alcohol, and there were some traces of marijuana. In the aftermath of the offending, Ms Melrose was admitted to hospital suffering from Major Clinical Depression and paranoia. A clinical psychiatrist gave evidence that Ms Melrose would be at a high risk of committing suicide should she be placed in full-time custody and that with appropriate supervision and abstinence from substances, she had strong rehabilitative prospects.
Held	McClellan J ultimately considered that Ms Melrose's circumstances to be exceptional, such that the imposition of a custodial sentence would be inappropriate. Instead, he ordered that Ms Melrose be subject to a good behaviour bond for four years. The conditions included continued abstinence from drugs and alcohol (including testing), continued mental health treatment and ongoing psychological and medical reviews.

Case name	***R v Kennedy* [2000] NSWSC 109**
Jurisdiction	Supreme Court
Charge	Murder; Manslaughter
Keywords	Sentencing
Facts	Ms Kennedy (Aboriginal identifying) pleaded not guilty to murder but guilty to manslaughter of her partner, Sharpley (also Aboriginal identifying). Throughout their relationship, Sharpley subjected Ms Kennedy to severe physical and psychological abuse. Sharpley would punch and kick Ms Kennedy, push her downstairs, threaten to kill her, control her movements, humiliate her and rape her. Occasionally, Sharpley's family would also abuse Ms Kennedy. A number of apprehended domestic violence orders were made against the deceased, though she rarely reported the abuse to the police or the hospitals she attended. Ms Kennedy grew to become addicted to alcohol. In the weeks approaching the offending, the deceased became increasingly temperamental and his unpredictable behaviour concerned Ms Kennedy. On the day in question, Ms Kennedy was drinking and smoking marijuana with Sharpley. An argument occurred, and Ms Kennedy left the home and called the police, who collected the deceased and took him to Namoi Village to 'cool off.' Later, Ms Kennedy went to a hotel where the deceased found her. They continued to argue and left together to return home. The deceased began punching and kicking Ms Kennedy. In the spur of the moment, she grabbed a knife and stabbed him. She immediately asked her neighbours to call an ambulance, but the deceased was unable to be saved. The manslaughter plea was accepted in satisfaction of the indictment on the basis that she had committed an unlawful and dangerous act (i.e. she lacked the intention to cause GBH or kill the deceased).
Held	The sentencing judge took into account Ms Kennedy's turbulent upbringing, demonstrated remorse, guilty plea, minor (insignificant) criminal record, strong rehabilitative prospects and her likelihood of self-harm if not appropriately counselled. The judge highlighted that *'it is now well established that when a human life is taken, even within the context of domestic violence, the Courts will not deal leniently with the offender unless the case is exceptional. It is only in the most exceptional case that a non-custodial sentence will be imposed'* [56]. This case was considered to be at the lower end of severity. The judge ultimately considered that a non-custodial sentence was appropriate; Ms Kennedy was ordered to enter a recognisance of $5000 and to a good behaviour period of four years.

High Court of Australia: A brief note on *Zecevic* and its relationship with Queensland law

Zecevic v DPP (1987) 162 CLR 645 clarified and simplified the common law test for self-defence,[1] which used to apply in New South Wales and Victoria before it was altered and enshrined in their respective criminal legislation. Otherwise, the case remains good law. Most relevantly, the Queensland Court of Appeal has characterised the test for self-defence set out in *Zecevic* as identical to the test under the *Queensland Criminal Code*.

Discussion

The common law test of self-defence, as enunciated in *Zecevic*, involves both a subjective and an objective assessment. It requires: (1) that the accused honestly believed that lethal force was necessary, and (2) that belief was reasonable in the circumstances. This test is not constrained by a requirement that the threat be 'imminent' or that the response be 'proportionate', yet imminence and proportionality do bear upon the assessment of the reasonableness of the belief.[2]

Zecevic has been given neutral treatment by the QCA in nine cases.[3] In *R v Wilmot* [2006] QCA 091, Jerrard JA (with whom McMurdo P and Muir J agreed) said that the test for self-defence under *Zecevic* and the *Queensland Criminal Code* is the same.[4] In the remaining cases, *Zecevic* was often quoted to illustrate how self-defence might be raised on the facts/when it ought to be left to the jury.[5] The most recent case to consider *Zecevic* invoked it in a discussion on what the law considers to be a reasonable belief that the accused's actions were necessary in self-defence.[6]

While these decisions suggest there is little to distinguish the position in *Zecevic* and the *Queensland Criminal Code*, Crofts and Tyson consider that Code jurisdictions' law on self-defence is '**more complex**', as it requires that a person is responding to an assault.[7] This, however, represents merely an additional 'threshold' requirement for the defence, rather than any substantive alteration of the common law subjective/objective test.

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[1] Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39(3) *Monash Law Review* 864, 878, citing *Zecevic v DPP* (1987) 162 CLR 645 at 662 (***Zecevic***).
[2] *Zecevic* (n 1) at 665.
[3] See *R v Dayney* [2020] QCA 264 (***Dayney***); *R v FAV* [2019] QCA 299 (***FAV***); *R v Faulkner* [2017] QCA 301 (***Faulkner***); *R v George* [2013] QCA 267; *R v Newton* [2012] QCA 127 (***Newton***); *R v Dean* [2009] QCA 309 (***Dean***); *R v Wilmot* [2006] QCA 091; *R v Duncan* [2006] QCA 046 (***Duncan***); *R v Hagarty* [2001] QCA 558.
[4] At [33] and [36].
[5] See, eg, *Newton* (n 3) [11]; *FAV* (n 3) [97]; *Faulkner* (n 3) [45]; *Dean* (n 3) [36]; *Duncan* (n 3) [31].
[6] *Dayney* (n 3) [113].
[7] Crofts and Tyson (n 1) 878, citing critiques of Queensland's law in *R v Gray* (1998) 98 A Crim R 589, 592; R S O'Regan, 'Self-Defence in the Griffith Code' (1979) 3 *Criminal Law Journal* 336, 353; Sally Kift, 'Defending the Indefensible: The Indefatigable Queensland Criminal Code Provisions on Self-Defence' (2001) 25 *Criminal Law Journal* 28, 30.

Unreported decisions

***The following decisions are unreported. Please note that the facts have been gathered from secondary sources. Each case name has been linked with the source from which most of the information has been taken.

Case name	*R v* Carmen *Chipreo* **(Supreme Court of New South Wales, Latham J, 31 January 2011)**
Jurisdiction	Supreme Court
Charge	Manslaughter
Keywords	Excessive self-defence
Facts	Ms Chipreo was charged with manslaughter after she stabbed her partner of six years. Throughout their relationship, the deceased had been extensively physically and verbally abusive towards Ms Chipreo. On the day in question, the pair had been drinking together when they began to argue. The argument grew increasingly aggressive. The deceased lifted Ms Chipreo by her hair, threw her around and put his foot into her ribs. When the deceased began to approach Ms Chipreo with his fists clenched and an angry glint in his eyes, she grabbed a knife and stabbed him once. Ms Chipreo immediately called for help. At trial, Ms Chipreo pleaded not guilty on the grounds of self-defence. The Crown asserted that either Ms Chipreo lacked the belief for self-defence or had acted in excessive self-defence.
Held	Ms Chipreo successfully raised self-defence and was acquitted. The authors of the article linked to this summary attribute Ms Chipreo's success to: a) The confrontational nature of the scenario conforming with traditional conceptions of traditional self-defence; b) The evidence adduced to establish a history of physical and emotional violence; c) Expert evidence regarding battered wife syndrome; and d) Legal parties who were well-educated on issues surrounding domestic violence.

Canada

Case name	*R v Khill*, 2021 SCC 37
Jurisdiction	Supreme Court of Canada
Charge	Second degree murder
Keywords	Murder; self-defence
Facts	In 2016, Peter Khill (***K***) was awoken by his partner, who alerted him to some loud knocking outside their home. K went to the bedroom window and observed that the lights of his truck were on. He retrieved (and loaded) his shotgun, left the house, and approached the truck. K noticed someone bent into the open passenger-side door, and shouted, "hey, hands up!" As the person (***S***) turned towards K, K fired twice, shooting S in the chest and shoulder, killing him. K told the 911 dispatcher and police that he had shot S in self-defence, as he thought S had a gun and was going to shoot him. S had no weapons aside from a folding knife. K admitted that his intentional use of deadly force caused S's death, but he claimed he acted in self-defence under s 34. In directing the jury, the trial judge described some of the factors in s 34(2) that should assist in weighing whether K's shooting of S was reasonable, but did not mention K's 'role in the incident' under s 34(2)(c). The jury found K not guilty. The Ontario Court of Appeal overturned K's acquittal and ordered a new trial, finding that the omission of K's 'role in the incident' as a discrete factor under s 34(2) was a material error. The Court of Appeal held that an accused's 'role in the incident' was not limited to unlawful conduct or provocation, but rather that s 34 entitled the jury to refer to an accused's behaviour throughout the incident to determine the extent of their responsibility for the final confrontation and the reasonableness of the act underlying the offence. K appealed to the Supreme Court.
Held	Appeal dismissed. Acquittal set aside – new trial ordered
Reasoning on s 34	The majority held that the phrase 'the person's role in the incident' in s 34(2)(c) refers to all the accused's conduct the course of the incident, including acts, omissions, and exercises of judgment (whether wrongful or not). While the omission of a jury instruction on this factor may not always be an error, in this case, it had a material bearing on the verdict which justified a retrial. This is because the error may have given the jury the mistaken impression that they need only consider the reasonableness of K's final act (ie, shooting S).

	The new s 34 has replaced the previous four overlapping statutory categories of self-defence. Self-defence now comprises three basic components (see *R v Poucette* ***above***), which can be conceptualised as (1) the **catalyst**, considering the accused's state of mind and perception of the events; (2) the **motive**, considering the accused's personal purpose in committing the act; and (3) the **response**, being the reasonableness of the action as opposed to the accused's mental state. According to the Court, the latter inquiry operates to ensure the law of self-defence conforms to community norms of conduct, balancing the personal security of the accused and the victim and affording the provision greater flexibility. This flexibility is also expressed in the factors in s 34(2), none of which are necessarily determinative of reasonableness. Interpreting s 34(2)(c) specifically, the majority found: 'The plain language meaning of a person's "role in the incident" is wide-ranging and neutral. It captures both a broad temporal scope and a wide spectrum of behaviour, whether that behaviour is wrongful, unreasonable, or praiseworthy.' At [79] 'The "person's role in the incident" captures conduct, such as actions, omissions and exercises of judgment in the course of the incident, from beginning to end, that is relevant to whether the act underlying the charge is reasonable — in other words, that, as a matter of logic and common sense, could tend to make the accused's act more or less reasonable in the circumstances.' At [124]

Case name	*R v Poucette*, 2021 ABCA 157
Jurisdiction	Court of Appeal of Alberta
Charge	Manslaughter
Keywords	appeal against conviction; self-defence
Facts	Ms Poucette (***P***) was charged with manslaughter after admitting to stabbing her partner, Mr Twoyoungmen (***T***). The sole issue at trial was whether she had acted in self-defence. The trial judge determined that P's actions were not reasonable in the circumstances under s 34 of the *Criminal Code*, so she was convicted of manslaughter. P and T had lived together for approximately five years in what was a verbally and physically abusive relationship. On the day in question, P and T had been smoking marijuana and drinking heavily and P's sister's house. They eventually began to argue about T's 'jealousy and possessiveness' respecting P. T left the residence for a period, but returned and continued arguing with P, which also involved T putting his knees on her chest and pinning her arms behind her. Later, P's brother-in-law heard P yelling for help and coughing. He saw T choking P in the hallway and separated the two. The trial judge found that P then went to the kitchen, got a knife from the kitchen sink, advanced to the hallway and reached over her brother-in-law to stab T once in the upper body. She then called 9-1-1. When emergency services arrived, T was pronounced dead. On the elements of self-defence, the trial judge found that P believed on reasonable grounds that force was threatened against her, and that the Crown had failed to prove beyond a reasonable doubt that P did not stab T for the purpose of defending herself from that force. However, he also found that P's actions were excessive when viewed objectively in the circumstances. In this appeal, P argued that the trial judge erred in resolving conflicting testimony by way of a credibility contest, and erred in his interpretation of self-defence under s 34. Namely, P argued that the trial judge improperly considered her failure to retreat, applied a purely objective standard to the third branch of the self-defence test (the act being 'reasonable in the circumstances'), and failed to consider battered woman syndrome.
Held	Appeal dismissed – manslaughter conviction upheld
Reasoning on s 34	The 'new test' for self-defence contains three basic requirements: reasonable belief of force or threat of force; a **subjective**, defensive purpose for the response; the act committed is **objectively** reasonable in the circumstances. However, the Court agreed with the analysis in *R v Khill*, 2020 ONCA 151, that the

	reasonableness inquiry blends objective and subjective factors. This is owing to the language in s 34(2), with the factors influencing reasonableness including things like 'the relevant circumstances of the person, the other parties and the act', and the nature of an abusive relationship. On this score, the Court quoted *Khill* as follows: *'The approach to reasonableness in s. 34(1)(c) and s. 34(2) renders the defence created by s. 34 more open-ended and flexible than the defences created by the prior self-defence provisions. At the same time, however,* ***the application of the new provision is less predictable and more resistant to appellate review****. Assuming the trier of fact is properly alerted to the relevant considerations, there would seem to be little direction or control over how the particular factors are weighed and assessed in any given case. Reasonableness is left very much in the eye of the beholder, be it judge or jury.'* (At para 63) (emphasis mine) In P's case, the trial judge had considered the reasonableness of P's act with reference to the s 34(2) factors, placing particular emphasis on her brother-in-law's role in attempting to separate the parties and diffusing the conflict/danger. The trial judge also found that, while the evidence about P and T's 'destructive and abusive relationship' was 'critical', P had not viewed the assault in question to be different from other abuse she had suffered. The Court found that, in inquiring into the reasonableness of P's actions in the context of her personal experiences, and her experiences as a woman, rather than her status as a battered woman, the trial judge committed no error.

Case name	*R v Ryan*, 2013 SCC 3
Jurisdiction	Supreme Court of Canada
Charge	Counselling the commission of an offence
Keywords	Crown appeal against acquittal; defence of duress; stay of proceedings
Facts	Nicole Ryan (***R***) was the victim of a violent, abusive and controlling husband. She arranged to pay an undercover police officer, posing as a hit man, $25,000 to kill her husband. She was thereafter charged with counselling the commission of an offence. The trial judge found that all elements of the offence were satisfied. The sole issue at trial was whether the defence of duress applied. The trial judge accepted R's evidence that the reason for her actions was intense and reasonable fear arising from her husband's threats of death and serious bodily harm to herself and their daughter. He found that the common law defence of duress applied and acquitted R. The Crown argued that duress was not available to R in law. The Court of Appeal upheld R's acquittal. The Supreme Court allowed the subsequent appeal.
Held	Appeal allowed, but proceedings stayed due to the unfairness of subjecting R to another trial in the context of (1) the abuse she suffered; (2) the protracted nature of the proceedings; (3) the law of duress being unclear, making resort to the defence at trial unusually difficult; and (4) the Crown changed its position between the trial and appeal. Duress, under both common law and statute, is only available when a person commits an offence while under compulsion of a threat made for the purpose of compelling her to commit the offence. This was not R's situation, so the defence of duress was not available to her. If an accused is threatened without compulsion, her only defence is self-defence. Although the defences of duress and self-defence are both based on involuntariness and both apply where the accused acted in response to an external threat, the rationales underlying them are profoundly distinct. For the defence of duress, the law **excuses** those who commit an act in an involuntary manner, where there was realistically no choice but to commit the act. Self-defence, however, is a **justification** based on the principle that it is lawful in defined circumstances to resist force/a threat of force. Generally, **the justification of self-defence ought to be more readily available than the excuse of duress**. If infliction

	of harm is not justified by the law of self-defence, it would not likely be excused by the more restrictive law of duress.

Case name	*R v Lavallee* [1990] 1 SCR 852
Jurisdiction	Supreme Court of Canada
Charge	Second degree murder
Keywords	Murder; self-defence
Facts	Ms Lavallee (22 years old) was charged with murder after she shot her partner in the back of the head as he left her room. The deceased had frequently physically abused Ms Lavallee throughout the relationship and had been assaulting and threatening her at the time of the killing. At trial, a psychiatric assessment of Ms Lavallee was tendered. In that report, the doctor relied on statements provided by Ms Lavallee, which did not have any evidentiary basis. The nature of the psychiatric evidence was Battered Wife Syndrome ("BWS"). This evidence was used to argue that Ms Lavallee had been acting in self-defence. Initially, Ms Lavallee was acquitted. However, the verdict was overturned by the Manitoba Court of Appeal and sent back to trial. This decision was appealed by Ms Lavallee. The primary issue on appeal was whether
Held	The appeal was allowed, and the original acquittal was restored.
Reasoning	Wilson J held that the psychological effect of battering on wives was a subject area where expert evidence was both necessary and important. Specifically, expert evidence is useful in dispelling 'popular mythology about domestic violence' and in assisting jurors to consider the elements of self-defence being asserted by a battered woman. Justice Wilson adopted a more subjective interpretation of self-defence, considering the context of the offending. Notably, this case represented a significant departure from the precedent on self-defence, which previously required imminence. *'If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".* *The situation of the battered woman as described by Dr. Shane strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable. To the extent that expert evidence can*

	assist the jury in making that determination, I would find such testimony to be both relevant and necessary.

United Kingdom

Case name	*R v Dawes* [2013] EWCA Crim 322
Jurisdiction	Court of Appeal (Criminal Division)
Charge	Murder
Keywords	Appeal against conviction
Facts	Mark Dawes (***D***) had been charged and convicted of killing Graham Pethard (***P***) with a knife, having found him asleep on the sofa with D's estranged wife (***C***). D and C had had an abusive relationship. At trial, D argued that he had acted in self-defence. D gave evidence that P had attacked him with a bottle before D picked up the knife. The trial judge found that D had incited the violence of P, and that no qualifying trigger to the loss of control defence available. On appeal, D argued that this conclusion was wrong, and that the relevant provisions under s 55 only served to disapply the qualifying trigger if the defendant had incited violence with the specific purpose of providing himself an excuse to be violent. D argued that while the jury had concluded that the violence used by D was excessive, this did not preclude the 'loss of control' defence. D's case was combined with two other homicide cases raising similar issues – one about whether the loss of control defence should be left to the jury, another about whether the jury was fully directed as to the defence.
Held	Appeals dismissed
Reasoning on ss 54-5 *Coroners and Justices Act 2009*	In D's case, the trial judge's approach to whether the loss of control defence should be left to the jury when only self-defence was advanced for it to consider by the defence was correct. Further, the trial judge's decision that loss of control should not be left to the jury was justified, because there was not sufficient evidence that D had, in fact, lost self-control. Whether loss of control arises, either because the defendant has advanced it or the judge is contemplating to leave it to the jury, depends on the judge's analysis of all the evidence (which the jury may or may not choose to believe). Sections 54-5 do not change these long-standing principles. The loss of control defence first requires that the defendant's acts or omissions arose from a loss of self-control. This need not be

	sudden or immediate and may follow from the cumulative impact of earlier events. The defence also requires that a person with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have behaved in the same or a similar way. Among the potential 'qualifying triggers' for the defence, there is 'fear of serious violence' from the victim. The Court considered that 'fear' in this sense may be diminished where the defendant is 'out to incite violence', but the mere fact that a defendant was behaving badly and looking for/provoking trouble may not necessarily lead to the disapplication of this qualifying trigger. Self-defence remains wider than the loss of control defence, in that even if the defendant lost self-control, provided the violent response was not unreasonable in the circumstances, he or she would be entitled to rely on self-defence. Furthermore, the loss of control defence requires fear of *serious* violence, as opposed to self-defence which is concerned with the threat of violence in any form.

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