



Review of the Law Relating to Self-Defence Tasmanian Law Reform Institute

Issues Paper No.20
November 2014

women's
legal
service
tasmania

Introduction

Women's Legal Service Tasmania is a not-for-profit organisation providing free and confidential legal advice to women in all areas of Tasmania. As well as telephone advice, WLST can also provide ongoing legal assistance with casework and representation resources permitting.

WLST provides clients with information about their legal and non-legal options, including referral to other legal services and law firms, or to appropriate support services.

WLST represents women from low socio-economic backgrounds – those who are unable to afford legal assistance and who do not qualify for a grant of legal aid. The majority of our casework is in family law, often with a focus on family violence.

WLST is committed to making the legal system more accessible and responsive to the issues affecting women in Tasmania.

We wish to provide you with a submission from our service drawing on our experience assisting women in Tasmania.

Our submission will focus solely on the possible amendments regarding family violence.

Women's Legal Service Tasmania

PO Box 707

NORTH HOBART TAS 7002

T: 03 6231 9466

F: 03 6231 9566

E: admin@womenslegaltas.org.au

W: www.womenslegaltas.org.au

Question 12

Should reforms be made to the criminal law in Tasmania to facilitate the reception of evidence of family violence in relation to the defence of self-defence?

Women's Legal Service believes that reforms should be made to facilitate the reception of family violence in relation to the defence of self-defence.

It is unusual in Tasmania for women to be charged and prosecuted for murder. Since 2008 only one woman has been convicted of murder in Tasmania. Although this murder took place in a domestic context, no allegations of family violence were made and self-defence was not raised. It is therefore rare, and not in recent memory, that a woman has pleaded not guilty to the murder of her husband or partner on the basis of self-defence due to family violence.

Women in this situation may previously have used the defence of provocation but this was abolished in Tasmania in 2003. It does appear that the defence was used sparingly. Bradfield, in her paper on domestic homicide and the defence of provocation, identified only three cases between 1979 and 1999 in Tasmania where a female offender successfully relied on the defence of provocation where she had killed her abusive partner.¹

It is also possible that police opt not to charge women with murder if it appears to be a clear-cut matter of self-defence, or if charges are laid they may be dropped during early proceedings once self-defence becomes clear.

For example, a woman charged with the murder of her on-off partner's murder in Georgetown in February 2013 had the charge dropped in the Supreme Court in August 2013 when the Prosecutor told the Court that "after a careful analysis of all the available evidence the State has concluded that it could not prove beyond reasonable doubt that (the woman) was not acting in self-defence".²

In the above example, available information indicates that the relationship had been turbulent and the murder occurred after a "heated exchange and a physical altercation."³

While this incident can be viewed as a typical case of self-defence, not all incidents of family violence are so clear cut, and as further discussed in our submission regarding imminence, most are not.

The law relating to self-defence in Tasmania in the situation where a woman has killed or injured another defending herself in a relationship with a history of family violence has not been tested recently. It is not possible to know how a Court or a jury would react. Application of the law also needs to be consistent. It is important

¹ Bradfield R, 'Domestic Homicide and the Defence of Provocation: A Tasmania Perspective on the Jealous Husband and the Battered Wife' (2000) 19(1) University of Tasmania Law Review 5, at 8.

² Billings P, 'Murder charge dropped' *The Examiner*, 15 August 2013

³ Wahlquist C, 'George Town murder charge' *The Examiner*, 9 February 2013

to note that the concept and understanding of family violence and what it entails has developed significantly in recent times and certain behaviour now constitutes family violence that previously was not recognised as violence, and may have even previously been common in some relationships. For example, in Tasmania rape in marriage was only acknowledged to be rape in 1987 and the law changed accordingly.

Family violence is prevalent in Australia. Most Australians are now familiar with the statistic that one Australian woman is killed every week by their current or former partner. So far in 2015, this figure is closer to two women every week. One in six Australian women have experienced physical or sexual violence from a current or former partner.⁴ One in four Australian women have experienced emotional abuse by a current or former partner.⁵

We speak to women weekly whose lives and the lives of their children have been endangered by their partners or husbands. Sarah⁶ is a client of our Service. Sarah's story below is an example of the relentless abuse many women suffer, both during relationships, and after.

Sarah's Story

Sarah and her partner were together on and off for three years. He was obsessive and very controlling from the start. He dictated who she could see and when, and would hide her car keys so she couldn't go anywhere. Sometimes he locked her in the house.

His behaviour became worse when Sarah fell pregnant and they learnt their baby might have a disability. Sarah's partner wanted her to have a termination but she refused. From this point on he was physically violent. The objects he has used as weapons against her include an axe, a lawnmower, electrical cords, pots, knives, pillows, cans of food – essentially anything within reach.

There have been Police Family Violence Orders and Family Violence Orders in place against Sarah's former partner for the past fifteen years as a result of his ongoing violence towards her and their children. Sarah has called the police multiple times, as have neighbours and family members. There are also Parenting Orders in place, which have worked around the Family Violence Orders, utilising a Contact Centre as the site for time spent between her ex-partner and their children. Sarah had considered varying the Family Violence Order so that her children could spend time with their father at his home, however on an occasion when Sarah tried to drop the children at his house he chased her down the street with an axe.

⁴ www.ourwatch.org.au

⁵ www.ourwatch.org.au

⁶ Name changed

Sarah's former partner has breached the Family Violence Orders countless times. The breaches were initially minor, beginning with phone calls on the pretext of speaking to their children, who he was allowed to contact. They progressed to him visiting her home, sending her letters, stalking and following her, and visiting friend's homes when he knew she would be there.

This escalated to him breaking into her house and waiting for her to come home, setting fire to her car and damaging her property. He would set off the alarm in her house so that she ran outside where he was waiting for her, ready to assault her. He would try anything to get inside her home. Once he turned up looking as though he'd been beaten up. Sarah let him in, only to discover that the injuries were self-inflicted as a ruse to gain entry. On another occasion he overdosed on sleeping tablets while standing on her doorstep and has also stood outside her home and threatened to harm himself with a knife.

The constant abusive and harassment became so bad that Sarah moved away and now lives away from her family and friends to keep herself and her children safe. Her house is secure, she is known to local police and she has an emergency exit plan which also involves her neighbours. Her ex partner does not know where they live, but she lives in constant fear that he will find out.

It is foreseeable that in the near future a victim of family violence in Tasmania may find themselves before the Court in the position where they have had no other option but to kill or seriously wound their partner in order to protect themselves or their children. It is too late at that point to see how the current law applies.

Queensland and Victoria have provisions in their criminal legislation that address the admissibility of family violence. Several other states' Law Reform Commissions and the Australian Law Reform Commission have made recommendations about the inclusion of sections addressing the admissibility of family violence with regard to self-defence.

Tasmania was the leading state in addressing family violence with the introduction of its Safe at Home legislation. It would be unfortunate if Tasmania were left behind in this opportunity to further reform the law to protect vulnerable women.

We strongly support the legislative reforms made in Victoria's Crimes Act 1958 ss322J and 322M and recommend they are included in the Tasmanian Code. While we believe reforms need to be made to the current legislation to ensure victims of family violence are able to use self-defence as a defence, even if this reform is not considered legally necessary, the inclusion of sections such as the Victorian ones into the Criminal Code would show that Tasmania takes family violence seriously and that it will be taken into account. It is also validating to victims of violence to have the forms it can take recognised in legislation.

The definition of violence included in the Victorian legislation and how it can affect victims is valuable, however our preference would be that the section specifies that violence includes, but is not limited to the listed acts.

We especially support the Victorian model in listing what types of behaviour family violence encompasses, and that it includes a pattern of behaviour that includes acts that may appear trivial when viewed in isolation. Acts such as these often mean more to victims than anyone else, for example a hidden reference to a previous assault, a family pet that was killed or a seemingly meaningless text message with a much deeper meaning to the victim. Subtle acts are often used by perpetrators as a threat or warning to their victim to keep them under control.

Many women are not as “fortunate” as Sarah. They do not manage to escape, albeit to a life of exile. It is a failing of the law as it stands to allow such women to properly demonstrate what contributed to them committing the most serious of crimes.

Question 13

Should reforms be made to the criminal law in Tasmania to specify that imminence is not necessary where self-defence is raised in the context of family violence?

Women's Legal Service believe that it is very important that any reforms specify that imminence is not necessary where self-defence is raised in a family violence context.

While lack of imminence may still allow self-defence through common law developments, it is important that it is specifically mentioned to recognise that it is rare for victims of family violence to respond immediately to a threat. We support the inclusion of a section similar to s322M of the *Crimes Act 1958* (Vic).

Self-defence is often viewed to have a gender bias, as it is typically suited to the type of situation involving a one-off attack between male strangers and an immediate retaliation. Women who kill do not usually fall into this category.

A high proportion of women who kill a partner are responding to long-term violence by that partner.⁷ Research shows that women who are responding to long-term violence by their partner do not usually respond during the actual attack.⁸ This is often because they are smaller and not as strong as their attacker, and as such, women are more likely to use a weapon where retaliating.⁹

Women may carefully plan what they need to do, and drug or wait for their partner to fall asleep. Women in these situations need to be sure that their partner will die, because if he does not they will be in incredible danger.

Toole argues that because of these factors, abused women's actions often lack both immediacy and proportionality.¹⁰ It can be harder for juries to see that the force used by the women was reasonable in the circumstances, even with the understanding of what the women believed the risk to be. As Bradfield states, "The idea that a sleeping man with no threat on his lips could pose a threat does not fit easily with the traditional notions of self-defence."¹¹

Academic studies have found that victim fear is the most reliable predictor of future family violence and that women generally overestimate their safety, and underestimate the risk of violence.¹² History of abuse in a relationship also means

⁷ Toole K, 'Self-Defence and the Reasonable Woman: Equality before the new Victorian Law' (2012) 36 Melbourne University Law Review 251, at 256.

⁸ Eastal P, 'Battered Women Who Kill: A Plea of Self Defence' in Patricia Eastal and Sandra McKillop (eds), *Women and the Law* (Australian Institute of Criminology, 1993) at 37,38.

⁹ Note 7 at 256-257.

¹⁰ Note 7 at 257.

¹¹ Bradfield R, 'The treatment of women who kill their violent male partners within the Australian criminal justice system' (2002) PhD thesis, University of Tasmania at 21.

¹² Note 7 at 277.

victims can read cues and note changes in the perpetrator's behaviour which signal escalating violence.¹³

To understand why imminence is not a usual feature in the context of family violence, it is important that juries understand why a victim of family violence may believe their only option is to act in self-defence to save their life, and that most of the time leaving or seeking help is not an option.

From September 2010 to September 2012 Women's Legal Service undertook a survey about the Family Violence Order system in Tasmania. Callers to our telephone advice line were provided with advice regarding the matter they had called about and if solicitors identified in that advice that the client was or had been affected by family violence they were asked if they had at any time had a Family Violence Order or Police Family Violence Order. If the answer was affirmative the women were asked to partake in our survey.

During this time period it was our experience that while there were family violence indicators for nearly 400 women we spoke to during the period, only 50 surveys were completed during this time, largely because in reality only a very small number of women actually had Orders. Very few women chose not to participate in the survey. There were also a small percentage of women who were not asked to complete the survey as the solicitor at the time determined they were not emotionally able to take the survey.

While we were initially surprised at the low number of women who had Orders, the number does support and sit within the statistic that most family violence goes unreported to police or authorities. Eighty per cent of Australian women who experience violence from their current partner have never contacted the police.¹⁴

Fifty-eight per cent of women who had experienced violence from an ex-partner have never contacted police,¹⁵ and 24% have never sought advice or support.¹⁶

There are many reasons why women do not contact the police or seek help, among them shame and embarrassment, low self-confidence and the belief that they will not be believed, and fear of the repercussions from the offender. Many women in such situations live a life that is so controlled and monitored that they do not have the opportunity to seek help.

It is common for victims of such violence to be conditioned to accept that what they have to say is wrong or not important, and to not stand up for themselves if questioned or challenged. Because of their history of abuse, manipulation and control, women feel that they are being a nuisance, and that what they say will not be taken seriously. They often do not trust others.

¹³ Explanatory Notes, *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill (Qld) 2009* at 2.

¹⁴ Australian Bureau of Statistics, *Personal Safety, Australia, 2012*, Cat no 4906.0, Canberra 2013

¹⁵ Note 14.

¹⁶ Note 14.

Leaving is incredibly difficult. Patton found in her Tasmanian study of women's pathways out of violent relationships that there are five phases of the leaving process, and that it could take weeks for some and years for others.¹⁷

In 2005, 35% of women who had experienced violence from their current partner in the past five years had left and returned to that partner at least once.¹⁸ Fifty-seven per cent of women who were no longer with their violent partner had left and returned at least once also.¹⁹ A World Health Organisation study of multiple countries found that 8-21% of women had left a violent relationship two to four times, and up to 6% had left six or more times.²⁰

There are many barriers to leaving, including childcare, housing, finances, lack of support, social attitudes and beliefs, and most importantly, safety. Research shows that women are at higher risk of partner violence following separation.²¹

A 2009 nationwide survey by the Australian Institute of Criminology into community attitudes to violence against women found that 80% of participants said, "it is hard to understand why women remain in violent relationships".²² Half said that most women could leave if they wanted to.²³

Leaving does not mean that a woman is safe. Neither does having a Family Violence Order or other form of protection order. The Australian Bureau of Statistics Safety Survey identified that 58% of women who had an order against their ex-partner experienced further violence.²⁴

Unless you have been in or know people in such a situation, it is hard to understand why these women don't just leave, why they stay in violent relationships, and why they often return multiple times.

We appreciate the need to ensure that self-defence is only used in extreme circumstances and there needs to be significant reasons for taking the law into one's hands. However we submit that women living in constant fear of family violence can be faced with the situation where they have no other option.

¹⁷ Patton S, 'Pathways: How women leave violent men' Government of Tasmania 2003 at 41-42.

¹⁸ Australian Bureau of Statistics, *Australian social trends: women's experience of partner violence*, Cat no 4102.0, Canberra 2007.

¹⁹ Note 18.

²⁰ Garcia-Moreno et al, 'WHO multi-country study on women's health and domestic violence against women: initial results on prevalence, health outcomes and women's responses' world Health Organisation, Geneva 2005 at 77.

²¹ Australian Domestic & Family Violence Clearinghouse, Fast Facts 7, July 2012

²² Australian Institute of Criminology, The Social Research Centre and VicHealth *National survey on community attitudes to violence against women 2009: changing attitudes – preventing violence against women: a summary of findings*, Victorian Health Promotion Foundation, Melbourne 2009 at 48.

²³ Note 22.

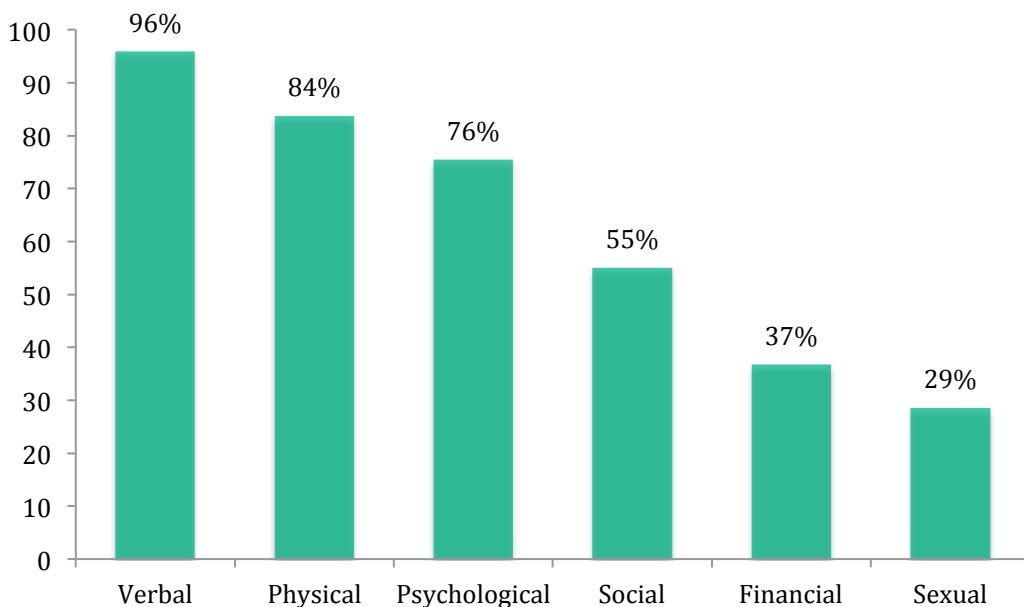
²⁴ Note 14.

Question 14

Should reforms be made to the criminal law in Tasmania to provide for jury direction where self-defence is raised in the context of family violence?

Jury directions where self-defence is raised in the context of family violence are vital. It is essential that juries not only receive directions from the Judge, but that they also hear evidence from expert witnesses about the nature of family violence.

Family violence is so much more than physical abuse. Clients who completed our survey on Family Violence Orders reported to us the following forms of violence:



Directions need to be more substantial than merely reading out the relevant law to the jury; juries need to understand the lived experience of women in this situation. Expert witnesses need to be called too, not just psychiatrists or psychologists, but also workers at the coalface.

Family violence is complex and relentless. It rarely consists of physical violence alone, and often the most damaging violence is the psychological and emotional abuse and threats. The constant manipulation and control that many women experience leads to them believing they are stupid, unlovable, useless and worthless. They are exhausted and often accepting of their fate, believing that they do not deserve more. Derrington J in *Stjernqvist* said:

What emerges is necessarily a sad picture of serious violence – not violence that caused any great physical harm at any particular time, but violence of such a nature that, you might think, would be virtually

intolerable, particularly if one had the view that it was going to be never ending. To live in an atmosphere where there was a constant threat of violence, you might think, is a very hard thing and must be very emotionally wearing. And, of course, after a while it becomes a case where not only is there physical violence, but the mere endurance of the threat of violence also becomes a form of psychological violence as well.²⁵

As stated in our response to Question 13 above, leaving is often not an option for these women and family violence is severely unreported. Most women who suffer from family violence have not reported it to the police or other services. They may not always seek medical attention, and if they do they will often lie about the cause of their injuries.

We speak to women who have Family Violence Orders or Police Family Violence Orders that are frequently breached by their ex-partners, often in apparently trivial ways. Examples include the ex-partner calling up to thirty times per day on the pretext of speaking to the children, calling the woman derogatory terms such as “ugly”, “fat” and “stupid” or being present in public areas where they know the woman will be, such as a bus stop or a doctor’s surgery.

In our experience it is very common for police not to charge the offender with a breach of an order for this type of behaviour, as they say the breach was either not a breach, a minor breach, or difficult to prove. This is despite the women having orders that say they are not to be approached, contacted, harassed or abused.

Police in Tasmania receive family violence awareness training so that they can achieve the Safe at Home program goals. These are to achieve a reduction in the level of family violence in the community and in the short term improve safety for adult and child victims as well as changing the offending behaviour of those responsible for the violence.²⁶ The Police adopt a pro-arrest policy where the onus is on the offender to show that they are not a danger or a risk to their partner and children.

If police who are specifically educated in recognising and enforcing the law with regard to family violence do not always identify such behaviour as family violence or recognise the impact it has on victims, how are untrained jury members supposed to understand.

If the jury are not adequately directed as to what violence can consist of, and the affect it has on victims, it will be difficult for them to appreciate the constant state of fear and alert women live with and to understand why women may use force that in any other circumstance may seem extreme.

We support the directions introduced into s32 of the *Jury Directions Act 2013* (Vic) as a model for Tasmania.

²⁵ *Stjernqvist* unreported, Cairns CC, 18 June 1996 at 153 per Derrington J.

²⁶ <http://www.police.tas.gov.au/programs/safe-at-home/>

Question 17

Should a partial defence of killing for self-preservation in a domestic relationship be introduced in Tasmania? If so, how should the defence be formulated?

Women's Legal Service recognises that there could be some value in introducing a partial defence of killing for self-preservation in a domestic relationship as a "safety net", however we do have concerns about what impact this may have on self-defence as an absolute defence.

We would not support a partial defence of killing for self-preservation in a domestic relationship if it caused victims to plead guilty to this offence unnecessarily or caused juries to tend towards this partial defence instead of acquitting on the basis of self-defence.

Victoria introduced defensive homicide in 2005, in part to address the situation where women killed their violent partners. However the overwhelming majority of offenders convicted of defensive homicide were male (25 out of 28 convictions) and the majority of victims were also male (26 out of 27).²⁷ Only 7 offenders of the 28 convicted had a family relationship with the victim.²⁸

There were also suggestions that female offenders had also either inappropriately pleaded guilty to defensive homicide or were inappropriately convicted of defensive homicide by a jury. In her paper, *Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law*, Toole writes about the cases of *Black*²⁹ and *Creamer*³⁰, both involving women who killed their male partners. Toole suggests that the facts in *Black* demonstrate that a complete acquittal on the basis of self-defence was open, and that in *Creamer*, that facts suggested that a conviction for murder was the appropriate result.³¹

The unintended consequences of defensive homicide caused an outcry and led to defensive homicide being abolished in 2014.

Queensland has a partial defence for killing for preservation in an abusive domestic relationship that reduces murder to manslaughter. This defence has particular importance to Queensland as a conviction for murder results in a mandatory life sentence in that State. We submit that the Victorian experience is more relevant to Tasmania and our sentencing regime.

Women who have been subjected to family violence are often lacking in confidence. Some have spent years, even decades, being constantly undermined, put down and degraded. They are often embarrassed or ashamed of the behaviour that has been perpetrated against them and the possibility of

²⁷ Department of Justice Victoria *Defensive Homicide: Proposals for Legislative Reform Consultation Paper* September 2013 at vii.

²⁸ Note 27.

²⁹ *Black* [2011] VSC 152 (12 April 2011)

³⁰ *Creamer* [2011] VSC 196 (20 April 2011)

³¹ Note 7 at 271.

having strangers in an open Court pour over the details of their relationship and abuse is both terrifying and humiliating. This could see women more inclined to plead guilty to a partial defence or defensive homicide when an acquittal may be a valid option if they pursued self-defence instead.

We are also concerned that juries may convict on a partial defence instead of acquitting, especially if they do not understand, or have not been properly educated on the nature of family violence. As such, our preference is that any amendments addressed the reception of evidence of family violence and jury directions as a priority.