



Support, Help & Empowerment (SHE) Inc.

Submission to the Tasmania Law Reform Institute
Review of the law relating to Self Defence

2015



About Support, Help and Empowerment (SHE) Inc.

SHE is a community organisation that provides specialist counselling services for women who are currently or have previously experienced domestic violence, abuse and other violations. Our mission is to provide women with support and information in a safe and secure environment. As a feminist service, SHE believes people are disadvantaged by gender roles, cultural, social and historical inequalities. We work towards the elimination of abuse and violence by providing an integrated response to domestic violence.

SHE was established in 1989 from the acknowledgement of the long term effects of violence on women's lives, and the decision to set up a women's service was based on a philosophy of equity and empowerment. SHE is an advocate against family violence and all violence against women. We recognise that community change will not come about without clear messages, education and opportunities for growth.

Issues in relation to the review of the law relating to self defence

In recognition of this context, SHE's comments on the Tasmania Law Reform Institute Issues paper on self-defence are limited to the issues related to family violence, and in particular to Questions 12, 13, and 14 of the Issues Paper. A comment is also included on Question 18.

The use of the particular terms to describe family violence

The Tasmania Law Reform Institute Issues Paper variously refers to 'battered women syndrome', 'domestic violence' and 'family violence'. SHE suggests the term 'battered woman' is not used in describing the defence as it may have the adverse consequence of limiting fact finders consideration of family violence effects to physical expressions of violence only. Additionally the phrase 'battered woman syndrome' generically refers to a 'syndrome' recognised in psychology but the effect of family violence is no less real absent any formal diagnosis.

The term *family violence* is consistent with current Tasmanian legislation.

Family Violence as a separate defence

SHE supports the creation of a separate defence for women who have been subject of family violence. Incorporating the special circumstances of women who have experienced family violence in a general category of 'self-defence' may only serve to 'water down' the elements of the defence in order to cater to other general circumstances in which the defence is used.

Family Violence as a complete defence

It is preferable that a proven self-defence in the context of family violence operate as a complete defence resulting in acquittal.

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?

SHE supports the model demarcated by Victorian state codes that allow for the admission of evidence of prior family violence where a defendant is on trial for taking the life of their intimate partner. This provision is significant to women who have been subjected to long term violence and abuse from their intimate partner. Research (Jones et al, 2001) has revealed that women who have be subject to ongoing violence and abuse may exhibit symptoms of posttraumatic stress disorder which immediately impacts on their ability to cope, respond and rationalise abusive or aggressive behaviour and corresponding defensive behaviours and self-preservation tactics.

The Victorian model also allows for the consideration that the evidence of family violence extends to violence against the accused as well as other family members which an important inclusion in considering that women do and will act to protect their children from abuse and other violations.

Extreme but common forms of family violence can carry on for many years, often over decades and can involve violence as a punishment, "to teach a lesson", as revenge for a perceived wrong doing, to humiliate and to physically control. Other psychological tactics of coercive control can include threats to remove children from their mothers, limiting freedom of movement, controlling or reducing access to food, brain washing, insults, put downs, public humiliation and other forms of verbal assault. These examples are listed here as it is necessary to consider the ongoing impact that this level of abuse, violence and torture has on a women's self-esteem and perception of choices and

rights. Most women who have lived through these horrific but not uncommon experiences exhibit limited sense of self-agency, hopelessness, helplessness, self-loathing, depression, self-harm and do not feel that they have the same rights a citizen in our community should expect to have.

SHE advocates that these contextual experiences of long term abuse and the impact on the psychological wellbeing of women is an essential consideration to self-defence (and other protective mechanisms). The law needs to make provision for women who kill their partner when they believe that it is the only option available to them to protect themselves or their children. Furthermore, due to physical strength disparities between men and women, women often wait for a less confrontational situation such as when their partner is asleep to enact self-preservation mechanisms. "When women kill an intimate partner, they are far more likely to do so in order to protect themselves or their children from their partner's violence" (Polk 1994; Morgan 2002; VLRC 2002 - Domestic Violence Resource Centre Victoria Discussion paper, 2013 p. 5).

Circumstances such as these will also require juries to be informed on the nature and impact of domestic violence and abuse. Juries need to understand that cases involving domestic violence cannot be looked at as a one-off occurrence and the historical experiences of the individual need to be taken into consideration.

It is also noted that the scope of relationships covered under the Family Violence Act 2004 (Tas) does not extend to parental abuse whereas the Victorian legislation is broad enough to encompass evidence of violence against a parent or step parent and other persons. This is preferable to the scope of relationships covered under the Family Violence Act 2004.

It is also noted that the Victorian legislation is non limiting to the extent that single acts may constitute family violence as well as a number of acts which form a pattern of behaviour. This concept is supported and should be included in Tasmanian legislation however the legislation should clarify that the acts do not have to be similar in nature to constitute a 'pattern of behaviour' [Victorian Crimes Act 1958, s 322J (2)(b)] nor would they have to occur against the same person.

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?

There should be no temporal requirement between the attack and the reasonableness of force used in self-defence. To impose any requirement of imminence ignores the reality that the threat of family violence is ongoing, pervasive and uncertain in terms of when violence will be inflicted. It can arise for minor incidences. This can be compared for instance to the type of force utilised by a person in the street in response to a threat of an attack by a stranger. They are two very different circumstances and should be treated by the law differently.

As described above, the experiences of women are not necessarily confined to particular acts or instances of violence. With domestic violence it can be virtually impossible to construct a timeline of relevant events. A man may be able to instil sufficient terror in his partner (through past behaviour, ongoing threats, violence to pets or killing pets, destroying property and other forms of intimidation) that he need only needs to give a “look” or other non-verbal signal to communicate a threat that results in the women submitting to his control. Implied behaviour can have the same impact as actual behaviour so it is therefore pertinent that imminence of provocative or threatening acts not be necessary where self-defence is raised in the context of family violence.

It may also be the case that the woman only has the capacity to actively defend herself or her children when her partner is calm, distracted, intoxicated or asleep and this also needs to be considered in terms of the long term, deep rooted impact of domestic violence. “As women are often smaller and physically weaker than their male partners, women may kill their abusive partners when they are asleep or have their guard down.” (VLRC 2004)

If imminence is a requirement then virtually all domestic violence situations could immediately be excluded from this justice mechanism, alienating a large section of society from utilising the law.

S322M of the Victorian legislation referenced in the Tasmania Law Reform Institute paper is supported noting that it enables a defence to be raised even if the harm is not imminent and the force that was used was in excess of the harm or threatened harm. It is also noted that this evidence goes to both the subjective and the objective components of the defence and this is also supported.

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?

Attitudes towards domestic violence and gender inequity vary greatly in the community. The recent Vic Health study of National Community Attitudes towards Violence against Women revealed that 22% of respondents agree that domestic violence can be excused if people get so angry that they lose control and that 21% of respondents agree that domestic violence can be excused if the violent person regrets it. This information is helpful in considering the biases and misinformation that will be held by some members of the jury. It is therefore essential that judges give direction to the jury in order to educate the members on current standards of acceptable behaviour in relationships.

Through Victoria law reform the Crimes Act was amended to allow for jury direction. Tasmania should follow suit as this provides an opportunity to educate the jury and ensure they understand that domestic and family violence situations are profoundly different to regular assault or homicide. Jury members need to have a level of understanding of the impact of domestic violence and the circumstance that may lead to a women killing her intimate partner in self-defence or in defence of her children.

It is however noted that the Victorian legislation requires a direction only at the request of the accused or the accused's counsel. The direction under s32(6) and s32(7) are supported but should be mandatory requirements in any case where family violence is raised as an aspect of self-defence.

The law has recognised that in particular instances it is important the juries are warned prior to considering evidence raised in a trial. In *R v Baartman* [2000] NSWCCA 298 it was suggested that jury warnings are required in the following instances:

Where the jury would benefit from the accumulated experience of the court in dealing with certain types of evidence of the jury may overestimate the probative value of the evidence. When the danger on acting on the evidence is real and substantial and the jury has not perceived of that danger during the trial or attention has been diverted from it

It is recommended that similar regard should be held for evidence related to family violence due to its particular manifestations. That is, if a mandatory jury direction in relation to the circumstances and nature of family violence is not provided by the judge, then the jury may underestimate its probative value and the danger to the accused of not acting in full knowledge of family violence evidence is real and substantial.

Question 18 – Should a partial defence of diminished responsibility be introduced in Tasmania? Or should diminished responsibility be a matter that is taken into account in sentencing?

Defence of self-preservation like QLD Criminal Code s304B reduces murder to manslaughter and erases need for a triggering assault. In Queensland this is intended to be an additional back-up where the state has mandatory sentencing for murder. Therefore this defence is relevant to ensure domestic victims don't endure mandatory sentencing.

In Tasmania where there is no mandatory sentencing we may not require this extra level of legislative protection. It is our concern that in cases of domestic violence this addition could be confusing for jurors, undermining initial defence of self-defence.

The prevalence of domestic violence in Australia

Domestic violence is widespread throughout the Australian population. Domestic violence is a gendered crime. It is overwhelmingly committed by men against women. Research from the ABS Personal Safety Survey (2012) highlights the alarming prevalence of domestic violence in Australia. Since the age of fifteen, one in six Australian women had experienced physical or sexual violence from a current or former partner. One in four Australian women had experienced emotional abuse by a current or former partner. Sixty one percent (61%) of women reporting violence in the ABS study stated that they had children in their care when the violence occurred. Domestic violence is under-reported to the police. Fifty eight percent (58%) of women who had experienced violence by an ex-partner reported that they had never contacted the police. The Australian Institute of Criminology found that, on average, one woman is killed every week in Australia by a current or former partner (Chan & Payne, 2013).

Family violence is a very serious issue for women from Aboriginal and Torres Strait Islander backgrounds. Indigenous women experience violence at far higher rates than non-Indigenous women (Willis, 2011). Indigenous women are as much as 35 times as likely to sustain serious injury and require hospitalisation as a result of domestic violence (Al-Yaman, Van Doeland & Wallis 2006). Indigenous Australians are over-represented as victims of intimate partner homicide. Forty two percent (42%) of indigenous homicide victims were killed by an intimate partner, compared with 20% of non-indigenous victims who were killed by an intimate partner (Chan & Payne, 2013). This violence must be understood in the context of colonisation and disadvantage in which it occurs. There is also a high incidence of violence against women with disabilities. Women with Disabilities Australia (2013) suggest that over a third of females with disabilities experience some form of intimate partner violence. Such violence is likely to be more severe and continue for longer than that experienced by women without disabilities (Morgan & Chadwick 2009).

The impact of domestic violence

Domestic violence results in significant social, emotional and economic costs to victims, their families and the broader community (Laing & Bobic 2002). The costs to society generally are significant and ongoing. Domestic violence has a profound impact on physical and mental health. It can lead directly to serious injury, disability or death. VicHealth (2004) found that among women under 45, domestic violence contributes more to their poor health, disability, and death than any other risk factor.

Domestic violence often has very severe negative impact on the well-being of the whole family. These effects may affect the family for the rest of their lives. Children's physical health, learning, cognition, social and emotional development can all be impaired by experiencing domestic violence (Chadwick & Morgan, 2009). Exposure to the trauma of domestic violence can harm the child's brain development (Perry, 2001). The secure attachment between a child and their carer can be disrupted. The World Health Organisation highlights the ongoing impact of childhood abuse; "some children from households where there is intimate partner violence may exhibit increased rates of behavioural and emotional problems that can result in increased difficulties with education and employment, often leading to early school drop out, youth offending and early pregnancy"

(WHO, 2010, p.5). Older children may also have an increase in health-risk behaviours such as drug and alcohol misuse and dependence (WHO, 2010). Adolescents who experience violence at home are at risk of experiencing or perpetrating violence in their own dating relationships (Flood & Fergus, 2008).

The factors contributing to the present levels of domestic violence

Complex and interactive factors contribute to Australia's present levels of domestic violence. The ecological model of intimate partner and sexual violence conceptualises violence as a multifaceted phenomenon grounded in interplay among individual, family, community and societal level. Key determinants of violence against women include gender roles and relations, social norms supporting violence and access to resources (VicHealth, 2007).

While women may be use violence in relationships, the vast majority of domestic violence is committed by men against women. Consequently, gender is a significant factor in domestic violence. Unequal power relations between the genders are deeply embedded in Australian political, legal, occupational and religious domains. Men tend to have greater access to resources and therefore greater access to power.

Australian culture has many values, norms and beliefs that support greater male power. Models of manhood tend to emphasis insensitivity and aggression rather than nurturing and sharing power. Societal norms regarding families and gender roles can provide men with leverage for coercive control and shape the options that women believe are available to them (e.g. attitudes that men are 'bread-winners' and the 'head of the household'). These factors can also contribute to the humiliation and shame women experience and make it difficult for them to reach out to supports. This further reinforces the isolation of the victim from friends, family and other sources of assistance.

Attitudes towards violence correlate strongly with exposure to violence and may be transferred across generations via learning processes, schools, the media and experience of violence. Whether a person acts on their attitudes depends on their assessment of what others think and the presence of factors in the social environment that either sanction or condemn violent behaviour (VicHealth,

2006). Exposure to, and experience of, family violence during childhood may lead to learnt models of behaviour regarding the use of violence. Additionally, absence of parental encouragement in regards to emotional regulation and self-esteem can lead to a child to respond to emotionally distressing cues with assertion of power and violence or, alternatively, learned helplessness. These responses have impact on their future adult relationships.

Goals for policy decisions and community responses to domestic violence

Policies aimed at reducing domestic violence must address the contributing factors to domestic violence in society, including the influence of family and early childhood experience, unequal power relations between the genders, the value of women's work, negative attitudes regarding women, religious, institutional responses and support networks. Adequate policies must aim to reduce the tendency for men to have greater leverage for coercive control, strengthen early intervention initiatives to decrease intergenerational transmission of violence and strengthen the capacity of victims to leave domestic violence and avoid future abusive relationships.

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