Sexual Assault Support Service

Tasmanian Law Reform Institute

Review of the Law Relating to Self-defence

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Foreword

The Sexual Assault Support Service (SASS) is a community based service committed to providing high quality support and information services to survivors of sexual assault in Southern Tasmania, their carers and support people, professionals, and the general public. SASS delivers a 24 hour sexual assault crisis response program; 24 hour phone support and counselling service to people affected by sexual abuse; and face to face information, support, counselling, and referral services for anyone affected by sexual abuse.

SASS welcomes the opportunity to contribute to the Tasmanian Law Reform Institute's Review of the Law relating to Self-defence. SASS supports reform to the current law of self-defence in order to more comprehensively address the needs of defendants who act in self-defence within a context of family violence.

Question 1

Should the current law of self-defence contained in the Criminal Code (Tas) s 46 be amended to introduce an additional/different requirement of reasonableness or should the current formulation be retained? Please provide reasons.

SASS recommends that the current formulation of the law of self-defence contained in the *Criminal Code (Tas)* s46 be retained. Our reasoning for this is set out below.

A subjective test of the accused's perception of the threat is significantly more likely to accommodate the experience of people who kill in response to prolonged family violence. As summarised in the Issues Paper, the historical interpretation and application of the defence has

largely excluded claims from such defendants, instead better capturing claims regarding 'the spontaneous once-off encounter between two males of equal strength'. Reform of the current law to introduce an objective test of reasonableness would further limit its ability to understand and represent the nature and dynamics of domestic violence, thus limiting the accessibility of the defence to women who kill their abusive partners 'in a non-confrontational situation or in response to a seemingly innocuous threat, or who used a weapon against an unarmed victim'.

As discussed below under Question 14, the level of understanding of family violence – including the ease with which women may leave situations of family violence – is generally low across the Australian community.[i] Introducing an objective test of reasonableness would mean that the 'reasonableness' of an accused's actions were judged from the perspective of a society that has not yet fully developed a comprehensive understanding of the nature and dynamics of family violence, rather than from the perspective of an accused for whom it is an every day and ongoing experience.

Question 2

If the current test for self-defence is retained, should the Criminal Code s 46 be amended to reflect the wording of the Model?

SASS recommends that the *Criminal Code* s s46 be amended to reflect the wording of the Model Criminal Code, in order to aid jurisdictional consistency and clarity of interpretation. We agree that the *Crimes Act 1958* (Vic) s322K provides a useful model upon which the Tasmanian amendment could be based.

Question 3

If the Criminal Code (Tas) s 46 is amended to include a requirement that the accused's perception of the circumstances be based on reasonable grounds, which model should be adopted:

(a) a model based on the common law position;
(b) a model based on the Northern Territory (non-Schedule 1 offences) position;
(c) a model based on the Western Australian position;
(d) a model based on the Queensland and former Tasmanian position;
(e) another model?

As per our response to Questions 1 and 2 - SASS recommends that no amendment be made.

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?

SASS recommends that Tasmania follow the approach set out within the *Crimes Act 1958* (Vic) ss 322J and 322M with regard to the nature of evidence that can be adduced about the history of the relationship, and the nature of violence in the relationship.

These sections provide a useful model as they enable a broad examination of *all* relevant evidence with regard to both the specific case of family violence (including the cumulative impact of family violence on the accused or a family member) and also with regard to the dynamics and nature of family violence in general – thus drawing on evidence and current knowledge of family violence patterns, dynamics and effects.

These provisions also provide that evidence of family violence is relevant in determining both whether the accused believed the conduct to be necessary, and whether the conduct is a reasonable response in the circumstances as a person perceives them, which SASS believes should be an important element of the reformed Tasmanian provisions.

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?

SASS recommends reform to the criminal law in Tasmania to specify that imminence is not necessary where self-defence is raised in the context of family violence.

It is crucial that any legislative reform clarifies that actions may be considered to be in self-defence where the threat is not immediate, but either ongoing or more remote in time. This approach is significantly more consistent with the nature of family violence, which, as the Tasmanian Law Reform Institute indicates, 'is a cumulative and complex experience with the threat of violence ever present.' Specifically, we recommend the adoption of a provision into the Tasmanian *Criminal Code 1924* similar to s322M (1) (a) in the *Crimes Act 1958* (Vic) that explicitly states that that the harm responded to by the accused does not need to be immediate.

In recommending this, we agree with authors Hopkins and Easteal (2010) that the Victorian reforms, including sections 322M and 322J, go furthest in terms of ensuring engagement with the experience of battered women.[ii]

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?

SASS recommends that 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.

We feel that this is a critical aspect of the potential reforms. Gross community misconceptions regarding family violence still exist in Australia. Findings from the 2013 National Community Attitudes towards Violence against Women Survey (NCAS) indicate that within the Australian community;

- 51% of respondents agree that most women could leave a violent relationship if they really wanted to;
- 78% agree that it is hard to understand why women stay in a violent relationship; and

- 9% agree that it is a woman's duty to stay in a violent relationship.[iii]

These perceptions are highly likely to influence jury attitudes around the experience and dynamics of family violence. They are likely to lead jurors to raise questions such as why the accused didn't leave the situation of family violence or seek help to escape the threat – in short why the accused resorted to lethal violence when other options could have been available. As Hopkins and Easteal highlight,

> Viewed from the perspective of the average judge or juror, uninformed about the dynamics and effects of domestic violence, the killing may appear entirely unreasonable; as either irrational or retaliatory. However, from a battered woman's perspective — having lived with serious abuse under the constant threat of violence, having developed a heightened capacity to perceive danger from her batterer, for whom escape has failed or is not a realistic option — there may have been no other reasonable alternative…to determine whether a woman's actions were justified in self-defence requires a holistic appreciation of her predicament.

Jury directions are therefore crucial in attempting to counter the myths and lack of understanding surrounding family violence prevalent in the Australia community, and in enabling a jury to understand why an accused may have acted in self-defence.

SASS specifically recommends that Tasmania adopt similar provisions to those set out in the *Jury Directions Act 2013* (Vic) s32.

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?

SASS does not recommend the introduction of a partial defence of killing for self-preservation in a domestic relationship.

We believe instead that the self-defence provision should be appropriately framed in order to effectively and comprehensively accommodate situations of self-defence within a family violence context. To support the application of a reformed self-defence provision, we endorse the recommendation of the Australian Law Reform Commission (ALRC) for judicial and legal professional education and training to ensure correct application of the law in this area, as a complementary approach alongside legislative reform and guidance.[iv]

Our reasoning for this is that a partial defence prejudices defendants who could otherwise have qualified for a full acquittal if they had successfully raised self-defence. It risks leading to differential treatment of those who have killed in the context of family violence, as opposed to non-familial violence. Furthermore, it could potentially cause confusion for a jury if self-defence and any potential new partial defence are both raised within a case, as for they will be required to consider the same essential elements for both defences.[v]

SASS agrees with the ALRC recommendation that "criminal defences should not recognise the circumstances of family violence victims in an 'atypical context', or typecast the reactions of family violence victims who kill as the product of 'extraordinary psychology'."[vi] Instead, the law should recognise that within a context of family violence, self defence should be viewed as a rational or reasonable response to serious threats.

Need for continuing legal professional and judicial education

SASS would lastly like to endorse the recommendations of the ALRC that any reform in this area be accompanied by;

- "Continuing legal professional and judicial education… [to ensure] that judges and lawyers practising in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences."
- The production of a national family violence bench book (as recommended by the National Council to Reduce Violence Against Women and their Children). Such a bench book "should specifically address the application of defences to homicide where victims of family violence are charged with homicide offences."
- All 'bodies offering continuing professional development should include sessions on family violence in the criminal law".[vii]

Whilst we understand that these issues are not within the scope of the current review, we feel that they are critical to raise, as enabling access to the defence for defendants who kill within situations of family violence cannot be achieved by doctrinal reform alone.

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[i] Webster K, Pennay P, Bricknall R, Diemer K, Flood M, Powell A, Politoff V, Ward A. (2014). *Australians' attitudes to violence against women: Full technical report, Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS).* Victorian Health Promotion Foundation. Melbourne, Australia.

[ii] Submission by Hopkins and Easteal cited in the Australian Law Reform Commission (ALRC). (2010). *Family Violence A National Legal Response*. ALRC Report 114. Australian Government, 646.

[iii] Webster et al. Op. cit., 112.

[iv] ALRC. Op. cit., 650.

[v] Hopkins, A. and Easteal, P. (2010). 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland'. *Alternative Law* Journal, 35 (3).

[vi] ALRC. Op. cit., 649.

[vii] Ibid, 651.