Self Defence in the Western Australian Criminal Code: Two Proposals for Reform

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In 2008, as part of a major set of changes to Western Australian homicide laws, self-defence in the Western Australian Criminal Code was reformulated. The main purpose for the reformulation was to answer criticisms that self-defence operated unfairly in that it excluded women disproportionately. At the same time, in 2008, a statutory obligation was created to review the amendments as soon as practicable after five years of operation. This article participates in that review. It proposes two further amendments: (1) that s248(4) of the Code (self-defence) be amended to resolve a contradiction which makes the defence impossible to apply; and (2) that a new provision be enacted which declares the kinds of evidence that may be relevant where self-defence is raised in the context of domestic or spousal violence.

INTRODUCTION

We are all permitted to defend ourselves. If we assault another, cause them serious harm or even kill them, our acts are permissible if what we did was in self-defence. No wonder the limits of self-defence are contested; no wonder that our anxieties, individual and collective, surround this defence.1 In 2008, as part of a major set of changes to Western Australian homicide laws, self-defence in The Criminal Code (WA) (the Code) was reformulated. In part, the aim of the reformulation was to simplify a complex law.2 However, the main substantive purpose for the amendments was to answer the criticisms that self-defence operated unfairly. The defence catered for social contexts where a person needed to respond immediately to a physical attack – a model of human behaviour descriptive, generally, of men’s experiences. But it did not cater for many women’s experiences – where defensive force was used against on-going violence that was more difficult to respond to immediately.3 The Criminal Law Amendment (Homicide) Act 2008 (WA), the Act that amended the Code, also created a statutory obligation to review the homicide

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2 The Honourable Jim McGinty, Second Reading Speech, Criminal Law Amendment (Homicide) Bill 2008, Western Australian Parliamentary Debates, 19 March 2008 (Second Reading Speech, Criminal Law Amendment (Homicide) Bill 2008), pp1,3
3 Ibid.
amendments. The Minister is obliged to report to Parliament on the effectiveness of the new laws as soon as practicable after five years of operation. This article participates in that review by examining the reformulation of s248 (self-defence). Two further amendments are proposed.

The first Part of the article analyses the key changes that were made to self-defence in 2008. Part Two identifies a problem with the current terms of s248. The problem relates to the relationship between the objective and subjective components of the defence. It is argued that (probably inadvertently) Parliament has created contradictory requirements in paragraphs (a) and (b) of s248(4) which makes the section impossible to apply. Part Three of the article examines a proposal made by the Law Reform Commission of Western Australia (LRCWA) which was omitted from the amendments of 2008. That recommendation concerns the kinds of evidence that may be relevant where self-defence is raised in the context of domestic or spousal violence. It is proposed that a provision such as that proposed by the LRCWA is still needed and should be implemented.

THE 2008 RE-FORMULATION OF SELF-DEFENCE

Before 2008 self-defence (and defence of another) was contained in sections 248, 249 and 250 of the Code. Section 248 provided:

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Section 249 dealt with self-defence against a provoked assault, allowing defensive force to be used in extremely limited circumstances, and only after the accused had retreated. Section 250 dealt with defence of another, allowing

4 The Code, s739.
5 Section 249 provided: “When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous bodily harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
defensive force to be used to the same extent as would have been allowed had the accused themselves been the target of the assailant. These old provisions were criticised for their complexity and it is true that s249 in particular was practically incoherent, and extremely difficult to apply. However, the primary impetus for amendment was the claim that the defence operated unfairly in that it excluded women disproportionately: it failed to cater for self-defence within intimate relationships. The Western Australian reforms to self-defence were based on recommendations made by the LRCWA in its Review of the Law of Homicide, Final Report, 2007 (Homicide Report) but were (as was the Homicide Report itself) part of a national and international movement for the reform of self-defence. Every Australian jurisdiction – Commonwealth, State and Territory – has enacted significant legislative changes in the past decade as part of that movement.

This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.”

Section 250 provided: “In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself against an assault it is lawful for any other person acting in good faith in his aid to use a like degree of force for the purpose of defending such first mentioned person.”

See above fn 5; and Randle v R (1995) 81 A Crim R 113.

In Western Australia, as a result of this movement and the *Homicide Report*, a number of aspects of the old self-defence were replaced by a single structure. The new (current) structure is based on a balance or proportionality between the attack of the assailant and the response of the accused, utilising the concept of a “harmful act”. A “harmful act” replaces the legally-defined concepts of “assault” and “grievous bodily harm”. The harmful act of the accused must have been a reasonable response to the (reasonably perceived) harmful act of the assailant. That is, there is now a more explicit equivalence required – measured by reference to the facts of each case - between the danger faced by the accused on the one hand and her/his response on the other. In 2008, the old sections 248, 249 and 250 were repealed and self-defence is now contained in just one section of the Code, s248, which creates this general structure. That section provides:

1. In this section —
   
   *harmful act* means an act that is an element of an offence under this Part other than Chapter XXXV.

2. A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).

3. If —
   
   (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
   
   (b) the person’s act that causes the other person’s death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be, the person is guilty of manslaughter and not murder.

4. A person’s harmful act is done in self-defence if —
   
   (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
   
   (b) the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
   
   (c) there are reasonable grounds for those beliefs.

5. A person’s harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.

6. For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.
Apart from the general structure of the defence based on the ‘harmful act’ described above, the new s248 made a number of specific changes.

1. The distinct forms of the defence, involving the use of less serious or very serious defensive force (paragraphs one and two of the old s248), were combined in one general form.

2. The distinction between unprovoked and provoked self-defence (the old ss248 and 249 respectively) was abolished. Under the current law if an accused begins an altercation by acting provocatively, this is assessed through the general requirements that there were reasonable grounds for a belief in the necessity to defend her/himself and her/his response was reasonable.

3. The rule in the old s250 which allowed a person to defend another person to the same extent as they would have been justified in defending themselves remains unchanged but is now incorporated in the general defence, in s248(4)(a).

4. Sub-section 248(3) created a new partial defence of excessive self-defence. This defence applies in relation to a charge of murder and, if successful, results in a conviction of manslaughter. It applies where a person is found to have had a belief on reasonable grounds that they needed to defend themselves (s248(4)(a)) but their response was not reasonable (s248(4)(b)). This partial defence was introduced at the same time the partial defence of provocation\(^ {10}\) was abolished. Provocation was abolished because it was seen to be providing an illegitimate excuse for outbursts of lethal violence, primarily by men, including violence against female spouses and men who had made non-violent homosexual advances towards an accused.\(^ {11}\) The partial defence of provocation had, however, been used in another context. Women who had been abused over a long period by their spouse and who eventually responded by killing him not uncommonly relied on both self-defence and provocation. In some cases it was the provocation defence that reduced a murder conviction to manslaughter. This use of provocation was seen to be inappropriate in the sense that a woman’s use of force in that situation is properly characterised as defensive rather than as a loss of emotional control.\(^ {12}\) However, it was a legitimate use of the defence insofar as it provided for a lesser conviction where a murder conviction would have been unjust. That is to say provocation appears to have been used by juries as a ‘half-

\(^{10}\) The former s281, the Code. The defence reduced Murder or Wilful Murder (now abolished) to Manslaughter.

\(^{11}\) Homicide Report, above fn 7, pp211-216.

\(^{12}\) See the Homicide Report, above fn 7, p216; see also, Victorian Law Reform Commission, Defences to Homicide, Final Report (2004), [2.48]; and Department of Justice, Victoria, Defensive Homicide: Proposals for Legislative Reform, Consultation Paper, (2013), p33.
way-house’. Although the LRCWA was of the view that self-defence was the appropriate defence in a context where a woman responded to serious and on-going violence in a spousal relationship, it was concerned that, in the absence of a partial defence, some women may be unjustly convicted of murder if the extremity of their circumstance was not recognised in a trial. For these reasons the LRCWA recommended the introduction of excessive self-defence, along with the abolition of provocation. Both these recommendations were implemented.

5. As noted, the current s248 is based on the general concept of a “harmful act” done by the accused in the face of a “harmful act” perpetrated or threatened by an assailant. The legally defined terms in the old s248 of “assault” (against which an accused must have been defending themselves) and “grievous bodily harm” (a reasonable apprehension of which an accused must have held in order to have inflicted very serious harm on their assailant) were abandoned. Two implications of these changes were as follows: First, removing the requirement in the old s248 of an “assault” (by the assailant against the accused) removed the only purely objectively determined requirement in the defence. All the elements in the current s248 are assessed in a mixed subjective/objective inquiry. (This is discussed further below.) Second, the removal of the requirement, in the old s248, that an accused reasonably believed they would suffer “grievous bodily harm”, as legally defined in s1 of the Code, probably broadens the scope of the kinds of attack against which an accused may be justified in inflicting very serious harm, or even death, on their attacker. This is because the threat of rape¹³ may not amount to a threat of grievous bodily harm. Section 1 of the Code defines grievous bodily harm as a “bodily injury” that, _inter alia_, causes or is likely to cause “permanent injury to health”. It is unclear whether this definition extends beyond physical injury.¹⁴ It may be a rare instance in which an accused feared rape but did not also fear serious physical injury or death, nevertheless, any uncertainty in that situation where it arises is resolved by the 2008 amendment. All cases are now determined by an assessment of the factual proportionality between the assailant’s attack (rape) and the accused’s response (lethal or very serious force), unrestricted by the legal definitions of “bodily injury” and “grievous bodily harm”.

6. The harmful act against which an accused defended themselves need not be “imminent” (s248(4)(a)). This amendment directly addresses the arguments that self-defence prior to 2008 was applied in a way that excluded women. In his Second Reading speech, the Attorney General,

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¹³ The equivalent of common law rape is ‘sexual penetration without consent’, the _Code_, s325.

¹⁴ _Tranby v The Queen_ (1991) 52 A Crim R 228, 234. Psychiatric illness may amount to a permanent injury to health but s1 of the Code requires this to have been caused by a “bodily injury”.
Jim McGinty said:

“Another important change contained in this bill is that the harmful act that the person believes it is necessary to act against in self-defence will not have to be imminent. The Law Reform Commission noted that the concept of imminence is currently a barrier for women, particularly in domestic violence situations, relying on self-defence because women do not necessarily respond to an imminent attack, as to do so may place them in even more danger. The commission also noted that imminence is hard to reconcile with the constant nature of domestic violence.”

The old s248 did not preclude self-defence against a non-imminent attack in its terms but it was interpreted such that an accused could not claim their perception of danger and the need to use defensive force was “reasonable” where they were not responding to an imminent physical attack. This amendment puts it beyond doubt that response to on-going domestic violence can come within the defence whether or not the accused responded at the time of a physical attack.

Thus, the 2008 amendments to s248 made significant changes. It is argued in the remainder of the article that two further reforms are needed: an amendment to the terms of the current reformulated s248 relating to the subjective/objective requirements and the introduction of a new provision that would bear on trials in which self-defence is raised.

THE SUBJECTIVE/OBJECTIVE REQUIREMENTS IN S248

1. The 2008 amendments

All formulations of self-defence comprise three components: the danger that beset the accused; the accused’s assessment of the need to use defensive force (rather than a non-physical response); and the nature and degree of the force actually used. Further, each formulation sets a subjective, objective or mixed subjective/objective standard for assessing each of these components. Before 2008 the existence of some danger (an assault) was assessed purely objectively and, relevant for the serious-force self-defence, the level of danger was assessed in an objective/subjective test (the accused must have had a “reasonable apprehension” of death or grievous bodily harm). The need to use physical force was assessed subjectively/objectively (a “belief on reasonable grounds” that no other option was available). The nature and degree of force actually used was expressed to require an objective test (only “necessary force” was justified), however, that element had been interpreted to incorporate a subjectivity from the other elements.

16 The determination of “necessary force” was held to follow necessarily from the determination of the other elements of the defence. See Muratovic [1967] Qd R 15; Marwey (1977) 138 CLR 630; Minnitti [2001] WASCA 148. This is discussed further below.
After 2008 the requirement for the existence of danger in the form of an assault was removed. The danger that beset the accused and the need to use physical force in defence is assessed objectively/subjectively ("reasonable grounds for a belief" that the accused needed to defend her/himself). The nature and degree of force used is assessed objectively/subjectively ("reasonable response" in circumstances the accused believed on reasonable grounds existed).

As discussed, the main aim in the reform of self-defence in 2008 was to remedy unfairness in the way the defence was operating, insofar as it excluded women unjustifiably. Do these changes in the arrangement of the subjective/objective requirements in assessing the components of the defence bear on that main aim? The answer to that question is yes, but only in one respect. The current defence has no purely objective assessments of any of the three components. That is, the purely objective assessment of whether an "assault" had occurred was removed. That element in the old law was one of the ways in which a requirement of 'immediate combat' self-defence had been implied. Its removal took that restriction away so that the on-going nature of violence in a spousal relationship could more readily be contemplated. That is to say, insofar as the requirement that there be an "assault" meant there needed to be an immanent physical threat to which the accused responded immediately, the removal of that requirement allowed self-defence to be contemplated where a woman acted in defence at a time when her assailant was unarmed or otherwise occupied. Other than this, however, the changes made in 2008 to the ways in which the components of self-defence are arranged with regard to the objective/subjective nature of the assessments has no bearing on the aim of gender equity.

Nevertheless, there is a problem with how the current s248 is arranged with respect to its objective/subjective requirements. Paragraphs (a) and (b) of s248(4) create an irreconcilable contradiction that makes the defence very difficult to apply. Before explaining this contradiction, however, the next section explains why the 2008 re-arrangement of the subjective/objective requirements in the defence makes no difference in gender equity terms, despite the fact that "reasonableness" – the objective element of self-defence – is pivotal in all claims that the defence operated unfairly for women.

2. "Reasonableness" in self-defence and its relevance to gender equity

There is a paradox when it comes to analysing self-defence through a gender lens. On the one hand all criticisms of the defence focus on its objective assessment

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17 In *R v Secretary* (1996) 86 A Crim R 119 the Northern Territory Court of Appeal held that an "assault" could continue within a specified timeframe. That is, if an assailant threatened to apply force at a particular time in the future, the assault continued until that time so long as the assailant’s capacity to inflict the threatened harm remained. (In *Secretary* the deceased victim threatened to kill the accused when he woke up.) Thus, the requirement of an "assault" limited self-defence to immediate-combat circumstances, albeit with some extension in the case of a threatened application of force.
components: whether there were ‘reasonable grounds’ for a belief or the response was ‘reasonable’. On the other hand little or nothing turns on how the defence is structured regarding the objective/subjective assessments. That is, it is the content of what is considered a ‘reasonable’ belief or response that affects whether the defence is applied consistently and fairly rather than precisely where a requirement of reasonableness appears. The following section explains this paradox further.

“Reasonableness” is at the heart of self-defence. The subjective claims of a person who has caused harm may also determine the outcome of cases of course but the subjective assessments in self-defence do not contain the very complex moral, social questions. Subjective inquiries turn on whether a person is telling the truth when they say they needed to defend themselves and there is general agreement on the morality of lying. Society’s complex questions are determined through the concept of reasonableness which, in reality, is a rubric within which each case, or kind of case, is determined on its facts; that is to say, how each set of facts is socially understood. The current social attitudes at a given time, about what is proper to sanction, moulds the content of the term. This is why legal contests about ‘reasonableness’ are always, also, quite directly, social contests. In this way a society is always promoting its values via legal concepts of ‘reasonableness’, and in this process courts are required, quite properly, to make value judgements. That courts are required to be involved in questions of social values in this way was acknowledged recently in Pargin v Kelly, a case dealing with the defence of lawful force used to prevent escape from arrest. There, Mazza J said that the level of force which is “reasonably necessary” is a “value judgement to be made by the court”.

Moreover, with respect to self-defence (and some other lawful-force defences), there is even greater complexity than just determining whether an individual should have been permitted to cause harm. This is because inherent in that judgement, where self-defence is concerned, is also a judgement on the state itself. It is the state’s job to protect us from harm. Determining that it was reasonably necessary for an individual to protect themselves is to say, in some way or other, the state failed. Further, this involvement of the state in judgements about self-defence has particular significance in the context of women’s reliance on the defence. Where a need to act defensively arose suddenly and without warning the state can be forgiven relatively easily for not being able to come to a citizen’s aid. But where danger has existed for a while – sometimes for years - it is more difficult to come

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18 For example, Francis v Dodd [2011] WASC 185, [43], one of the first appellate decisions on the current s248: a trial judge should ensure the jury makes a positive determination about the accused’s subjective belief.

19 In fact complex questions do arise in determining a person’s state of mind. A person’s ‘intention’ and ‘beliefs’ are in reality often extremely difficult to encapsulate. To the extent that these complexities arise in the criminal law, however, they are grappled with in the context of intention and other mental states that comprise homicide offences rather than in discussions of self-defence.

20 [2012] WASCA 68.

21 Ibid, [74]
to terms with the state’s failure to protect. Thus, where a person uses defensive force against an on-going threat the state is implicated in a serious way. This, too, influences how what is ‘reasonable’ is to be determined in any social era. The profundity of this alignment between the boundaries of lawful-force defences and the integrity of the state itself is recognised by the courts. In the context of the common law defence of necessity (the equivalent of the Code defence of emergency) Gleeson CJ said:

“The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed.”

Thus, “reasonableness” is pivotal in every formulation of self-defence. It is the portal through which all the social, cultural understandings of what is justifiable will be engaged to determine each case. And it has particular significance in women’s claims about the unfairness of self-defence. In one way or another, women’s objections to self-defence have been objections to what has not been included (socially/legally) as within reason. Their actions have commonly been characterised as: “delayed”, “disproportionate”, responses to “non-imminent”, “possibilities” of harm. And, therefore, as punishment or revenge rather than defence.

In another sense, however, how reasonableness is dealt with in the law of self-defence has little or no influence on the substantive application of the defence and gender fairness. That is, how the relationship is arranged between the subjective and objective requirements in any particular legal formulation of the defence will not determine the justice or fairness of that formulation. The same important social/legal question will arise however the elements are arranged in this regard: that question is - was what the accused did within reason? This is not to say that a fact-finder may not consider separately the three components of the defence: the reasonableness of a belief held by the accused about the existence or seriousness of an attack; the reasonableness of an accused’s decision to react with force; and the nature and degree of force used. Nor does it mean that articulating these components in the law is not useful. But each assessment depends on the other and each combines, ultimately, with the others to make a determination about what will be accepted as reasonable conduct.

What is suggested here is that the objective dimensions of self-defence are fundamentally one question: was what the accused did to defend themselves acceptable (reasonable)? And although the specific questions about the threat, availability of alternative escape routes and the particular nature of the response are all analytically distinct they bear on each other. The quality and extent of the danger will determine the availability of alternative escape routes and the limits of the force required for defence. This is true in all self-defence scenarios but it has special significance in situations where a woman was responding to on-going violence in an intimate relationship and where she killed in the absence of a physical attack. The reasonableness of the perception of the quality and extent of the danger will go with the reasonableness of perception that the use of an alternative to physical force was not viable. The same social questions arise in each, about personal and community understandings of spousal violence.

Thus, although all questions of gender equity concern the requirements of “reasonableness” in self-defence, there is no difference between the old and new Western Australian self-defence with regard to the way the subjective/objective components of the defence are arranged. That is, the change from the requirements of the old law - a “reasonable apprehension” of harm and a “belief on reasonable grounds” that a person couldn’t otherwise save themselves - to the requirements of the new law - a “belief on reasonable grounds” about the necessity to defend themselves and a “reasonable response” in the circumstances believed to exist - makes no difference in terms of gender equity.

3. The need for further amendment to s248

Self-defence will always be complex, for the reasons discussed: it embodies complex questions of society’s acceptance of really regrettable conflict. However, clarity in the law so far as possible will always promote justice. Simplicity in the form of law (the language of legislation) is desirable but conceptual clarity is most important.

The terms of s248 create an irreconcilable contradiction. The objective assessments overlap in a way that makes it impossible to meet the requirements of the section

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23 A similar point is made about s248(4)(a) in Goodwyn v The State of Western Australia [2013] WASCA 141, [3], [116]-[117], [178].

24 The removal of the purely objective requirement of an assault in self-defence is an exception to this, as discussed, insofar as that requirement limited self-defence to immediate-combat situations. However, even in that instance, note the importance of the social/legal determination of what is “reasonable”. It was assumed that the requirement of “assault” limited self-defence in this way but there was no doctrinal requirement in the old law that the assault occurred (or was about to occur) immediately before the defensive force was used. The terms of the law allowed an assault to have occurred at some time, even long before the defensive force was used. Thus, the real obstacle to self-defence in the context of on-going violence was the implied requirement of imminence of an assault. It was assumed that unless an assault was imminent, the accused’s perception of danger and the need to use force (the other elements of the defence) could not be ‘reasonable’.
without ignoring some terms or contorting the meaning of others. This occurs in sub-s248(4):

“(4) A person’s harmful act is done in self-defence if —

(a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and

(b) the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and

(c) there are reasonable grounds for those beliefs.”

As discussed above, in order to have been acting in self-defence a person must have believed the following. (1) They were in danger - that an attack was going to occur against them. (2) They could not deal effectively with the danger except by attacking back – using physical force against the attacker. For example, they could not remove themselves in a way that would eliminate the danger or restrain their attacker or get help to restrain them in a way that would eliminate the danger. (3) What they did to the attacker was required to eliminate the danger - the amount of force they used was needed to quell the attack. They did not, for example, kill their assailant out of a reasonably held belief that they were at risk of a simple assault.

The first of these components is sometimes referred to as the ‘threat occasion’; the third as the ‘response’, corresponding to the ‘necessity test’ and the ‘proportionality test’. The second component of the defence, dealing with the person’s perception of their options, is part of the ‘threat occasion’ insofar as it refers to a person assessing danger, risk and preservation and it is part of the ‘response’ insofar as it refers to a decision to physically attack an assailant (rather than seek an escape). As discussed, each statutory formulation must also determine whether each of these components should be assessed objectively as well as subjectively. Sub-section 248(4) is unique among the Australian jurisdictions with regard to which aspects should be determined subjectively and which objectively/subjectively. The difficulty arises because in its terms paragraph (a) of sub-s248(4) covers all three components of self-defence listed above. A determination that an accused believed they were under attack, or would be, is not express, but inherent, in paragraph (a). Further, and this is the source of the difficulty, paragraph (a) requires an inquiry about not only the accused’s perception that a physical response was needed (as opposed to a non-violent resolution – i.e. component (2) listed above) but also about the accused’s perception of the nature and degree of force actually used (i.e. component (3) listed above). This is so because what is


26 See discussion in Goodwyn v The State of Western Australia [2013] WASCA 141, [3], [116]-[117], [178].
required to be assessed by paragraph (a) is the accused’s belief about the necessity to do the “harmful act” they in fact did. That is, their particular act that caused the victim harm is the subject of inquiry in paragraph (a) not merely their belief about the need to use force. Insofar as the inquiries required by paragraph (a) cover all components of self-defence in this way, it is very unclear what paragraph (b) means – what work remains for that paragraph to do.

The question that makes the complexity clear is this one: if a person believed, on reasonable grounds, that they would be attacked and believed on reasonable grounds that they needed to do what they in fact did in defence against that attack (para (a)), what room is left for an inquiry into whether what they did was a reasonable response (para (b))? Either their response was necessarily reasonable because they had reasonable grounds for believing what they did was necessary or an overarching, abstract, ‘more objective’ notion of what is reasonable is required by paragraph (b) in addition to the earlier inquiries. This latter approach would mean that a claim of self-defence could be defeated even if a person had reasonable grounds for doing what they in fact did in defence of themselves.

Precisely this dilemma inherited in the old Western Australian law prior to 2008. Where lethal force was used and intended, reliance on self-defence depended on: (1) a reasonable belief that a severe attack would take place; (2) belief, on reasonable grounds, that no other avenue was open to the accused; and (3) the force used was “necessary”. The weight of judicial authority in, The Queen v Muratovic, Marwey v The Queen, Gray v The Queen and Minnitti v The Queen was that if (1) and (2) were found to have existed then the force used by the accused was, ipso facto, “necessary”. In Minnitti, Murray J wrote:

“In the final analysis … the second paragraph of s248 requires three conditions for its operation:

(1) The accused must be the recipient of an unprovoked unlawful assault.
(2) The nature of that assault must be such as to cause the accused reasonable apprehension of death or grievous bodily harm judged objectively from his or her point of view in the circumstances known to him or her ....
(3) ... the accused person … believes, upon objectively reasonable grounds, that the person to be defended from the reasonably apprehended risk of death or grievous bodily harm, cannot be so defended otherwise than by doing what the accused did so as to

See also Raux v The State of Western Australia [2012] WASCA 1, [144]; Shaw v Mansell [2012] WASC 451.
See the terms of the old s248 above, in text following fn 4.
[1967] QdR 15
(1977) 138 CLR 630
(1998) 98 A Crim R 589
[2001] WASCA 148
cause the death or grievous bodily harm which results to the initial attacker.

If those conditions were satisfied, the force used by the accused is lawful – is taken to be necessary for defence ...

A dissenting line of authority on the old s248, represented by Pincus JA in *R v Julian*, reasoned that reference to force having to have been “necessary” required a distinct inquiry. If the legislature had not intended for it to have its own force, then it would not have been included. There was, according to this view, an overarching objective limitation on claims of self-defence. That is, even if a person had reasonable grounds for their belief that they were being attacked and needed to do as they did, their claim of self-defence could be defeated.

Thus, the ambiguity in the current provision is the same as that in the old. However, it is not clear the current ambiguity can be resolved in the same way. To do so (that is, to interpret sub-s248(4) so that if an accused believed on reasonable grounds that their harmful act was necessary in defence then, *ipso facto*, their response was a reasonable one) would, in effect, render the whole of paragraph (b) redundant. That is, in the current law a whole paragraph is at stake. This lends weight to the need for Pincus J’s approach: the Parliament must have intended those words to have meaning. Moreover, in the current s248, an entire partial defence turns on the operation of s248(4)(b): excessive self-defence. That is, if paragraph (a) of sub-s248(4) is found to have been satisfied but not paragraph (b) then, on a murder charge, an accused must be convicted of manslaughter only. Thus, the courts’ approach to the old s248 in cases such as *Gray* and *Minnitti* cannot be taken to the current law.

However, taking the approach of the minority authority in *Julian* is also difficult. On this approach a “reasonable response” in the current s248(4)(b) must import a community standard, quite independent of an assessment of what was a reasonably held belief on the part of the accused. This approach would provide ‘work’ for paragraph (b), yet it is hard to see how such an overarching objective requirement would work, by reference to both the terms of s248(4) and the Parliamentary intention behind its enactment. A purely objective assessment cannot be required because paragraph (b) is expressed to be by reference to the circumstances as the accused perceived, on reasonable grounds, them to be. And these are, presumably, the same circumstances as have been considered for determining, for paragraph (a), that the accused had a belief based on reasonable grounds that they needed to act as they did in defence. Further, if this interpretation is required by the text of sub-s248(4), it means the current law of self-defence is ‘more objective’ than the old law of self-defence. It would require an assessment of the accused’s response

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33 *Ibid*, [59]-[60]
34 [1998] QCA 119, [7]-[14].
35 Along with paragraphs (c).
36 *Raux v The State of Western Australia* [2012] WASCA 1, [144].
that is more removed from the standpoint of the accused; more abstracted than was required before 2008. And this is contrary to the Parliamentary intention behind the amendments to self-defence, which was to ensure that greater recognition could be given to all the circumstances in which an accused acted. It was greater, not lesser, contextualised assessment of ‘reasonableness’ that was intended.\footnote{Second Reading Speech, \textit{Criminal Law Amendment (Homicide) Bill 2008}, above fn 2, pp3-4.}

Thus, the meaning of paragraph (b) of sub-s248(4) is unclear and the lack of clarity arises because paragraph (a) already requires an assessment of all the components that make up a claim of self-defence.

It is likely that this contradiction was unintended. The Parliament’s intention appears to have been to implement the LRCWA’s recommendations on self-defence\footnote{Ibid. Note the Attorney General described the new s248 as “follow[ing] the example of the model Criminal Code”. (\textit{Ibid}) The Model Criminal Code construction of self-defence does not create the contradiction described here but it is incorrect to say s248 follows that model.} and those recommendations did not include this ambiguity. In the \textit{Homicide Report} the Commission recommended that the new s248 provide that an act is carried out in self-defence if:

\begin{quote}
\textquote{“(a)  the person believed on reasonable grounds that it was necessary to use force to defend himself or herself or another person; and 
(b)  the person believed that the act was necessary in order to effectively defend himself or herself or another person; and 
(c)  the act was a reasonable response to the circumstances as the person perceived them (on reasonable grounds) to be.”}\footnote{Homicide Report, above fn 7, p172.}
\end{quote}

This proposed paragraph (a) only deals with the first two components of self-defence, the perception of danger and the need to “use force” in defence. The third component is then dealt with in paragraphs (b) and (c). Perhaps in an attempt to simplify the form of words the substantive ambiguity was created inadvertently.

The ambiguity in s248(4) needs to be resolved and this could be achieved in either of the following ways:

1. By making it clear that paragraph (a) is concerned only with an accused’s belief about the need for the use of force itself and does not deal with belief about the need to do the particular act done or the degree of force used. This is in line with the LRCWA’s recommendation.

2. By requiring a purely subjective inquiry in paragraph (a) dealing with the accused’s belief about the need for defence and the response in the form of the particular act s/he did. This would leave paragraph (b) as the objective limit on that assessment. This is the structure of the self-
defence provisions in the Model Criminal Code that the Commonwealth, New South Wales, the Australian Capital Territory and the Northern Territory have enacted.\textsuperscript{40}

A NEW PROVISION: RULES OF EVIDENCE RELATING TO FAMILY VIOLENCE

In 2007, in the \textit{Homicide Report}, the LRCWA recommended:

"That the \textit{Evidence Act 1906} (WA) be amended to provide that if an accused seeks to rely on self-defence, opinion evidence about domestic violence may be led where relevant to assist in the determination of:

(a) the reasonableness of the accused’s belief that it was necessary to use force to defend himself or herself or another person; or
(b) whether the act was a reasonable response to the circumstances as the accused perceived them to be."\textsuperscript{41}

This recommendation was not implemented in 2008, though virtually all other recommendations relating to self-defence were.\textsuperscript{42} This recommendation had the same general aim as the others – to ensure fair access to the defence by those who killed in response to domestic violence – and the Western Australian government was clearly in support of that rationale.\textsuperscript{43} The failure to implement the evidence recommendation may have been due to the government’s intention at the time to reform evidence laws generally, in a way that would have achieved some of the same ends – i.e. by enacting the national uniform evidence legislation.\textsuperscript{44} Be that as it may, this recommendation was not implemented in 2008.

In this Part it is argued that although evidence of domestic violence, including opinion evidence, will be admissible under current evidence law, where relevant, nevertheless a legislative declaration such as that recommended by the LRCWA is needed. Such a provision is likely to influence how the law is applied and how cases are conducted; it would encourage a wider, proper, application of the defence.

\textsuperscript{40} \textit{Criminal Code 1995} (Cth), s10.4; \textit{Crimes Act 1900} (NSW), s418; \textit{Criminal Code 2002} (ACT), s42; \textit{Criminal Code} (NT), s43BD.

\textsuperscript{41} \textit{Homicide Report}, fn 7, p293

\textsuperscript{42} The only substantive recommendation for the reform of self-defence that was not implemented by the \textit{Criminal Law Amendment (Homicide) Act 2008} (other than this one and one other relating to evidence rules) was a provision recognising that “a response may be a reasonable response for the purpose of self-defence ... even though it is not a proportionate response”. (See \textit{Homicide Report}, above fn 7, p172)

\textsuperscript{43} Second Reading Speech, \textit{Criminal Law Amendment (Homicide) Bill 2008}, above fn 2, pp 3-4.

\textsuperscript{44} See \textit{Homicide Report}, above fn 7, pp292, 294.
1. **Evidence of domestic violence is admissible to support a claim of self-defence under current laws of evidence**

The evidence of domestic violence at issue here, where an accused raises self-defence, is evidence of violence perpetrated by the victim against the accused (or other family member) prior to a killing. It includes evidence of the particular history of violence and general evidence of the dynamics and consequences of such violence.

In Western Australia, evidence laws are found in the common law and in the *Evidence Act 1906* (WA). Only relevant evidence is admissible in a trial and all relevant evidence is, *prima facie*, admissible. It will be excluded only if an exclusionary rule applies or if a trial judge exercises one of a limited number of discretionary powers to exclude relevant material. Under the common law evidence is relevant if it bears on liability and is not too remote. Evidence will bear on liability if it is evidence that, if accepted, “could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding”. The facts in issue in a claim of self-defence are one or more of the following:

1. The accused believed she or he was in danger and needed to defend themselves with physical force;
2. There were reasonable grounds for that belief; and
3. The accused did not use force unreasonably excessive.

All evidence that in fact founded an accused’s belief will be relevant: the accused’s experience of the victim, including violence; and the accused’s knowledge of the victim’s conduct and disposition. In *Masters v The Queen* it was held that evidence of an accused’s knowledge of an acquaintance’s disposition gleaned from what he, the accused, had been told by a third party was admissible to show the accused’s state of mind and that there were reasonable grounds for that state of mind. The nature and extent of past injuries caused by the victim or the victim’s controlling behaviour will be relevant.

The exclusionary rule against the admission of propensity evidence prohibits introduction of evidence of past acts in order to show a tendency in a person to commit acts of that kind, unless the evidence has significant probative value. That is, propensity evidence must have a relevance over and above that which is ordinarily required. The rule exists because propensity evidence carries a high risk of influencing the jury illegally. This rule may be seen as a barrier to the

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45 Other jurisdictions, the Commonwealth, New South Wales, Tasmania and Victoria, have enacted uniform Evidence legislation.
46 *Hollingham v Head* (1858) 140 ER 1135; *R v Stephenson* [1976] VR 376.
47 *Dair v The State of Western Australia* [2008] WASCA 72, [60].
49 *Evidence Act 1906* (WA), s31A.
admission of evidence of domestic violence. 50 However, the propensity evidence rule applies in the case of the accused’s past conduct, not conduct directed at the accused. 51 It is designed to protect the accused against an unfair trial. Thus, in the case where self-defence is claimed because an accused was subjected to domestic violence, evidence of past violence perpetrated against the accused will be relevant and will not be excluded on grounds that it is inadmissible propensity evidence. Evidence of this kind is not uncommonly admitted in homicide trials. The LRCWA wrote:

“... the Commission’s review of cases revealed that evidence about the relationship between the accused and the deceased, including previous acts of violence and criminal convictions, was regularly admitted in homicide trials and in sentencing hearings in Western Australia ... where the victim of the previous violence had killed the perpetrator, evidence was led of the previous violence as the basis of a claim of self-defence (including reasonableness) or to explain the state of mind of the accused.” 52

With respect to expert evidence, additional rules apply. Expert evidence is admissible as an exception to the exclusionary rule that prohibits evidence of opinion; only evidence of fact is admissible generally. Under the common law, applicable in Western Australia, to qualify as expert evidence, the evidence must not offend the common knowledge rule, must be knowledge produced within a recognised field of expertise and must be adduced by a relevantly qualified expert. 53 It was held in Runjanjic and Kontinnen 54 that expert evidence of ‘battered woman syndrome’ (BWS) was admissible under these rules. Knowledge of the likely responses of an ordinary person to continued violence and a loss of control over their circumstances was recognised as outside the ken of the ordinary juror. And the psychological specialty of BWS was, the Court found, a recent but

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51 Evidence Act 1906 (WA), s31A (1). The rule restricting admission of propensity evidence can have implications for gender equality where a killing is itself a continuation of past domestic violence. Where the accused has perpetrated violence in the past against the deceased or another, evidence of the past violence could be excluded on grounds that it was impermissible propensity evidence. This kind of ‘silence’ about past violence was criticised in the context of spouse killings where an accused relied on provocation. See, for example, Jenny Morgan, “Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them”, (1997) Melbourne University Law Review 237. The problem may also arise in the context of the new offence of Assault Causing Death under s281 of the Code and, in Victoria, Defensive Homicide. But in the context of self-defence with a background of domestic violence against the accused the question of propensity evidence should not arise.

52 Homicide Report, above fn 7, p292

53 Clark v Ryan (1960) 103 CLR 486.

sufficiently recognised branch of psychology or psychiatry. The admissibility of BWS evidence was affirmed by the High Court in *Osland v The Queen*.  

However, BWS evidence is only one kind of relevant expert evidence, and the usefulness of it has been questioned from the outset because of its tendency to pathologise victims of domestic violence, based as it is on a psychological model. Expert evidence of the social research about domestic violence is referred to as ‘social context’ or ‘social framework’ evidence. This is research about domestic violence within a social, economic, familial and/or feminist framework. It explains domestic violence from a broader perspective than does a purely psychological model. Evidence of this kind may be given by, for example, a domestic violence worker who could convey some of the realities of experiencing such violence and the constraints on many of those attempting to free themselves from it: care for children; lack of resources and paid employment; and the dangers of escalating violence that leaving can precipitate.  

Under the common law rules of expert evidence social context evidence is probably also admissible. The Courts in *Runjancic and Kontinnen* and *Osland* held that the dynamics of domestic violence are not within common knowledge. An expert’s knowledge and insights may assist jurors to gain accurate understandings about the nature and dynamics of violence, “identify their own biases and reconsider what may be reasonable from the perspective of a victim of abuse”. And research about the social and economic conditions associated with domestic violence could be said to be a sufficiently developed social science. At common law a witness may be qualified as an expert based on their experience and need not have formal qualifications. Therefore, those with knowledge about social contexts of domestic violence from long experience working with families affected by violence may qualify as experts.

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57 The Victorian Law Reform Commission cites a case (*R v Gadd*, Unreported, Supreme Court of Queensland, 27 March 1995) in which a social worker who had worked as a co-ordinator of a women’s health centre, at a domestic violence resource centre and at a women’s refuge was permitted to give evidence of the nature and dynamics of violence, the difficulties women might experience in leaving a partner who is violent and the lack of visibility of abuse. Victorian Law Reform Commission, *Defences to Homicide, Final Report* (2004), p180.  
60 *Weal v Bottom* (1966) 40 ALJR 436.
2. The need for a legislative provision declaring the relevance of evidence of domestic violence

As discussed, evidence of past domestic violence, including expert evidence of its ‘social context’ and psychological consequences, is admissible. However, there is a weight of opinion that an express legislative declaration of its potential relevance is nevertheless needed. Rules of evidence do not determine the elements of self-defence but they affect how a case is prepared and how a ‘story’ is heard at trial. Rules of evidence “govern the kind of information on which the fact-finder in a case bases its decision”. In this context, where recognition of self-defence with a background of domestic violence has been slow, the value of a provision such as the LRCWA proposed is in its capacity to encourage a proper assessment of whether an accused’s conduct was “reasonable”. The Victorian Law Reform Commission is of the view that clarification in legislation “will resolve any residual doubts that may exist about its relevance and admissibility. It may also encourage greater recognition by judges, lawyers and jurors of the range of issues that will be relevant to a plea of self-defence where the homicide has taken place against a background of prior abuse.”

For the same reasons the Australian Law Reform Commission and the New South Wales Law Reform Commission recommend that “State and territory criminal legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide”. Thus, an express provision that this kind of evidence may be relevant makes clear that self-defence in family contexts is within the meaning of the defence.

Moreover, expert evidence can provide a context within which to understand other, direct evidence of violence – again, in the preparation of cases as well as at trial. It may encourage recognition of the significance of some evidence that may otherwise be more difficult to understand. For example, violence occurring a long time in the past may not appear significant whereas, if it was part of a relationship of control and fear, its distance in time may not affect, or even increase, its significance. Evidence of violence by a victim towards people other than the accused may not be seen as significant in a family context even where there is a settled principle that an accused’s beliefs about the victim’s disposition is relevant and admissible evidence in a one-off attack context. Evidence of

61 The Homicide Report, p 291.
62 Victorian Law Reform Commission, Defences to Homicide, Final Report (2004), p184. The VLRC’s recommendation was enacted in the Crimes Act 1958 (Vic), s9AH. (See below)
64 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, ‘Reforms to Homicide for Battered Women: A Comparative Analysis of Law in Australia, Canada and New Zealand’ (2012) 34 Sydney Law Review 467, 484, discussing R v Dzuiba (Unpublished, Supreme Court of Western Australia, 27 November, 2006).
violence by the victim towards others that the accused does not have knowledge of may not appear significant yet it may be highly probative of the question of the degree of danger an accused faced. The significance of controlling behaviours by a victim that were not physical may be difficult to comprehend.

As discussed in Part 2, the meaning of self-defence centres on the ‘content’ of “reasonableness”. This is the broad framework within which both legal and social determinations of what is an acceptable response to violence are made. Feminist arguments have all centred on the claim that false assumptions have led to a lack of appreciation of the circumstances of domestic violence and therefore to an unfair limit on what will be described as reasonable. This was why the express legislative declaration was made in s248(4)(a) that an accused may defend themselves against a harmful act “that is not imminent” – even though there was no doctrinal impediment to self-defence in that context. The same reasons should be recognised for the introduction of a provision declaring that evidence of domestic violence may, potentially, be relevant in a claim of self-defence.

3 Proposal for reform

Two Australian jurisdictions have introduced provisions relating to the kinds of evidence that can be brought in self-defence trials involving family violence. These provisions may provide starting points for a similar provision in Western Australia. Victoria introduced s9AH into the Crimes Act 1958 in 2005 and Queensland introduced s132B into the Evidence Act 1977 in 2010. The Victorian provision sets out six kinds of evidence that “may be relevant in determining whether” an accused believed it was necessary to defend herself or himself. The section applies where self-defence is raised to a charge of murder, manslaughter or defensive homicide. The section covers evidence of:

(a) The history of the relationship between the accused and a family member including violence involving the accused and the victim of the offence charged.
(b) The cumulative effect of the violence
(c) Social, cultural or economic factors that impact on the accused or family member affected by family violence;
(d) The general nature and dynamics of relationships affected by family violence, including possible consequences of separation;
(e) The psychological effects of family violence on people;
(f) Social or economic factors that impact on people affected by family violence.

Evidence of the kind in (a), (b) and (c) relate to the accused’s experience; evidence of the kind in (d), (e) and (f) is general expert evidence. Definitions of “family

66 Defensive Homicide is an offence created by s9AD of the Crimes Act 1958 (Vic). It is in the form of an offence but is the equivalent of excessive self-defence.
“member”, “family violence”, “violence” and other terms are defined in the same section.

Section 132B of the *Evidence Act 1977* (Qld) provides that “[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed” is admissible in evidence in relation to offences defined in Chapters 28 to 30 of the *Criminal Code* (Qld). Those offences include homicides, offences endangering life or health and assaults. “Domestic relationship” is defined as a “relevant relationship” under the *Domestic and Family Violence Protection Act 2012* (Qld) which means an intimate personal relationship, a family relationship or an informal care relationship as defined under that Act. The two provisions are set out in the following table.

**Victorian and Queensland provisions relating to kinds of evidence admissible in support of self-defence**

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<tr>
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<th>Provision</th>
<th>Applies to which offences/defences</th>
<th>Evidence</th>
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<tr>
<td><strong>Victoria</strong></td>
<td>Section 9AH <em>Crimes Act 1958</em> (Vic)</td>
<td>Self-defence in relation to murder, manslaughter or defensive homicide where family violence alleged</td>
<td>Where family violence is alleged, six kinds of evidence: history of relationship between accused and family member and other evidence relating to family violence with respect to accused’s circumstances and general, expert evidence. Not limited to evidence of violence between accused and victim of offence being prosecuted.</td>
</tr>
<tr>
<td><strong>Queensland</strong></td>
<td>Section 132B <em>Evidence Act 1977</em> (Qld)</td>
<td>Offences in Chapters 28 to 30 <em>Criminal Code</em> (Qld) – i.e. homicide, offences endangering life or health, assaults</td>
<td>History of domestic relationship between accused and victim of offence being prosecuted.</td>
</tr>
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</table>
The Victorian model is preferable insofar as it declares the kinds of evidence which may be relevant. This supports the rationale for such a provision because it provides clear guidance about the sorts of evidence which may be adduced. In addition, the Victorian model declares that relationships between the victim and other family members may be relevant whereas the Queensland legislation limits the evidence to that of the relationship between the victim and the accused. Family relationships are networks and relationships between the victim and those other than the accused may well be relevant. The Queensland model is preferable insofar as it applies to a wide range of offences where self-defence can be raised, not only murder and manslaughter.

CONCLUSION

Significant changes were made to homicide laws in Western Australia in 2008, including the law of self-defence. The Western Australian government is in the process of reviewing these amendments. This article has considered parts of the law of self-defence and recommends two further reforms. First, probably inadvertently, the 2008 law introduced a contradiction into the terms of s248(4). This contradiction should be resolved by adopting either the framework recommended by the LRCWA in 2007 or that of the Model Criminal Code, which has been enacted in four other Australian jurisdictions. Second, the article recommends the enactment of a provision relating to the kinds of evidence that may be relevant where self-defence is raised in a context of domestic violence. A provision similar to the one recommended by the LRCWA in 2007 has been enacted in Victoria and Queensland. Such evidence will be relevant and admissible with or without this kind of provision. However, as was the case for the legislative declaration that self-defence may be justified against a non-imminent attack, this provision is needed to ensure reliance on self-defence in the context of domestic violence is not unfairly restricted.