

TASMANIA
LAW REFORM
INSTITUTE

**Review of the Law Relating to Self-
defence**

FINAL REPORT NO 20

OCTOBER 2015

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Terese Henning of the University of Tasmania. The members of the Board of the Institute are Ms Terese Henning (Chair), Professor Margaret Otłowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Stephen Estcourt (appointed by the Honourable Chief Justice of Tasmania), Dr Jeremy Prichard (appointed by the University Council), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative), Mr Rohan Foon (appointed by the Law Society of Tasmania) and Ms Kim Baumeler (appointed at the invitation of the Institute Board).

Background to this Final Report

In September 2011, the Director of Public Prosecutions wrote to the Attorney-General to raise concerns that the current Tasmanian law on self-defence, as contained in s 46 of the *Criminal Code* (Tas), was too lenient and was out of step with modern standards. In November 2012, the Attorney-General requested that the Tasmania Law Reform Institute conduct a far-reaching examination of the law in Tasmania relating to self-defence and provide advice as to whether the law should be amended. The Institute released an Issues Paper in November 2014, *Self-defence*, Issues Paper No 20 and a Submission Template, which contained a series of case scenarios, with a call for submissions by 20 February 2015. The Institute received 10 responses to the Issues Paper:

Mr A J Abbott SC

Mr Benedict Bartl (Policy Officer), Tasmanian Association of Community Legal Centres

Mr D G Coates, Acting Director of Public Prosecutions

Commissioner of Police D L Hine, Tasmania Police

Mr Gary Law

Ms Liz Little (CEO), Sexual Assault Support Service

Mr Luke Rheinberger (Executive Director), The Law Society of Tasmania

Mr Tony Story

Support, Help & Empowerment (SHE) Inc

Women's Legal Service Tasmania

The Institute also received three responses to the Submission Template:

Mr Andrew Adam

Mr Peter Cartwright

Ms Liz Little (CEO), Sexual Assault Support Service

The Institute thanks all those who responded.

The Final Report is available at the Institute's web page at <<http://www.utas.edu.au/law-reform/>> or can be sent to you by mail or email.

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List of Recommendations

Recommendation 1	A review of the defence of insanity contained in the <i>Criminal Code</i> (Tas) s 16 should be undertaken to assess the extent to which the criminal law reflects contemporary medical knowledge about mental illness.
Recommendation 2	Amendments should be made to the <i>Criminal Code</i> (Tas) to clarify the interaction of the law of self-defence and the defence of insanity.
Recommendation 3	The <i>Criminal Code</i> (Tas) should be amended to clarify the relationship between self-induced intoxication and self-defence.
Recommendation 4	Section 46 of the <i>Criminal Code</i> (Tas) should not be amended to require that the accused's belief in the need for self-defence be reasonable or based on reasonable grounds.
Recommendation 5	The <i>Criminal Code</i> (Tas) s 46 should not be amended to reflect the wording of the Model Criminal Code.
Recommendation 6	The <i>Criminal Code</i> (Tas) should be amended to provide if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the <i>Criminal Code</i> (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the <i>Criminal Code</i> (Tas).
Recommendation 7	The <i>Criminal Code</i> (Tas) should be amended to provide that for the purposes of self-defence contained in the <i>Criminal Code</i> (Tas) s 46 evidence of intoxication may be considered: (a) for the purposes of assessing the accused's belief in the need for self-defence; (b) for the purpose of determining the circumstances as the accused believes them to be; and (c) as a physical characteristic of the accused in determining whether the response was reasonable.
Recommendation 8	Intoxication that is caused by methamphetamine use should not be treated differently, for the purposes of self-defence in the <i>Criminal Code</i> (Tas) s 46, from intoxication arising from other causes.
Recommendation 9	Methamphetamine use that causes a disease of the mind should not be treated differently, for the purposes of the <i>Criminal Code</i> (Tas) s 17(1), than a disease of the mind attributable to other drug/alcohol use.
Recommendation 10	The operation of the insanity defence and the rules of intoxication in cases of drug-induced psychosis should be considered as part of a review of the law of insanity.
Recommendation 11	Drug-induced psychosis should not provide the basis for self-defence in the <i>Criminal Code</i> (Tas) s 46.

Recommendation 12	A partial defence of mistaken self-defence is unnecessary under the current formulation of self-defence contained in the <i>Criminal Code</i> (Tas) s 46.
Recommendation 13	A partial defence of mistaken self-defence should not be introduced in Tasmania in the event that the <i>Criminal Code</i> (Tas) s 46 is amended to introduce an additional requirement of reasonableness.
Recommendation 14	A partial defence of excessive self-defence should not be introduced in Tasmania.
Recommendation 15	A partial defence of diminished responsibility should not be introduced in Tasmania.
Recommendation 16	The law in Tasmania should be reformed to allow self-defence to better accommodate the claims of those who use violence in response to family violence.
Recommendation 17	The <i>Evidence Act 2001</i> (Tas) should be amended to include provisions based on the <i>Crimes Act 1958</i> (Vic) ss 322J and 322M that provide for a broad range of family violence evidence to be admitted and to make it clear that that evidence is relevant to both the subjective and objective components of s 46.
Recommendation 18	The amendment to the <i>Evidence Act 2001</i> (Tas), as contained in Recommendation 17, should provide an inclusive definition of violence and should make it clear that violence may include a number of acts that form part of a pattern of behaviour (whether or not the acts are of the same kind or directed towards the same person), even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.
Recommendation 19	The <i>Criminal Code</i> (Tas) should be amended to provide that a person may have an honest belief that they are acting in self-defence and that their conduct may be regarded as a reasonable response in the circumstances as the person perceives them to be even if the person is responding to a harm that is not immediate or that appears to be trivial (based on the Victorian model).
Recommendation 20	The <i>Criminal Code</i> (Tas) should be amended to provide that a trial judge must give a direction on family violence, if requested by defence counsel or the accused (if unrepresented), unless there are good reasons for not doing so. If an accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction if it is in the interests of justice to do so.
Recommendation 21	Part 6 of the <i>Jury Directions Act 2015</i> (Vic) should provide the model for the jury direction on family violence.
Recommendation 22	A partial defence of killing for self-preservation in a domestic relationship should not be introduced in Tasmania.
Recommendation 23	There should be no change to the current approach to the defences relating to prevention of crimes and defence of property contained in ss 39–40 of the Tasmanian <i>Criminal Code</i> .

Part 1

Introduction

1.1 Introduction

1.1.1 In November 2012, the Attorney-General requested the Tasmania Law Reform Institute to conduct a wide-ranging examination of the law in Tasmania relating to self-defence. The reference arose from concern expressed by the then Tasmanian Director of Public Prosecutions, Mr Tim Ellis SC, that this defence may operate too leniently, potentially resulting in unmerited acquittals.

1.1.2 This Report considers the circumstances in which a person can lawfully use force (including lethal force) to defend himself or herself or someone else. It focuses on areas of uncertainty and controversy in relation to the operation of the defence. In cases where the accused's perception of the need to use defensive force corresponds with the actual need to do so, the law of self-defence is unproblematic. However, difficulties arise when there is a difference between the actual circumstances and the circumstances as the accused mistakenly believed them to be. There is scope for considerable debate about the extent to which a person can rely on a mistaken belief for the purposes of self-defence, and whether the reason for the mistake has a role to play in determining the availability of the defence. A mistaken belief in the need for self-defence is particularly problematic in four situations:

- when it results from a delusion caused by a mental illness;
- when it is the product of psychological factors personal to the accused that made him or her more sensitive to threats of danger than the normal person;
- when it arises from self-induced intoxication; or
- when it proceeds from a delusion caused by drug-induced psychosis.

There is concern that the current formulation of self-defence in s 46 of the *Criminal Code* (Tas) does not preclude reliance on the defence in these circumstances, even if the accused's perception of the situation is *entirely* irrational. This is said to be inappropriate as it affords an unduly favourable defence to those who may resort to violence in the absence of any objective evidence of the need to do so.¹ For these reasons, the former Tasmanian Director of Public Prosecutions suggested that the defence operates too leniently and in a manner that is out of step with modern standards and community expectations.

1.1.3 These concerns are addressed in this Report. Their resolution is complex because it involves delineating the relationship of different defences, which have different theoretical and policy backgrounds. It also involves determining whether s 46 should be reconceptualised to introduce requirements of reasonableness into all components of self-defence. Additionally, it prompts consideration of whether new and partial defences should be created for situations where an accused acts upon a mistaken belief in the need for self-defence or uses excessive force in defending him or herself.

¹ See [4.1.2].

1.1.4 Another area of concern that is addressed in this Report is the operation of the law of self-defence in the context of family violence. For many years, the operation of the law of self-defence in the context of those who kill (particularly women who kill) in response to family violence has been a key area of critique. The argument has been that the law is not sufficiently receptive to their self-defence claims and that it is out of step with contemporary understandings of the nature and dynamics of family violence. While the law of self-defence in Tasmania is theoretically capable of accommodating the claims of those who use violence in response to family violence, its operation in this context remains largely untested. This Report includes recommendations for reform that would clarify the law and facilitate reliance on self-defence in cases arising in the context of family violence.

1.1.5 In summary, this Report makes recommendations in relation to whether the current law of self-defence in Tasmania should be retained or whether it should be amended. Based on the questions considered in the Issues Paper, recommendations are made in relation to:

- whether or not additional or different requirements of reasonableness should be introduced into the *Criminal Code* (Tas) s 46 (Questions 1 – 3 of the Issues Paper);
- the interaction of mental illness and self-defence (Questions 4 – 26 of the Issues Paper);
- the interaction of intoxication and self-defence (Questions 8 – 11 of the Issues Paper);
- the operation of the law of self-defence in the context of family violence (Questions 12 – 14 of the Issues Paper);
- whether or not partial defences of mistaken self-defence, excessive self-defence, killing for self-preservation in a domestic relationship and diminished responsibility should be introduced into the *Criminal Code* (Tas) (Questions 15 – 18 of the Issues Paper).

1.1.6 In the Issues Paper, the circumstances in which a person can use force in defence of property, in particular in defence of a person's home, was also considered. Defence of property is dealt with in Part 6 of this Report.

1.2 Background to this Report

1.2.1 In November 2014, in accordance with the reference received from the Attorney-General in November 2012, the Institute released an Issues Paper, *Self-defence*, Issues Paper No 20 and provided a Submission Template, which contained a series of case scenarios based on decided cases.

The Institute received 10 responses to the Issues Paper:

- Mr A J Abbott SC
- Mr Benedict Bartl (Policy Officer), Tasmanian Association of Community Legal Centres
- Mr D G Coates, Acting Director of Public Prosecutions
- Commissioner of Police D L Hine, Tasmania Police
- Mr Gary Law
- Ms Liz Little (CEO), Sexual Assault Support Service
- Mr Luke Rheinberger (Executive Director), The Law Society of Tasmania
- Mr Tony Story
- Support, Help & Empowerment (SHE) Inc
- Women's Legal Service Tasmania

The Institute also received three responses to the Submission Template:

- Mr Andrew Adam
- Mr Peter Cartwright
- Ms Liz Little (CEO), Sexual Assault Support Service (SASS)

1.3 Approach taken by the Institute

1.3.1 The Institute adopted several methods to assess the current operation of the law of self-defence in Tasmania, it:

- (1) sought and considered responses to the questions asked in the Issues Paper;
- (2) prepared and distributed a survey to people with specialised knowledge and experience in this area;
- (3) undertook a search of the online archives of Tasmanian newspapers to identify Supreme Court cases where an accused had relied on self-defence at trial and an acquittal was reported in the media;
- (4) conducted a search of sentencing comments and appeal cases heard in the Tasmanian Supreme Court to identify cases where the defendant relied on self-defence at trial (often unsuccessfully).

These investigative measures have enabled the Institute to obtain useful information about the practical operation of the defence of self-defence in Tasmania and, consequently, whether its operation accords with or is out of step with community expectations. However, the Institute acknowledges that the task of comprehensively assessing the operation of self-defence is difficult because ‘acquittals leave little trace.’² There is usually no public record of an acquittal.

Survey

1.3.2 The Institute conducted an online survey involving people with specialised knowledge about s 46 (judges, magistrates, prosecutors and defence counsel). This was done using the University of Tasmania supported online survey tool (*Lime Survey*). The survey sought to obtain information about the practical operation of the defence and about details of cases where an accused’s perception of a purported threat had been affected by intoxication and/or mental illness. In the ‘Invitation to Participate’, the Institute made it clear that it was:

interested in identifying cases where an accused had been acquitted of an offence of violence on the basis that the prosecution had not been able to satisfy the fact finder beyond reasonable doubt that the accused was not acting in self-defence, particularly in cases that may be viewed as “undeserving acquittals”. Given the subjective component of the test of self-defence (ie the defendant’s honest belief in the need to use force and the force used being (objectively) assessed ‘in the circumstances as the accused believed them to be’), a concern is that unmeritorious defendants may be benefiting from the current formulation. For example, a person may make unreasonable mistakes about the need to use self-defence based on an impaired perception of the circumstances due to intoxication. There is also a concern that there may be complete acquittals of mentally ill persons based on a delusion affecting their perception about the need for self-defence.

² E Sheehy, J Stubbs and J Tolmie, ‘Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*’ (2014) 38 *Melbourne University Law Review* 666, 671.

1.3.3 The survey contained seven questions. Three questions invited a written response:

- Q3: Are you aware of any cases where an accused has successfully relied on self-defence/defence of another where his/her perception of the threat has been affected by intoxication and/or mental illness? If so, please provide details such as case name and the approximate date;
- Q8: Do you have any concerns in relation to the current operation of self-defence/defence of another? Please provide details;
- Q9: What aspects of the current law of self-defence/defence of another do you consider to be working well? Please provide details.

Four questions invited the participant to select from a range of options (very rarely, rarely, sometimes, often, very often, never):

- Q4: In your experience, how often would an accused's assertion that he/she was acting in self-defence be based on impaired perception due to intoxication?
- Q5: In your experience, how often would an accused's assertion that he/she was acting in self-defence be based on impaired perception due to mental illness?
- Q6: In your experience, how often would self-defence/defence of another be raised by an accused in relation to offences of personal violence (assault, wounding, grievous bodily harm, homicide)?
- Q7: In your experience, how often would self-defence/defence of another be successful when raised by an accused in relation to offences of personal violence (assault, wounding, grievous bodily harm, homicide)?

1.3.4 Details of the survey were provided to the Chief Justice of the Supreme Court, the Chief Magistrate, the Acting Director of Public Prosecutions, the Officer-in-Charge, Southern Regional Prosecution Services, and the Chair, Criminal Law Sub-Committee of the Law Society of Tasmania who forwarded information by email to relevant persons within their body/organisation. The intended recipients included seven judges, 14 magistrates, 19 criminal prosecutors working in the Office of the Director of Public Prosecutions, and 24 police prosecutors who may have potentially participated in the survey. The Institute estimated that five defence counsel might be willing to participate in the survey. In the end, the Institute received 18 responses to the survey: one from a judge, one from a magistrate, 15 from prosecutors (eight DPP and seven police) and one from defence counsel. Although the participation rate was not high, the responses provided useful insights into the operation of self-defence in Tasmania.

Newspaper search

1.3.5 The Institute conducted a search of the online archives of Tasmanian newspapers (*The Mercury*, *The Examiner*, and *The Advocate*) using the *NewsBank* database to identify Supreme Court cases where an accused had relied on self-defence at trial and an acquittal was reported in the media. The *NewsBank* database is accessible from the State Library website and contains full text content for the three local newspapers in Tasmania: *The Mercury* (Hobart) from 1 January 1998; *The Examiner* (Launceston) from 2 January 1998;³ and *The Advocate* (Burnie) from 28 August 2006.⁴ A limitation of relying on newspapers is that the information that can be obtained about a case is only that which is reported. However, given that cases involving death or serious injury are generally considered to be

³ Data was unavailable from 1/1/2011 – 18/5/2011.

⁴ Data was unavailable from 1/1/2011 – 18/5/2011.

‘newsworthy’, there is some likelihood at least for such cases to be reported.⁵ It is acknowledged, however, that the cases identified and information obtained in this way cannot purport to be exhaustive. There are necessarily gaps in the specific details of the cases that can be obtained relying on media sources. Nonetheless, the cases that were identified provide a useful indication of the types of cases in the Supreme Court of Tasmania where self-defence has applied.

Sentencing comments and appeal cases

1.3.6 A search of sentencing comments and appeal cases heard in the Tasmanian Supreme Court between 1988 and 2013 was conducted to identify cases where the defendant relied on self-defence at trial (often unsuccessfully). Although different levels of detail are provided in the judgments or comments on passing sentence, these cases indicate the types of cases where self-defence has been in issue and the circumstances where the prosecution has been able to prove beyond reasonable doubt that the accused was not acting in self-defence.⁶

1.4 Report structure

1.4.1 Part 2 of the Report sets out the current law in relation to self-defence in Tasmania. In addition, the interaction of self-defence with the defence of insanity (s 16) and the law in relation to the intoxication (s 17) is addressed. The analysis in Part 2 reveals that there is uncertainty about how the different legal principles in these areas interact.

1.4.2 Part 3 of this Report considers the practical operation of the defence of self-defence in Tasmania as revealed by the investigations conducted into this matter, detailed at [1.3]. As a result of these investigations, the Institute has concluded that the current formulation of the defence in s 46 is not flawed. Nevertheless, the Institute has concluded that the uncertainty that exists in relation to the interaction of ss 46, 16 and 17 justifies clarification of this aspect of the law.

1.4.3 Part 4 of the Report provides an overview of the options for reform that were canvassed in the Issues Paper and sets out the Institute’s recommendations for clarification of the relationship between self-defence and the laws of insanity and intoxication.

1.4.4 Part 5 of the Report examines the operation of the law of self-defence in the context of family violence and makes recommendations for reform that would facilitate reliance on self-defence in this context.

1.4.5 Part 6 of the Report examines the operation of the law relating to the use of force in defending property and makes recommendations accordingly.

⁵ This point is made by E Sheehy, J Stubbs and J Tolmie, ‘Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand’ (2013) 34 *Sydney Law Review* 467, 485.

⁶ These cases were identified from decisions available on AustLII, Westlaw (Australia) and LexisNexis (Australia) and comments on passing sentence available on Supreme Court Sentencing Database (available since 2008) and Tasinlaw (1988–2007).

Part 2

The Law of Self-defence

In this part, the current Tasmanian law of self-defence is set out. In addition, the interaction between self-defence, the defence of insanity and the law relating to intoxication are addressed.

2.1 The current law of self-defence in Tasmania

2.1.1 In Tasmania, the law of self-defence is contained in s 46 of the *Criminal Code* (Tas) which provides:

A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.

Self-defence is a defence of general application relevant to a range of crimes including assault, wounding and causing grievous bodily harm, as well as homicide. Although referred to as a ‘defence’, the prosecution bears the onus of proof in respect of self-defence. This means that if there is sufficient evidence to raise the issue, the prosecution must prove that the accused did not act in self-defence.⁷ Self-defence is a complete defence. If the prosecution is unable to disprove self-defence, the defendant will be acquitted.

2.1.2 It is well settled in Tasmania that, in assessing self-defence, the jury must determine two matters:

- (1) the belief of the defendant in the need to use defensive force; and
- (2) whether the force used was reasonable in the circumstances as the defendant believed them to be.⁸

Was the defendant acting in defence of him/herself or another? (subjective test)

2.1.3 The first matter (whether the defendant believed there was a need to use defensive force) involves a purely subjective test. This means that the jury is concerned with the state of mind of the particular defendant at the time of the offence. The fact finders must put themselves in the position of the defendant and determine what he or she believed the threat or danger to be. The question is not what a reasonable person, in the defendant’s circumstances, would have thought or whether there were reasonable grounds for the defendant’s belief — but whether this particular defendant genuinely believed that his or her situation necessitated the use of force in self-defence or in the defence of another.⁹ Accordingly, the jury must determine whether the defendant genuinely and honestly believed that he or she was acting in self-defence as opposed to responding for some other reason such as revenge or retaliation. In making this determination, the jury may consider various matters, like whether the accused could have retreated or whether his or her response to the purported threat

⁷ *Wright v Tasmania* [2005] TASSC 113.

⁸ *Walsh* (1991) 60 A Crim R 419. Although the decision was overturned on appeal, this aspect of the judgment was not criticised (*Walsh* [1993] TASSC 91).

⁹ This is based on the explanation provided in J Blackwood and K Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Press, 4th ed, 2015) vol 1, 340–41.

was ‘highly disproportionate.’ Such things might indicate an aggressive or retaliatory intention rather than a belief in the need for self-defence.¹⁰

2.1.4 Accordingly, as the test for this component of s 46 is subjective, it may be satisfied even if the defendant was mistaken about the need for self-defence. For example, a person may believe that someone approaching him or her has a gun when in reality there is no weapon of any kind. Alternatively, a threatening situation may exist but the defendant may be mistaken about the nature or gravity of the threat. For example, the defendant may believe that the victim is carrying an iron bar when in fact it is a plastic rake.¹¹ Section 46 does not prevent the defendant from relying on self-defence in these circumstances. Importantly, it does not require that the defendant’s mistake is one that a reasonable person would make or that the mistake is based on reasonable grounds.¹² However, this does not mean that the fact finder (jury or magistrate) must take the defendant at his or her word. The fact finder may not accept that the defendant made a mistake and/or may not accept that the defendant believed there was a need for self-defence. As the Privy Council stated in *Beckford v The Queen*, ‘no jury is going to accept a man’s assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances’.¹³ The (un)reasonableness of a defendant’s belief will clearly be relevant to the jury’s assessment of whether the belief was genuinely held and ‘where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held’.¹⁴ This was made clear in the submission of the Acting Director of Public Prosecutions:

As the law currently stands the submission is often made by the State that a jury should not accept what an accused asserts at trial they believed at the relevant time, what they now assert they believed because such a belief would simply be unreasonable in all the circumstances, and generally people do not believe the unreasonable. Therefore, what the accused claims is not true. ... in reality a jury commonly interposes a test of reasonableness when determining what they accept an accused subjectively believed.

This means that even though a subjective test applies to the accused’s belief in the need to use defensive force, it is not necessarily difficult for the prosecution to prove beyond reasonable doubt that the accused was not acting in self-defence. This is borne out by the Institute’s investigation of the operation of the defence, detailed in Part 3 of this Report.

Was the force used reasonable in the circumstances as the defendant believed them to be? (subjective/objective)

2.1.5 The second matter to be determined in relation to self-defence (see [2.1.2] — whether the defensive force used was reasonable in the circumstances as the accused believed them to be) involves a mixed objective/subjective test. What the accused believed the circumstances to be is determined on a subjective basis. Whether the force used by the accused was reasonable in those circumstances is determined on an objective basis.¹⁵ So, for example, if the defendant was confronted by a person who pointed what the accused believed to be a loaded gun at him or her and threatened to shoot, the defendant’s response is to be assessed on the basis that he or she was threatened with a loaded gun, even if the gun was not loaded.¹⁶ The question then is whether, in those circumstances, the force the

¹⁰ Judicial College of Victoria, *Victorian Criminal Charge Book*, <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm>>.

¹¹ This example is taken from Blackwood and Warner, above n 9, 340–41.

¹² *Walsh* (1991) 60 A Crim R 419, 423 (Slicer J).

¹³ [1988] 3 WLR 611, 620 (Lord Griffiths) cited by Slicer J in *Walsh* at 423.

¹⁴ [1988] 3 WLR 611, 620 (Lord Griffiths).

¹⁵ *Ibid.*

¹⁶ This example was given in *McCullough v The Queen* [1982] Tas R 43 and cited by Slicer J in *Walsh* (1991) 60 A Crim R 419, 423–24. See also Blackwood and Warner, above n 9, 343, 348–351.

accused used in response was reasonable on an objective basis. The jury must decide whether the accused's reaction was reasonable in the situation as they believed it to be, or whether the level of force used by defendant in responding was excessive.

2.1.6 In assessing the defendant's response, (in the circumstances as he or she believed them to be) the jury may have regard to the defendant's particular knowledge, experiences and any sensitivities that may affect his/her perception of the circumstances. In *Walsh*, Slicer J directed the jury that they could take into account:

- the surrounding circumstances (place, darkness, relative size of the two men);
- the defendant's prior knowledge about the deceased (that he was a man with some military experience); and
- the defendant's personal experiences, which make him 'more susceptible to fear of consequences and more likely to perceive a necessity for immediate and drastic action' (that is, that he was a war veteran who had been badly injured, and also that he had been severely injured following an attack by a group of youths).¹⁷

His Honour also stated that expert opinion evidence could be adduced, in general terms, as to the effect of prior traumatic experiences on a person's susceptibility or sensitivity to perceived threats.¹⁸

2.1.7 Despite Slicer J's approach in *Walsh*, it remains uncertain whether *all* the accused's characteristics and attributes are potentially relevant to the determination of the reasonableness of the accused's response in the circumstances, as he or she believed them to be. For example, may the jury take into account the accused's state of self-induced intoxication or his or her deluded belief arising from a mental disorder? This is an area of considerable uncertainty in Tasmania and is discussed in detail at [2.2] and [2.3].

2.2 Self-defence and insanity

The law of insanity

2.2.1 The law of insanity in Tasmania has its origins in the rules laid down in 1843 by the House of Lords' decision in *M'Naghten*.¹⁹ In this case, medical evidence was presented that the accused held a delusional belief that he was being persecuted by the police, on instruction from the Tory party. At his trial, evidence was presented that the accused, acting under that delusion, killed a man believing him to be the Home Secretary, Sir Robert Peel.²⁰ *M'Naghten* was acquitted on the grounds of insanity and, as a result of the considerable public uproar that followed, the Queen asked the House of Lords to review the matter. In response, the House of Lords set out the rules of insanity. These rules first create a presumption of sanity and then define the circumstances in which a person may rely on the defence

¹⁷ *Walsh* (1991) 60 A Crim R 419, 423–24. This was not criticised by the Court of Criminal Appeal. See also *R v Katarzynski* [2002] NSWSC 613, [26] (Howie J) (endorsed by the Court of Criminal Appeal in *Elias v R* [2006] NSWCCA 365; *R v Burgess* (2005) 152 A Crim R 100); *R v Forbes* (2005) 160 A Crim R 1, [86].

¹⁸ *Walsh* (1991) 60 A Crim R 419, 424. In support of this proposition Slicer J relied on the fact that opinion evidence may be adduced to assist the jury to determine whether a person was provoked within the meaning of s 160 of the *Criminal Code*. Section 160 has since been repealed. His Honour also relied on the New Zealand decision in *R v Wang* [199] 2 NZLR 529 where evidence of battered woman syndrome was considered admissible in relation to the issue of self-defence (although the defence was ultimately withheld for the jury in that case).

¹⁹ (1843) 10 Cl&F 200; 8 ER 718. See F McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, 1993) 18–26; for a summary of the history of the insanity defence see R Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon Press, 1995) 92–6.

²⁰ See summary in A Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law* (LexisNexis, 2001) 179–180.

of insanity. In Tasmania, the presumption of sanity is set down in s 15 of the *Criminal Code*, which provides, '[e]very person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved'. This means that the prosecution does not need to prove in every trial that the defendant is sane. It can rely on the presumption of sanity until it is displaced by evidence to the contrary.²¹

2.2.2 The *M'Naghten* Rules find expression in s 16 of the *Criminal Code* (Tas), which provides:

16. Insanity

- (1) A person is not criminally responsible for an act done or an omission made by him —
 - (a) when afflicted with mental disease to such an extent as to render him incapable of —
 - (i) understanding the physical character of such act or omission; or
 - (ii) knowing that such act or omission was one which he ought not to do or make; or
 - (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.
- (2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.
- (3) A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.
- (4) For the purpose of this section the term *mental disease* includes natural imbecility

2.2.3 The theoretical basis of the defence of insanity rests on a fundamental principle of modern criminal law — the idea of individual responsibility: 'the idea of the subject as a rational agent with capacities of both cognition and self-control, and hence the idea of criminal liability is rooted in individual agency'.²² Individual responsibility is seen to be dependent on 'the principle of capacity and a fair opportunity to act otherwise'.²³ It is for this reason that the criminal law has long recognised

²¹ *Hawkins* (1994) 179 CLR 500, 507. This can be contrasted with the view expressed in *R v Falconer* (1990) 171 CLR 30 that the 'presumption that the accused is of sound mind ... imposed a legal burden of persuasion on the defence': I Leader-Elliott, 'Case Comment: *Hawkins v the Queen*' (1994) 18 *Criminal Law Journal* 347, 351. Leader-Elliott suggests that 'it must now be taken that the object of the presumption is to ensure that the issues of fault, voluntariness and insanity can be resolved without speculation about possible mental abnormalities unless there is acceptable evidence — usually medical — of abnormality, disorder or disease' (at 351).

²² N Lacey, C Wells and O Quick, *Reconstructing Criminal Law* (Cambridge University Press, 4th ed, 2010) 95.

²³ C Wells, 'Provocation: The Case for Abolition' in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 1984). Bronitt and McSherry write that '[t]he concept of criminal responsibility is based on the notion that individuals possess the capacity to make rational choices in performing or refraining from performing acts': S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 201. [4.05]. See also P Fairall and S Yeo, *Criminal Defences* (Lexis Nexis, 4th ed, 2005) [13.1]; S Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) 51–2.

‘the notion that ... the insane lack the ability to reason’ and this is reflected in ‘laws excusing them from responsibility for criminal acts’.²⁴ As noted by Lacey, Wells and Quick:

A plea of exemption such as insanity goes to the defendant’s capacity to be addressed as a normal subject of criminal law: if a defendant’s mental capacity is such that fundamental questions can be raised about her cognitive or, perhaps, volitional capacities, it might be argued that they are not even the kind of subject whom criminal law aspires to address.²⁵

Fairall and Yeo recognise that ‘the law would be unduly harsh to punish people who are unable to choose or control their conduct’.²⁶ They also point to the lack of utility in punishing people who are mentally impaired given that they ‘would not have been deterred by a threat of punishment’.²⁷

2.2.4 Despite its strong theoretical basis, the law of insanity has been controversial.²⁸ Problems are created by the mismatch between the ‘outmoded *M’Naghten* Rules’²⁹ (legal insanity) and contemporary psychiatric knowledge about mental illness (medical insanity).³⁰ As Ormerod writes, ‘[i]t is surprising that in the twenty-first century the law is based not of any medical understanding of mental illness but on a distinct legal criterion of responsibility’.³¹ There is also a need to strike ‘the right balance ... between fairness to mentally disordered accused persons and societal protection against their misconduct’.³² While a reconsideration of the defence of insanity is beyond the scope of this Report, the Institute considers that a review of the insanity defence is warranted given that the law of insanity ‘pre-dates the inception of modern psychiatry and psychology as professional disciplines’.³³ Particular concerns are the scope of the legal concept of mental disease (compared to the medical understanding of mental illness) and the focus on an accused’s incapacity rather than his or her actual awareness or understanding.³⁴

Recommendation 1:

A review of the defence of insanity contained in the *Criminal Code* (Tas) s 16 should be undertaken to assess the extent to which the criminal law reflects contemporary medical knowledge about mental illness.

²⁴ Bronitt and McSherry, above n 23 [4.10].

²⁵ Lacey, Wells and Quick, above n 22, 120.

²⁶ Fairall and Yeo, above n 23, [13.1]. This is an argument from the perspective of retributive theory.

²⁷ Ibid. In *R v Porter* (1933) 55 CLR 182, Dixon J stated that ‘it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment ... What is the utility of punishing people if they be beyond the control of the law for reasons of mental health’.

²⁸ Blackwood and Warner, above n 9, 280; S Yeo, ‘Commonwealth and International Perspectives on the Insanity Defence’ (2008) 32 *Crim LJ* 7; N Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982).

²⁹ Fairall and Yeo, above n 23 [13.65].

³⁰ See the Victorian Law Reform Commission (VLRC), *Defences to Homicide*, Final Report (2004) [5.11]–[5.44]; New South Wales Law Reform Commission (NSWLRC), *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Report No 138 (2013) Chapter Three; Bronitt and McSherry above n 23, [4.30]; A Schloenhardt, *Queensland Criminal Law* (Oxford, 4th ed, 2015) [17.1.2].

³¹ D Ormerod, *Smith and Hogan’s Criminal Law* (Oxford University Press, 13th ed, 2011) 294.

³² Fairall and Yeo, above n 23, [13.66]; VLRC, *Defences to Homicide*, Options Paper (2003) [5.15]–[5.19]; VLRC, above n 30; VLRC, *Review of the Crimes (Mental Impairment and Fitness to be Tried Act 1997*, Consultation Paper (2013); NSWLRC, above n 30; New Zealand Law Commission (NZLC), *Mental Impairment, Decision-making and the Insanity Defence*, Report 120 (2010); Law Commission, UK, *Criminal Liability: Insanity and Automatism*, Discussion Paper (2013).

³³ Schloenhardt, above n 30, [17.1.2].

³⁴ See A Simester and W Brookbanks, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2012), 322–340, 347; Bronitt and McSherry, above n 23 (2010) [4.30]–[4.35]; B McSherry, ‘Defining What is a “Disease of the Mind”: The Untenability of Current Legal Interpretations’ (1993) 1 *Journal of Law and Medicine* 76; VLRC, above n 30, [5.11]–[5.44]; NSWLRC, above n 30, [3.13]–[3.109].

Self-defence and insane delusions

2.2.5 The question that is explored here is whether an insane delusion can provide the basis for a claim of self-defence. As a preliminary matter, in considering the interaction of self-defence and insanity, the practical and legal implications for the defendant of relying on self-defence as opposed to the defence of insanity need to be acknowledged. As noted earlier, self-defence is a complete defence. In contrast, the defence of insanity may result only in a qualified acquittal — a verdict of not guilty on the grounds of insanity.³⁵ The defendant may be made the subject of a restriction order, a supervision order, a continuing care order or granted a conditional or unconditional release.³⁶ Further, differences exist in relation to the onus or burden of proof, ie who has the responsibility for proving the charge, and the standard of proof (the level of proof demanded). Self-defence must be disproved beyond reasonable doubt by the prosecution³⁷ whereas the defence of insanity must be proved on the balance of probabilities by the defence.³⁸ Clearly, there are reasons why a defendant may prefer to rely on self-defence rather than insanity.³⁹ However, for the purpose of this Report the central issue is whether mistakes arising from insane delusions can ever ground the defence of self-defence or whether they can only be relied upon in relation to the defence of insanity.

2.2.6 Delusions are closely associated in modern psychiatry with the concept of insanity: insanity is understood to be ‘a pervasive inability to engage reality: as a failure of reality testing to use the term of art favoured by psychiatrists’.⁴⁰ The loss of contact with reality is the feature that distinguishes psychotic disorders from ‘less serious neurotic and personality disorders’.⁴¹ Delusions are a key feature of psychotic illnesses, such as schizophrenia (including paranoid schizophrenia)⁴² and delusional disorder.⁴³ Delusions are defined as ‘overriding, rigid, convictions which create a self-evident, private and isolating reality requiring no proof’.⁴⁴ Delusions are ‘false, fixed ideas that are not shared by others’⁴⁵ and are ‘not in keeping with the culture’.⁴⁶ Delusions can be categorised as bizarre — those that involve a phenomenon that the person’s culture would regard as totally implausible (for example, a belief that the person is being controlled by aliens) or non-bizarre — those that are about situations that can occur in real life (for example, that someone is unfaithful or trying to hurt them).⁴⁷

³⁵ The form of the verdict where the accused person is acquitted on the ground of insanity is provided in s 383(2) of the *Criminal Code*: ‘If the jury acquit the accused person on the ground of insanity the verdict shall be that, [t]he accused committed the act [or made the omission] charged, but is not guilty, on the ground that he was insane at the time so as not to be responsible according to law’.

³⁶ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21.

³⁷ See [2.1.1].

³⁸ Blackwood and Warner, above n 9, 275.

³⁹ Other matters might be the stigma attached to a finding of insanity. Empirical evidence to support the view that insanity is infrequently relied upon is found in the VLRC’s study of Victorian prosecutions for homicide incidents between 1 July 1997 and 30 June 2001. Of the 94 homicide offenders identified who proceeded to trial, ten defendants relied on insanity or mental impairment and nine were found not guilty by reason of insanity/mental impairment (see VLRC, above n 32, [2.89]).

⁴⁰ McAuley, above n 19, 35 cited in S Bronitt and B McSherry, above n 23, [4.35].

⁴¹ McAuley, above n 19, 35.

⁴² Kaplan and Sadock, *Kaplan & Sadock’s Synopsis of Psychiatry: Behavioural Sciences/Clinical Psychiatry* (Wolters Kluwer, 11th ed, 2015) 292.

⁴³ *Ibid* 292.

⁴⁴ MA Sims, ‘Descriptive phenomenology’, in N Gleber, J Andreasen, J Lopez-Ibor Jr, J Geddes (eds), *New Oxford Textbook of Psychiatry* (Oxford, 2nd ed, 2009) vol 1, 51.

⁴⁵ Kaplan and Sadock, above n 42, 202.

⁴⁶ *Ibid* 330.

⁴⁷ *Ibid* 202, 330, 332–35.

2.2.7 A delusion arising from a mental illness may be relevant to establishing one of the consequences prescribed for the insanity defence contained in s 16(1) of the *Criminal Code* (Tas).⁴⁸ This is uncontroversial. A delusion may cause an offender to lack the capacity to understand the physical character of the act, as where he or she kills under an insane delusion that he was squeezing a lemon (rather than strangling a person).⁴⁹ Similarly, it may cause an offender to lack the capacity to know that the act or omission was one that he or she ought not do or make under section 16(1)(a)(ii).⁵⁰ For example in *McHenry v Western Australia (No 2)*,⁵¹ the accused killed his brother under the deluded belief that his brother was a threat to him personally and to the world. He believed that his brother was an alien linked to spiders and Satan and that they were planning to blow up the planet. By killing his brother he thought he would destroy the spider and save many from Satan. He also believed he would protect his brother from Satan. Expert evidence was given that the accused suffered from paranoid schizophrenia evidenced by auditory hallucinations (hearing voices) and delusional beliefs (religious and in extra-terrestrial aliens), and that this deprived him of the capacity to know that he ought not to do the act of killing. The accused was acquitted on account of his unsoundness of mind. A delusion may also cause a person to act under an uncontrollable impulse. For example, in *Western Australia v Strabach (No 2)*, during a psychotic episode, the accused developed a delusional belief that the victim was a paedophile. As a result, she lacked the capacity to control her actions when she killed him.⁵²

2.2.8 In contrast, there is less certainty about the operation of s 16(3) of the *Criminal Code* (Tas), which specifically refers to the effect of delusions on a defendant's criminal responsibility:

A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.⁵³

This provision substantially reproduces the statement of the House of Lords in *M'Naghten's* case about the effect of insane delusions on criminal responsibility. Its meaning and scope has remained obscure. In particular, there is uncertainty about the interaction of s 16(3) and s 46 (self-defence).

⁴⁸ The *Criminal Code* (Tas) s 16(1) provides that a person is not criminally responsible for an act done when afflicted with a mental disease to such an extent as to render them incapable of understanding the physical character of the act (first limb of the insanity defence) or knowing that such an act was one which they ought not do (second limb of the insanity defence). See further Blackwood and Warner, above n 9, 248–51.

⁴⁹ This example is provided in C Howard, *Criminal Law* (Law Book, 4th ed, 1982) 333 cited in Blackwood and Warner, above n 9, 249. Simester and Brookbanks make the point that this example (and other 'bizarre' examples traditionally provided such as a person who puts a child on the fire believing they were putting wood on the fire) are unlikely to arise: Simester and Brookbanks, above n 34, 348. See also W Brookbanks, 'Insanity' in W Brookbanks and A Simpson (eds), *Psychiatry and the Law* (LexisNexis, 2007) 6.4.5.

⁵⁰ See *Walsh v R* [1993] TASSC 91; *Salter v The Queen* (1991) 61 A Crim R 160 (although the expert opinion evidence of the nature of the accused's delusional belief and its effect on his capacity to know that he ought not kill his mother was not accepted by the jury). See further Blackwood and Warner, above n 9, 251–56.

⁵¹ [2010] WASCA 71.

⁵² [2012] WASC 227. This is the equivalent provision to the *Criminal Code* (Tas) s 16(2). See further, Blackwood and Warner, above n 9, 256–61.

⁵³ There are equivalent provisions in other Code jurisdictions: see *Criminal Code* (WA) s 27(2) and *Criminal Code* (Qld) s 27(2). A search of case law on Westlaw and Lexis Nexis Australia disclosed three cases where the application of s 27(2) in relation to a delusional belief in the need to use defensive force was raised as an issue: *Cooley v Western Australia* (2005) 155 A Crim R 528; *Western Australia v McDonald (No 2)* [2010] WASC 355; *Garrett v The Queen* [1999] WASCA 169. In all these cases, reliance on self-defence arising from a delusion was considered to give rise to an additional basis on which the accused could establish insanity.

Delusions, section 16(3) of the Criminal Code 1924 (Tas) and self-defence

2.2.9 *Walsh*⁵⁴ is the leading case on the relationship between delusions within the meaning of s 16(3) and self-defence in s 46 of the *Criminal Code* (Tas). In this case, the accused was charged with murder after he shot and killed an acquaintance at close range. Prior to the killing, there had been no hostility between the accused and the deceased. Both men had been drinking together at a party and had made a plan to go shooting wallabies. They arranged to drop another man at home and it was here that the shooting occurred. The accused had warned the deceased about keeping his dogs under control. When the vehicle stopped, two dogs belonging to the deceased were outside the vehicle barking. The accused's account was that:

I sang out to Peter, 'For God's sake Peter take control of those dogs' ... I had been nursing the gun in the car and I just carried it with me ... I stopped a little away from the wheels and axle and turned towards the car. Peter was walking from the rear of the vehicle to the driver's side door. He just turned and headed straight towards me. His eyes were squinting. I sensed danger. I can't say why. I just knew it. I knew he was going to bash me. I said, 'Stop Pete'. He kept coming. I said, 'Stop Peter'. He just kept coming. I can't explain why it happened. It just clicked. It just clicked. I had to stop him. He was only two or three yards away. I fired.⁵⁵

2.2.10 At trial, the defence did not seek to rely on insanity. Instead the accused sought to rely on self-defence on the basis of a hallucinatory belief that at 'the time of the discharge of the weapon the accused believed that he was in Korea defending himself from an enemy soldier'.⁵⁶ The accused had been a soldier in the Korean War where he had been severely wounded by a mortar explosion. Subsequently, he had on-going health problems that required hospital admission and, on some occasions, shock treatment. The defence sought to adduce the accused's medical files that 'showed a history consistent with a longstanding mental disorder caused by war experience'.⁵⁷ The defence also sought to lead expert evidence from a psychiatrist that the accused was suffering from post-traumatic stress disorder and, as a manifestation of that disorder, might have believed that he was on active service in Korea.⁵⁸

2.2.11 The trial judge, Slicer J, ruled that the accused's delusions could be relied upon under s 16(3) for the purpose of self-defence in s 46. However, his Honour held that self-defence would only be available in this way once the jury rejected the defence of insanity under ss 16(1) and 16(2).⁵⁹ This could occur where the jury was *not* satisfied on the balance of probabilities that the accused's disorder amounted to a 'mental disease' for the purposes of the insanity defence or that the mental disease affected him in one of the ways set out in ss 16(1) and (2). In these circumstances, Slicer J ruled that the jury could consider the accused's delusion, pursuant to s 16(3), for the purposes of self-defence. The Court of Criminal Appeal subsequently rejected this approach. Nevertheless, it is of interest because it shows how insane delusions could be relied upon in relation to both the defence of insanity and self-defence. This approach has been referred to in West Australian cases, though not relied upon.⁶⁰

⁵⁴ (1991) 60 A Crim R 419; [1993] TASSC 91.

⁵⁵ *Walsh*, 1991 60 A Crim R 419, 421 (Slicer J).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 422.

⁵⁸ *Ibid.*

⁵⁹ This accords with the approach to delusions in the *M'Naghten* Rules, see G Williams, *Criminal Law: The General Part* (2nd ed, 1961) [160].

⁶⁰ Slicer J's analysis of the interaction between a deluded belief falling short of sanity and self-defence was referred to by Murray J in *Garrett v R* [1999] WASCA 169, [79] and Hall J in *Western Australia v McDonald* [2010] WASC 355, [158]. In both these cases it was ruled that the accused's delusion did not give rise to a claim of lawful self-defence. It is noted that neither of the Western Australia cases made reference to the Court of Criminal Appeal decision overturning Slicer J's approach.

2.2.12 The jury convicted Walsh of murder. The Court of Criminal Appeal rejected his appeal stating that the trial judge's direction that the accused's deluded beliefs could be considered for the purposes of self-defence after the defence of insanity had been properly considered was unduly favourable to the accused. Further, the Court considered that the accused's action in shooting his acquaintance could not be regarded as a reasonable response, if he was sane. However, the Court accepted the expert evidence in relation to the accused's mental disease and quashed the accused's conviction for murder and substituted a verdict of not guilty on the grounds of insanity.

2.2.13 The Court of Criminal Appeal's view was that insane delusions are not relevant to self-defence. They would only be relevant to the defence of insanity. Only the accused's sane beliefs could provide a basis for the accused's subjective belief in the need for self-defence. The Court considered that, if accepted by the jury, the evidence of the accused's deluded belief brought him within s 16(1)(a)(ii) of the *Criminal Code*, and so, that limb of the insanity defence governed the accused's criminal responsibility. In the words of Crawford J:

On the evidence, if the appellant believed that he was being attacked or approached by an enemy soldier or by some assailant from Sydney the cause of that belief was his mental disease, that is to say the post traumatic stress disorder. If he acted in defence of himself under the influence of such a belief he was insane within the second limb of the M'Naghten rules because he was affected with mental disease to such an extent as to render him incapable of knowing that his act was one which he ought not to do (s16(1)(a)(ii)).⁶¹

The effect of the Court of Criminal Appeal's decision in *Walsh* is to restrict the relevance of insane delusions to the defence of insanity. Accordingly, if the jury reject the defence of insanity, they must judge the reasonableness of the accused's conduct on the basis that he is sane.⁶² Section 16(3) cannot be applied to extend the relevance of an insane delusion to the defence of self-defence.

2.2.14 While the Court of Criminal Appeal's decision in *Walsh* seems to restrict the operation of s 16(3) in relation to the defence of self-defence in s 46 of the *Criminal Code* (Tas), several issues remain unresolved:

- (1) Are there any circumstances where the jury might have regard to evidence of a mental disease and its effects when considering s 46 in circumstances where the defence of insanity has been rejected? In *Walsh*, the Court of Criminal Appeal left unresolved the question whether 'evidence concerning a mental disease and its effects may ever be taken into account by a jury when considering s 46 in circumstances where the defence of insanity has been rejected'.⁶³
- (2) To what extent does the High Court decision in *Hawkins v the Queen*⁶⁴ undermine the authority of the Court of Criminal Appeal decision in *Walsh*? This uncertainty arises because the High Court in *Hawkins v the Queen*⁶⁵ adopted a different approach to that of Tasmanian Court of Criminal Appeal in *Walsh* in relation to the relevance of expert opinion evidence of mental illness in circumstances where the jury has rejected the defence of insanity. In both *Walsh* and *Hawkins*, the defence wished to use evidence about the accused's mental impairment caused by a mental illness to deny the unlawfulness of the accused's conduct. However, different grounds were advanced for denying the unlawfulness of the accused's conduct in each case. In *Walsh* the defence sought to deny that the act was unlawful on the basis that the accused was acting in self-defence. In *Hawkins* the defence sought to deny the specific intention for the offence. In both cases, the issue for the court to decide was whether the expert opinion evidence of mental impairment could be used for a dual purpose — first, in

⁶¹ *Walsh* [1993] TASSC 91, [22] (Crawford J).

⁶² *Ibid* [24].

⁶³ *Ibid* [26].

⁶⁴ (1994) 179 CLR 500.

⁶⁵ *Ibid*.

relation to the insanity defence, and then, if insanity was rejected, as the basis for a claim of self-defence (*Walsh*) or to deny the specific intent of the offence (*Hawkins*). In *Walsh*, the Court of Criminal Appeal ruled that, in the circumstances of that case, the evidence could not be used for a dual purpose. In contrast, in *Hawkins*,⁶⁶ in the context of a denial of specific intent, the High Court said that the expert evidence could be used for the dual purpose sought. While *Walsh* is still binding authority in Tasmania in relation to the interaction of insanity and self-defence, it remains to be seen how, in light of the approach of the High Court in *Hawkins*, the issue might be approached if the Court of Criminal Appeal reconsidered the matter.

- (3) Is s 16(3) limited to insane delusions or does it apply to delusions more generally? On the basis that s 16(3) does not refer to insane delusions, some commentators have suggested that ‘specific delusions may be exempt from criminal responsibility even though they are not caused by mental illness’.⁶⁷ Read in this way, s 16(3) could apply to a delusion arising from drug-induced psychosis rather than from an underlying mental disease. However, the opposing view is that s 16(3) should be read as applying only to delusions that are produced by a mental disease. This interpretation is supported by the location of s 16(3) within the provision that sets out the insanity defence. This issue is unresolved.
- (4) If an accused is able to rely on a sane delusion under s 16(3) as a basis for raising self-defence, is the accused entitled to a complete or a qualified acquittal? In Tasmania, reliance on s 16(3) has commonly been considered to provide the accused with a basis for raising self-defence under s 46 and, if the prosecution cannot prove beyond reasonable doubt that the accused’s use of force was excessive, the accused would receive a complete acquittal.⁶⁸ A contrary position is that s 46 works within s 16 to provide the accused with an additional way of proving insanity and obtaining a qualified acquittal; that is, not guilty by reason of insanity.⁶⁹

Accordingly, it is the view of the Institute that there is a need to clarify the interaction of the law of self-defence and insanity.

⁶⁶ Ibid.

⁶⁷ Fairall and Yeo, above n 23, [13.32].

⁶⁸ This is the view of Blackwood and Warner, *Tasmanian Criminal Law: Texts and Cases Volume 1* (University of Tasmania Law Press, 2006) 230. It would also appear to be the approach of both Slicer J and the Court of Criminal Appeal in *Walsh*, who viewed the competing claims as being of reliance on insanity (qualified acquittal) or reliance on s 16(3) for the purposes of self-defence (complete acquittal).

⁶⁹ This is certainly the effect of the *M’Naghten* Rules on delusions. As Sullivan observes in relation to the third limb of *M’Naghten*, ‘[t]he remarks that D will be “exempt from punishment”, is intended to mean that D will be able to rely on the insanity defence, not because of a reliance on self-defence’: J Child and G Sullivan, ‘When Does the Insanity Defence Apply? Some Recent Cases’ (2014) *Criminal Law Review* 788, 792. See D Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, 3rd ed, 2012) [27–017]; Law Commission (UK), *Insanity and Automatism: Supplementary Material to the Scoping Paper*, 11 July 2012, 4.59 fn 62. See also *Western Australia v Macdonald* [No 2] [2010] WASC 355. It was also the approach in New Zealand before the provision dealing with delusions was removed: see Brookbanks and Simester who write that ‘the *McNaghten* Rules and earlier New Zealand legislation contained a provision that persons suffering “specific delusions”, but otherwise sane, were not to be acquitted on the grounds of insanity unless the delusions would, if true, have justified or excused the act’: above n 34, 328. Although more recently, in the United Kingdom, an offender relied on an insane delusion to provide the basis for his genuine belief in the need for self-defence but not for the purposes of assessing whether the amount of force used was reasonable: see *R v Oye* [2014] 1 WLR 3354 Crim 1725, [36] (Davis LJ); R Mackay, ‘*R v SO: Defendant Charged with Affray and Assault After Attacking Police — Crown Accepting Psychiatric Evidence that Defendant Believed Evil Spirits were Trying to Harm Him*’ (2014) *Criminal Law Review* 544; T Storey, ‘Self-Defence: Insane Delusions and Reasonable Force’ (2014) 78 *Journal of Criminal Law* 12.

Recommendation 2:

Amendments should be made to the *Criminal Code* (Tas) to clarify the interaction of the law of self-defence and the defence of insanity.

2.3 Self-defence and intoxication

2.3.1 A separate area of uncertainty is the relationship between the law of self-defence and the law relating to intoxication. The Institute considered the relationship between self-induced intoxication and the law of self-defence in its review of the law of intoxication.⁷⁰ The discussion that follows is based on that prior review of the law. Unlike the defence of insanity, intoxication is not a separate defence. Instead, evidence of intoxication may be admissible to negate the fault or mental elements of an offence.⁷¹ It may also be relevant to other defences that ‘require evidence of the beliefs which prompted the accused to engage in the conduct comprising the basis for the charge’.⁷² Further, unlike insanity, introducing evidence of intoxication does not shift the burden of proof. This means that in relation to evidence of intoxication the burden remains with the prosecution to prove beyond reasonable doubt that the accused possessed the requisite mental element for the offence.⁷³

2.3.2 Because evidence of intoxication may be relevant to defences involving the accused’s beliefs,⁷⁴ it should logically be relevant to the defence of self-defence. It is clearly *potentially* relevant to the subjective belief of the defendant in the need to use force and the objective assessment of whether, in the circumstances that the defendant believed to exist, the force used was reasonable. However, it is unclear whether an accused will be permitted to rely on evidence of intoxication to explain his or her mistaken belief in the need for self-defence. Similarly, it is unclear whether an accused’s intoxication may be considered to be part of the ‘circumstances as the accused believed to exist’ for the purposes of assessing the reasonableness of the force used.

The defendant’s belief in need to use force

2.3.3 There are a number of grounds for arguing that evidence of intoxication should be admissible as relevant to the question whether the defendant genuinely believed there was a need for self-defence:

- this approach is consistent with the 1987 amendment of s 46, which removed the requirement for the accused’s belief in the need for self-defence be held on ‘reasonable grounds’;
- this approach accords with the recognition in *McCullough v The Queen*⁷⁵ (decided under the old provision) that intoxication was relevant to whether or not the accused had an apprehension and belief in the need for self-defence (subjective test);

⁷⁰ See TLRI, *Intoxication and Criminal Responsibility*, Final Report No 7 (2006).

⁷¹ *Criminal Code* (Tas) s 17 in relation to the capacity to form specific intent; *Attorney-General’s Reference No 1 of 1996* (*Weiderman’s case*) (1998) 7 Tas R 293 in relation to the mental element of actual knowledge. See Blackwood and Warner, above n 9, Chapter Seven.

⁷² Fairall and Yeo, above n 23, [12.35].

⁷³ It is important to note that relatively small numbers of offenders rely on evidence of intoxication at trial when compared to the number of offenders who commit crimes while under the influence of drugs or alcohol: TLRI, *Intoxication and Criminal Responsibility*, above n 70, [1.1.2]–[1.1.3].

⁷⁴ Fairall and Yeo, above n 23, [12.35].

⁷⁵ [1982] Tas R 43.

- the fact that since the decision in *Weiderman*,⁷⁶ s 17 of the *Criminal Code* (the intoxication provisions) does not cover the field in relation to the admissibility of evidence of intoxication; and
- this approach is in conformity with the New South Wales decision in *Katarzynski*⁷⁷ where it was held that self-induced intoxication is relevant to the defendant's belief that it was necessary to act as he did in self-defence. It was further held to be relevant when considering the circumstances as the defendant perceived them to be for the purpose of assessing the reasonableness of the force used. This is also the approach in Victoria.⁷⁸

2.3.4 On the other hand, the Institute recognises that policy considerations cannot be disregarded in relation to issues of intoxication in the criminal law context. For example, in England, such policy considerations have resulted in the exclusion of evidence of self-induced intoxication in relation to self-defence. So, even though England has abandoned the objective test of reasonableness in favour of a purely subjective enquiry as to whether the defendant's belief in self-defence was honestly held, evidence of intoxication cannot be taken into account in assessing that matter.⁷⁹ The strength that such policy considerations may yet have in Tasmania can be seen in comments of the former Chief Justice in *Weiderman* regarding the possibility that intoxication might be relevant to self-defence:

I find it hard to imagine that Parliament ever contemplated the possibility that this might be the case and intended it to be so.⁸⁰

It remains to be seen whether the current Tasmanian Supreme Court would have the same view if this issue arose for determination.

The reasonableness of the force used in circumstances as the accused believed them to be

2.3.5 As noted at [2.1.5], the assessment of the force the defendant used in self-defence has two components: (1) a determination of what the accused believed the circumstances to be (a subjective test); (2) whether the force used was, in those circumstances, reasonable (an objective test). There is uncertainty about whether and how evidence of intoxication relates to both these matters.

2.3.6 Aside from policy considerations that may preclude reliance on evidence of intoxication, it would appear that intoxication should be relevant and admissible at least in relation to the question of what the accused believed the circumstances to be. This interpretive approach clearly accords with the wording of s 46, which makes it clear that the reasonableness of the force used is to be assessed 'in the circumstances as [the defendant] *believes* them to be' (emphasis added). It is also consistent with the interpretation of an identical self-defence provision in New Zealand⁸¹ and similar provisions in New South Wales⁸² and Victoria.⁸³

⁷⁶ (1998) 7 Tas R 293.

⁷⁷ *R v Katarzynski* [2002] NSWSC 613, [28] (Howie J).

⁷⁸ Judicial College of Victoria, *Victorian Criminal Charge Book*, 8.9.3.1 [64]–[68]; 8.9.3.2 <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19074.htm>>.

⁷⁹ See *R v O'Grady* [1987] 3 WLR 321, 326.

⁸⁰ (1998) 7 Tas R 293, 302 (Cox CJ).

⁸¹ *Simpson v R* [2010] NSCA 140, [68]. This is discussed in greater detail in the TLRI, *Intoxication and Criminal Responsibility*, above n 70 [6.9.11]. Simester and Brookbank write that the 'statutory formula [in s 48 *Crimes Act 1961*] overrides the general rule [that a D cannot call his intoxication in aid to explain why he made the mistake], and allows a defendant to rely on a mistaken view of circumstances even when the mistake is attributable to self-induced intoxication': above n 34, 358.

⁸² *R v Katarzynski* [2002] NSWSC 613. This is discussed in greater detail in TLRI, *Intoxication and Criminal Responsibility*, above n 70, [6.9.13]–[6.9.19].

⁸³ *Crimes Act 1958* (Vic) s 322T(2).

2.3.7 Finally, there is the question whether the jury should be able to take the defendant's intoxicated state into account when determining whether the force he or she used was reasonable. In its Final Report on *Intoxication*, the Institute concluded that the standard of reasonableness was not altered by an accused's intoxicated and thus distorted perception of the amount of force that was appropriate because 'it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgement might be unreasonable if he was sober, but reasonable because he was drunk'.⁸⁴ This was also the approach adopted in New South Wales and Victoria.⁸⁵ However, these matters have not been resolved in Tasmania and for this reason the Institute recommended that the law of intoxication be reformed to resolve the uncertainty. The Institute still considers that reform is necessary.

Recommendation 3:

The *Criminal Code* (Tas) should be amended to clarify the relationship between self-induced intoxication and self-defence.

⁸⁴ *McCullough v The Queen* [1982] Tas R 43, 53 (the Court).

⁸⁵ See *R v Katarzynski* [2002] NSWSC 613, [26] (Howie J); *Crimes Act 1958* (Vic) s 322T(2).

Part 3

The Operation of Self-defence in Tasmania

It has been over 25 years since the law in Tasmania was amended to provide for a greater focus on the accused's state of mind in applying the defence of self-defence. It is therefore timely to attempt to assess how the amended defence is operating in practice. The investigative measures used to undertake this assessment are detailed at [1.3]. In summary, they comprised:

- a survey of people with specialised knowledge (legal professionals) about the practical operation of s 46. The survey questions are set out at [1.3.3];
- an examination of newspaper reports about cases where there had been acquittals and self-defence had been in issue;
- an examination of the appeal cases and sentencing decisions where the defendant had raised the issue of self-defence at trial;
- seeking submissions to the Issues Paper.

That investigation revealed that it is generally accepted that the current formulation of self-defence in s 46 is not inherently flawed and works well but that certain aspects of the law require clarification.

3.1 Survey of legal professionals

The Institute received 18 responses to the survey — one from a judge, one from a magistrate, 15 from prosecutors (eight DPP and seven police) and one from defence counsel.

3.1.1 Five main observations were derived from these responses:

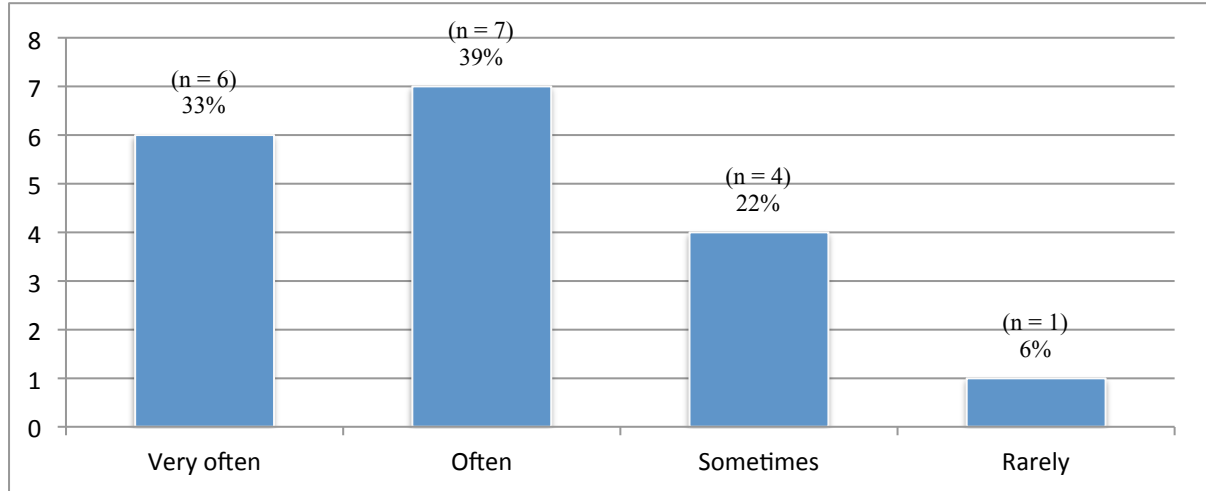
- (1) that while self-defence is often raised in response to offences of personal violence (assault, wounding, grievous bodily harm, homicide), it is not usually successful;
- (2) an accused's assertion of self-defence is sometimes based on an impaired perception due to intoxication;
- (3) an accused's assertion of self-defence is infrequently based on an impaired perception due to mental illness;
- (4) that there are few cases (if any) where an accused has successfully relied on self-defence where his or her perception of the threat has been affected by intoxication and/or mental illness; and
- (5) that the defence mostly works well. However, some respondents raised concerns about reliance on self-defence where the offender was intoxicated or suffering a mental illness and some respondents said that the defence is difficult to understand.

These observations are considered in detail below.

(1) Reliance on self-defence

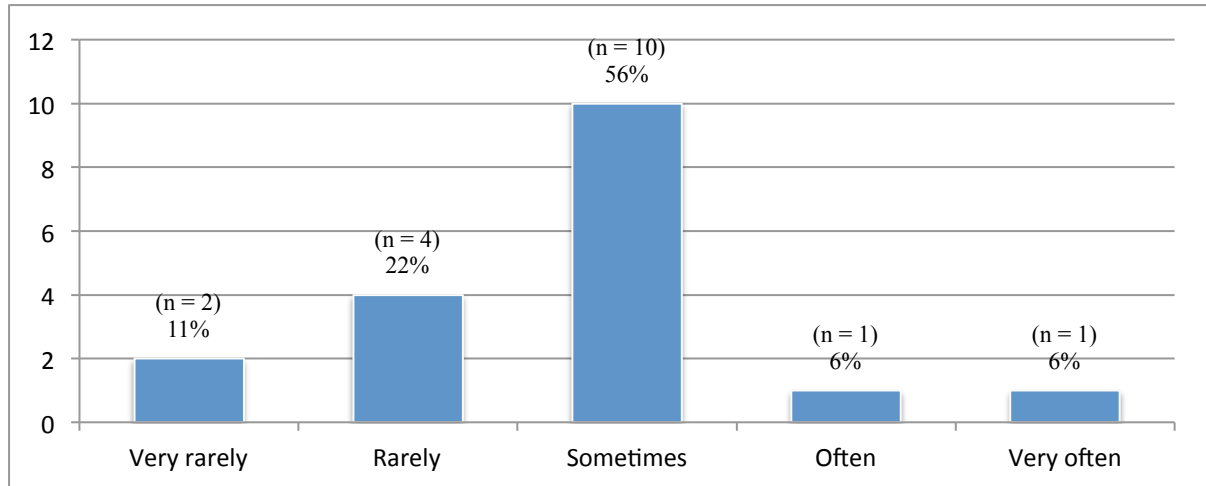
3.1.2 The responses received in relation to this matter are tabulated in Figure 1. As might be expected it shows that, in the experience of the respondents, self-defence is frequently raised in relation to offences of personal violence with 72% of respondents indicating that self-defence was often or very often raised by offenders in relation to offences of personal violence.

Figure 1: Frequency of reliance on self-defence in offences of personal violence



3.1.3 However, as indicated by Figure 2, it was the general view of the respondents that self-defence is not invariably successful with 55.5% of respondents saying that it is only sometimes successful and 33% indicating that self-defence is rarely or very rarely successful.

Figure 2: Success of self-defence in offences of personal violence*

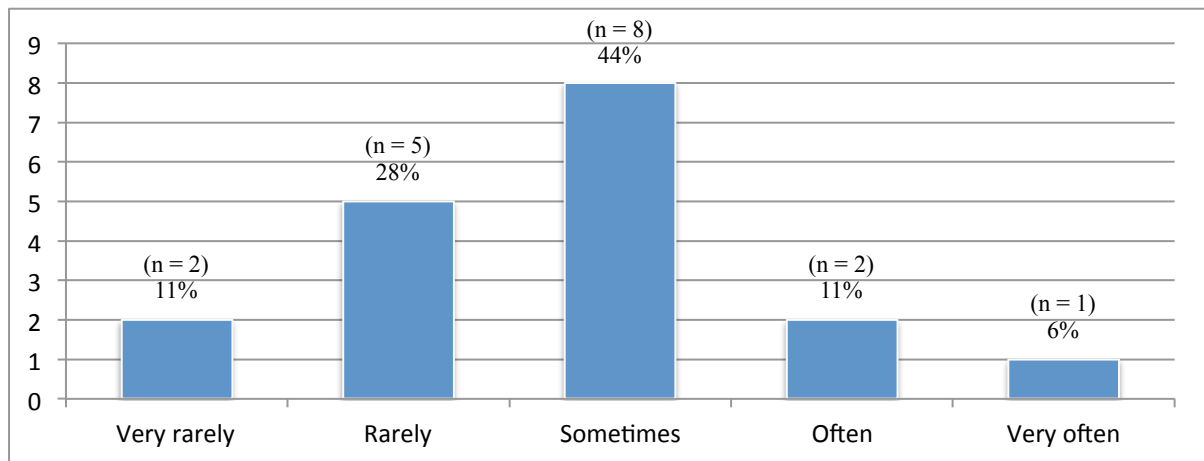


(2) Reliance on self-defence based on impaired perception due to intoxication

3.1.4 The responses in Figure 3 reveal a range of views about reliance on self-defence where the accused’s perception was impaired due to intoxication. The majority of responses indicated that this does not frequently occur, with 44% of respondents saying it occurs sometimes and 39% of respondents saying that this rarely or very rarely occurs. However, a minority of respondents stated that reliance on self-defence in these circumstances often happens.

* Percentages may not total 100 due to rounding.

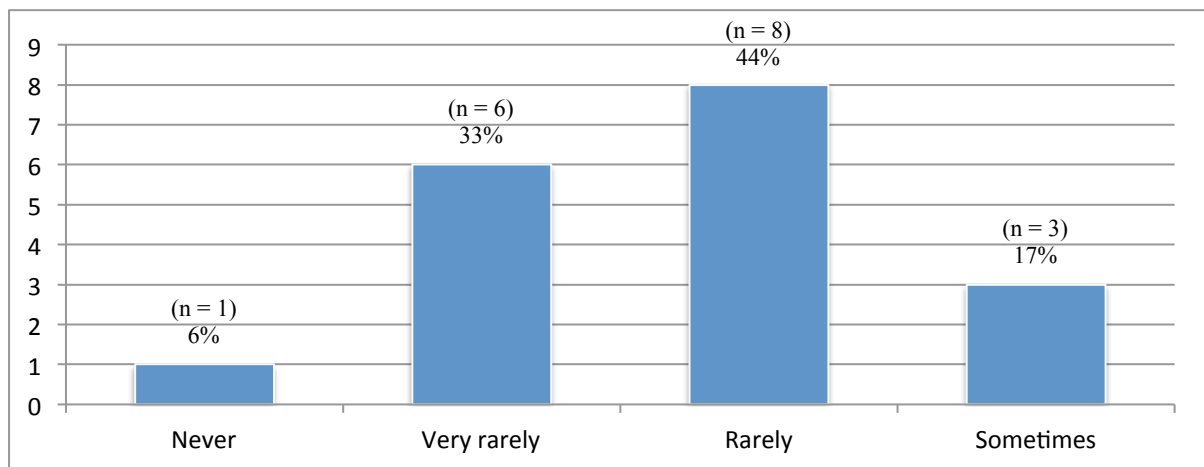
Figure 3: Reliance on self-defence where accused's perception was impaired due to intoxication



(3) Reliance on self-defence based on an impaired perception due to mental illness

3.1.5 The responses, as shown in Figure 4, suggest that an offender's claim that his or her use of force was in self-defence is not often based on an impaired perception of the circumstances due to mental illness — with 83% of respondents indicating that this does not frequently occur (33% very rarely; 44% rarely) and one respondent (a judge) indicating that this had never occurred in any matter that she or he had dealt with. These views accord with the results of the Institute's review of appeal cases and sentencing comments.⁸⁶

Figure 4: Reliance on self-defence where accused's perception was impaired due to mental illness



(4) Successful reliance on self-defence where the offender's perception of the threat was induced by intoxication and/or mental illness

3.1.6 The responses to the survey suggest that cases where an offender's perception is affected by intoxication occur more frequently than cases involving mental illness. However, in both cases the responses indicate that self-defence is rarely successful, with only three respondents suggesting that there have been cases where an accused has successfully relied on self-defence where his or her perception of the threat was affected by intoxication and/or mental illness. However, no specific cases were identified.

⁸⁶ See [3.3].

3.1.7 The rarity of cases where self-defence is successfully relied upon where an offender is intoxicated or suffering from a mental illness is supported both by the results of the Institute’s search of newspaper reports⁸⁷ and by the examination of sentencing and appeal cases.⁸⁸

(5) General comments on the operation of self-defence

3.1.8 Respondents were asked whether they had any concerns about the current operation of self-defence and whether there were aspects of the defence that they considered to be working well.

3.1.9 Thirteen respondents answered this question. Their comments are tabulated in Table 1. This table shows that four respondents had no concerns about the operation of s 46. It also shows that for those who do have concerns about its operation, their concerns are about two broad matters: (1) the fact that the subjective component of s 46 allows mistaken beliefs of the accused to be taken into account; and (2) difficulties jurors may have in understanding and applying the defence.

Table 1: Areas of concern in relation to current operation of self-defence

Nature of response	Number of responses	Details
No concerns	5	N/A
Concerns in relation to subjective nature of test	3	<ul style="list-style-type: none"> • ‘The mistaken belief’ (Respondent 7: Prosecutor – DPP). • ‘The subjective nature of the test allows the jury to take into account the Accused’s impaired perception of the circumstances based on their alcohol consumption or their mental health and provided they don’t use too much force they are often acquitted’ (Respondent 5: Prosecutor – DPP). • ‘Yes. The nature of methamphetamine has seen an increasing amounts of persons raising self-defence in the context of paranoid perceptions of strangers who have done nothing to them’ and that intoxication can be taken into account for the subjective test (Respondent 8: Prosecutor – DPP).
Concerns in relation to understanding and application of the test	6	<ul style="list-style-type: none"> • ‘I think that juries sometimes struggle with the concept of what self-defence is and when and how it applies. They are reliant on directions from the Judge and whilst they attempt to make it clear, I don’t think the current directions they are bound by are clear to lay people’ (Respondent 6: Prosecutor – DPP). • ‘In my view the subjective/objective elements to the defence make it very difficult for jurors to understand and apply to factual circumstances’ (Respondent 9: Prosecutor – DPP). • ‘[Some] juries have sometimes acquitted where severe injuries have been inflicted by householders responding to home invasions. Otherwise no concerns’ (Respondent 11: Judge). • ‘No. Other than it can be a difficult concept to explain to someone. But it seems to work’ (Respondent 17: Prosecutor – Police). • ‘It appears not to be very clear in the section and provides no guidelines etc’ (Respondent 18: Prosecutor – Police). • The objective assessment in the second limb is somewhat confusing at times’ (Respondent 2: Magistrate).

⁸⁷ See [3.2].

⁸⁸ See [3.3].

3.1.10 Table 1 shows that the concern of one of the prosecutors (Respondent 7) about mistaken perceptions potentially grounding a defence under s 46 was expressed in entirely general terms. Two prosecutors were concerned about reliance on self-defence where the offender was affected by alcohol and/or drugs, and one of those (Respondent 5) was also concerned about mistaken perceptions arising from a mental disorder. Respondent 8 was specifically concerned about reliance on self-defence in circumstances where the offender had used methamphetamine. Yet, neither Respondent 5 nor Respondent 8 identified any cases where an offender had successfully relied on an impaired perception of the circumstances as the basis for self-defence. Respondent 8 wrote, 'I have had many cases where the issue has been raised but not where the defence has succeeded. The most concerning aspect of the ability to rely on a defence of this type is where methamphetamine grounds the intoxication'. It appears to be the *possibility* that this scenario might found a successful defence rather than the fact that self-defence is successfully being used in these circumstances that is the predominant concern for these respondents.

3.1.11 The concerns expressed about the difficulties jurors may have in understanding and applying the defence relate primarily to the technical and conceptual problems it may present to lay-people. One respondent (Respondent 11) suggested that, in a certain type of case, those involving home invasions, jurors may not appropriately judge the reasonableness of the force inflicted by the accused so that they may be unwilling to find that the force was excessive in such cases. Essentially this is a concern about the application of the objective component of s 46 in a specific kind of case. It may also represent concern that jurors' and/or community standards in such cases may not match modern legal conceptions of appropriate standards of behaviour.

3.1.12 Those surveyed were asked which, if any, aspects of s 46 they consider to be working well. Eight out of the 18 respondents to the survey answered this question. Their responses were as follows:

- 'Juries understanding of it and willingness to accept the defence' (Respondent 1: Defence Counsel).
- 'I think the assessment of the defendant's alleged state of mind is an approach which works well (Respondent 2: Magistrate).
- 'The objective side of the test as it allows the jury to consider community standards of what is reasonable' (Respondent 5: Prosecutor – DPP).
- 'I have no firm view. I do like the simplicity in which it is expressed in statute' (Respondent 6: Prosecutor – DPP).
- 'All of it except the incorporation of intoxication in the equation' (Respondent 8: Prosecutor – DPP).
- 'All aspects. The law is fair and not hard to understand' (Respondent 11: Judge).
- 'The fact people are able to defend themselves and others from threats' (Respondent 5: Prosecutor – Police).
- 'The section works well enough' (Respondent 17: Prosecutor – Police).

Another respondent indicated that '[i]n my experience it is often foreshadowed as an issue for trial, it is sometimes pursued and rarely successful and is more often than not used as circumstances in mitigation' (Respondent 16: Prosecutor – Police).

3.1.13 If viewed in conjunction with the responses of those who indicated no concerns about the operation of s 46 (see [3.1.9]) it is evident that the majority of respondents (13 of 18) have positive views about the operation of s 46. In addition, six of the respondents were positive about its operation overall (four had no concerns about its operation and Respondent 11 and Respondent 17 said respectively that all aspects of s 46 work well and that it 'works well enough'). However, contrary views were expressed, with some respondents identifying at least potential problems in its application. Importantly, the responses do not indicate an overwhelming view that the defence is operating in a

manner that is fundamentally out of step with community standards and expectations. There is some concern, however, about the potential for offenders to rely on a mistaken belief caused by intoxication or mental illness.

3.2 Newspaper search

3.2.1 As detailed at [1.3.5], newspaper reports were examined to identify cases where an accused was acquitted after raising the issue of self-defence. The Institute identified 23 Supreme Court cases between 1998 and March 2014 where it was reported that the defence had raised the issue of self-defence and the defendant was subsequently acquitted (see Appendix 2). The search also identified one case where the prosecution withdrew the charge of murder on the basis that it would not be able to prove beyond reasonable doubt that the accused was not acting in self-defence.⁸⁹ Of the 23 acquittals, one case involved murder, one involved attempted murder and the remainder involved other offences of violence, such as assault, wounding or causing grievous bodily harm.

3.2.2 Most of the cases where self-defence was successfully relied upon involved an imminent threat — either an actual or threatened physical confrontation (13 cases)⁹⁰ or verbal confrontation (six cases).⁹¹ There was only one case that could be classified as involving a so-called pre-emptive strike.⁹² There were no cases where it appeared from the media report that the defendant had explicitly relied on a mistaken view of the circumstances. None of the media reports suggested that the accused had imagined a threat when in reality no threat existed. In particular, there were no cases where it appeared that the accused had relied on an altered perception of reality arising from a mental illness or self-induced intoxication.⁹³ This research revealed only one case in which a defendant was acquitted of all counts where reference was made to intoxication and two cases where an intoxicated defendant successfully relied on self-defence in relation to some counts.⁹⁴ In all three cases, it appeared that the accused faced an imminent threat from the victim and it does not appear that the accused relied on a mistaken view of the circumstances arising from a state of intoxication. There were no cases identified by the Institute where it appeared that an accused's mental illness provided the basis for a successful plea of self-defence.

3.2.3 Instead, typically the jury were required to determine, in relation to an altercation, whether the victim's or the accused's account of the incident should be believed or, alternatively, whether the

⁸⁹ The cases are detailed in Appendix 2. In one case, it was reported that the defendant relied on self-defence but subsequent reports containing the outcome of the trial could not be located: *Arnol* (*The Mercury*, 13 October 2004).

⁹⁰ See 'Henderson', *The Mercury* (Hobart), 9 February 2001; 'Freeman', *The Mercury* (Hobart), 24 June 2003; 'Butt', *The Mercury* (Hobart), 26 February 2008; 'Smith', *The Examiner* (Launceston), 25 March 2014; 'Lange', *The Examiner* (Launceston), 5 February 2014; 'Riley', *The Examiner* (Launceston), 24 April 2013; 'Kirkhope', *The Examiner* (Launceston), 27 October 2005; 'Wilkinson', *The Advocate* (Burnie), 24 April 2012; 'McWilliams', *The Mercury* (Hobart), 20 April 2011; 'Richards', *The Advocate* (Burnie), 25 November 2010; 'McMahon', *The Mercury* (Hobart), 3 May 2008; 'Berry', *The Mercury* (Hobart), 19 March 2008; and 'Walker', *The Examiner* (Launceston), 27 September 2012, as set out in Appendix 2.

⁹¹ See 'Jones', *The Advocate* (Burnie), 2 August 2012; 'Shaddock', *The Advocate* (Burnie), 13 September 2012; 'Isaako', *The Examiner* (Launceston), 29 November 2010; 'Carter', *The Examiner* (Launceston), 4 November 2009; 'Cooper', *The Mercury* (Hobart), 19 June 2008; and 'Lee', *The Advocate* (Burnie), 10 October 2006, as set out in Appendix 2. In two cases, the circumstances are unclear (see 'Cowardrey', *The Examiner* (Launceston), 14 August 2013; and 'Wombwell', *The Examiner* (Launceston), 3 May 2004).

⁹² 'Eastley', *The Mercury* (Hobart), 1 March 2005, as set out in Appendix 2.

⁹³ There was only one acquittal where it was reported that the accused was intoxicated. In this case, the victim came to the accused's house and there was an argument about money that was owed. There was a fist fight and then the accused hit the victim with an iron bar. The victim weighed 108kg and told the jury he had been tapping the accused on the head saying 'watch out for the left, watch out for the right' as the accused threw several punches at him: 'McMahon', *The Mercury* (Hobart), 3 May 2008, 30 April 2008).

⁹⁴ Acquittal on all counts: 'McMahon', *The Mercury* (Hobart), 3 May 2008; Acquittal on some counts: *Sims*, 9 September 2009, Slicer J (Sentence); *Bartlett*, 7 February 2008, Evans J (Sentence). See Appendix 2.

force used by the accused was reasonable or excessive. For example, in some cases the jury was required to determine in relation to a brawl or physical fight whether the accused was the aggressor or was acting in self-defence and if the latter, whether his or her response was reasonable.⁹⁵ In other cases, there appeared to be little dispute about the situation confronting the accused. The Crown case was that the force used by the defendant was not reasonable.⁹⁶ The cases identified in newspaper reports do not suggest that acquittals have resulted from the inclusion of subjective components in s 46 or that juries' assessments of reasonableness is significantly out of step with appropriate applicable standards. However, in this regard it should be noted that one judge (Respondent 11) did indicate in responding to the Institute's survey, that this may well be the case where self-defence is raised in the context of 'home invasions'.⁹⁷

3.3 Sentencing comments and appeals

3.3.1 The operation of s 46 was also ascertained by reviewing appellate decisions of the Tasmanian Supreme Court (reported and unreported) and comments made in passing sentence in cases where defendants had relied on self-defence and subsequently had been convicted. The Institute identified 76 cases heard in the Supreme Court between 1988 and 2013 where the defendant had raised the defence of self-defence at trial (see Appendix 3).⁹⁸ In 71 of these cases, the prosecution disproved self-defence in relation to some or all of the charges. In two cases, there was a successful appeal and the outcome of any subsequent proceedings is not known.⁹⁹ In one case, the Court of Criminal Appeal entered a finding of not guilty on grounds of insanity.¹⁰⁰

3.3.2 In addition, the Institute identified one case that went to trial (other than *Walsh*) where an offender's belief in the need for self-defence arose from a mental illness. However, self-defence was not relied on at trial and instead the accused was found not guilty by reason of insanity.¹⁰¹ In this case, the accused suffered from bipolar disorder and schizophrenia, an illness characterised by persecutory and paranoid delusions. In the days leading up to the killing, the accused was becoming increasingly unwell and he developed a delusional belief that the deceased was a significant threat to him. He became increasingly concerned that the deceased was 'fundamentally evil in nature and in particular he had evil intent upon the families of the people that were there'.¹⁰² Expert evidence was provided that at the time of the killing the accused was 'frantic, petrified and convinced that not only him but other individuals were in imminent and serious danger from [the deceased]'.¹⁰³ And further, that to the accused 'the threat was very real and very imminent and he was basing his actions and response to those delusions and he considered what he did in attacking [the deceased], as the correct action to do

⁹⁵ See for example, 'Riley', *The Examiner* (Launceston), 24 April 2013; 'Lange', *The Examiner* (Launceston), 5 February 2014; 'Smith', *The Examiner* (Launceston), 25 March 2014; 'Isaako', *The Examiner* (Launceston), 29 November 2010; 'Henderson', *The Mercury* (Hobart), 9 February 2001; 'Eastley', *The Mercury* (Hobart), 1 March 2005; 'Butt', *The Mercury* (Hobart), 26 February 2008; 'Cowdrey', *The Examiner* (Launceston), 14 August 2013; 'Wombwell', *The Examiner* (Launceston), 3 May 2004; 'Shaddock', *The Advocate* (Burnie), 13 September 2012; 'Wilkinson', *The Advocate* (Burnie), 24 April 2012; 'McWilliams', *The Mercury* (Hobart), 20 April 2011; 'McMahon', *The Mercury* (Hobart), 3 May 2008; see Appendix 2.

⁹⁶ See for example, 'Tonner', *The Mercury* (Hobart), 6 December 2006, 19 March 2008; 'Walker', *The Examiner* (Launceston), 27 September 2012; 'Richards', *The Advocate* (Burnie), 25 November 2010, as set out in Appendix 2.

⁹⁷ The use of force in defence of a person's home is considered in Part 6 of this Report.

⁹⁸ These cases were identified from decisions available on AustLII, Westlaw (Australia) and LexisNexis (Australia) and comments on passing sentence available on Supreme Court Sentencing Database (available since 2008) and Tasinlaw (1988–2007).

⁹⁹ *Howlett* [208] TASSC 38; *Finnegan* [2011] TASCCA 3.

¹⁰⁰ *Walsh* (1991) 60 A Crim R 419; [1993] TASSC 91.

¹⁰¹ *Assafiri*, August 2011.

¹⁰² Transcript, 25 August 2011.

¹⁰³ Transcript, 24 August 2011.

to prevent further potential assaults from [the deceased].¹⁰⁴ In reality, the deceased had been playing heavy metal music and consuming alcohol (both being things that the accused strongly disapproved of) and there was no threat of imminent harm. There was no evidence of any sane belief of the accused in relation to the existence of any threat — the only threat was a product of the accused’s insane beliefs. In this case, defence counsel made the point the only reason that she was not asking for self-defence to be left for the consideration of the jury was because of the Court of Criminal Appeal’s decision in *Walsh*.¹⁰⁵ This raises the concern that this type of case may ground a claim of self-defence in the event that *Walsh* is reconsidered by the Court of Criminal Appeal.¹⁰⁶

3.3.3 Case information provided in reports of costs applications also provide a source of information about the circumstances in which self-defence is relied on at trial. Two of the costs applications examined by the Institute contained information about self-defence: in one case the jury had been unable to reach a verdict and the prosecution did not proceed¹⁰⁷ and in the other the accused had been acquitted.¹⁰⁸

3.3.4 The observations that emerged from the appeal cases, sentencing cases and costs applications related to three broad matters:

- the types of cases where self-defence was in issue;
- the apparent influence on jury verdicts of evidence that the accused was intoxicated and, in such cases, where jurors rejected claims of self-defence, how sentencing judges construed the facts for the purpose of determining sentence; and
- how jurors handle claims of self defence in cases involving complex factual situations.

3.3.5 The cases where self-defence was in issue fell into four broad categories:

- (1) those involving domestic/family disputes;
- (2) those involving on-going animosity or disputes between acquaintances/neighbours;
- (3) cases where the accused sought out the perpetrators of a previous offence; and
- (4) cases involving violence between strangers in a pub/nightclub or in the street adjacent to such places at night (associated with the use of alcohol).

3.3.6 In relation to the apparent effect on jury verdicts of evidence that the accused was intoxicated, a noticeable difference was observed between the cases where the accused was acquitted of all charges (see [3.2.2]) and cases where the accused was convicted on some or all of the charges. In only one case (out of 23) where the accused was acquitted of all charges was the offender intoxicated.¹⁰⁹ In contrast, in 29 (out of 72) cases where the offender was convicted of a charge (and any appeal was unsuccessful), the offender was intoxicated.¹¹⁰ In a further nine cases, although no mention was made

¹⁰⁴ Transcript, 24 August 2011.

¹⁰⁵ Transcript, 26 August 2011.

¹⁰⁶ See [2.2.9]–[2.2.14].

¹⁰⁷ *Cashinella* [1994] TASSC 117 (costs application).

¹⁰⁸ *Ozkilinc* [2000] TASSC 59 (costs application).

¹⁰⁹ ‘McMahon’, *The Mercury* (Hobart), 3 May 2008.

¹¹⁰ *Tasmania v Daniels*, 12 April 2001, Blow J (Sentence); *Tasmania v McIntosh* [2002] TASSC 97; *Tasmania v O’Loughlin*, 17 February 2010, Tennent J (Sentence); *Tasmania v Cunningham*, 13 September 2012, Blow J (Sentence); *Tasmania v Connors*, 7 June 2013 Porter J (Sentence); *Tasmania v Andrews*, 14 February 2013, Evans J (Sentence); *Tasmania v Griffith*, 2 August 2010, Evans J (Sentence); *Tasmania v Krause*, 24 August 2010, Evans J (Sentence); *Tasmania v Duggan*, 25 May 2000, Blow J (Sentence); *Tasmania v Pullen*, 3 June 2009, Blow J (Sentence); *Tasmania v Young*, 15 April 2010, Crawford CJ (Sentence); *Tasmania v Perry*, 2 June 2010, Blow J (Sentence); *Tasmania v Peterson*, 6 April 2011, Evans J (Sentence); *Tasmania v Heywood and Mannie*, 30 January 2012, Crawford CJ

of the offender's state of intoxication, the offence occurred in a hotel/nightclub or at night in the streets outside such places.¹¹¹ These findings suggest that there is not undue sympathy for intoxicated offenders or those who are violent when intoxicated and seek to rely on self-defence. Jurors do not appear readily to believe the claims of drunken offenders that they were acting in self-defence. In cases where juries rejected claims of self-defence by intoxicated defendants, sentencing judges construed the facts for the purpose of sentencing in one of three different ways. In five of the 29 cases involving intoxicated defendants, they were sentenced on the basis that the force used was unreasonable.¹¹² In the remaining 24 cases, the defendants were sentenced on the basis that no threat existed or that they were the aggressors (that is, the defendants were not acting in self-defence). This tends to support the Institute's view that intoxicated offenders are not relying successfully on mistaken beliefs about the need to use defensive force.

3.3.7 The cases in the Appendix 3 show that claims of self-defence often arise in complex factual situations. In some cases juries are presented with contradictory, word against word claims, which they must decide between, such as where the defendant says that it is a situation of self-defence and the prosecution says that no situation of self-defence arose (for example *Tasmania v Cox*).¹¹³ Other cases may involve numerous incidents, some of which may give rise to lawful self-defence and others not, or they may involve groups of people (some of whom are intoxicated). The Institute's review of these cases indicates that claims of self-defence are closely scrutinised by juries and that juries do not readily harbour reasonable doubts about the Crown case where self-defence is in issue.¹¹⁴ Even in factually complicated cases, the law of self-defence is not proving to be overly complex for juries to apply in a discriminating manner. This conclusion accords with comments made by respondents to the Institute's survey that s 46 is easy to understand and apply.¹¹⁵ As illustrated by the case of *Tasmania v Sims*,¹¹⁶ juries do distinguish between the various acts of defendants to determine which were lawful acts of self-defence and which were not. The circumstances of this case were that there had been a verbal and physical altercation between the complainant and the defendant inside their home. The defendant then went outside and began to damage the complainant's motor vehicle. When the complainant intervened, the accused stabbed him. The defendant had underlying psychiatric issues and on the night in question she was irrational and her mental condition was exacerbated through intoxication. The defendant was found guilty of the crimes of unlawfully injuring property and wounding in respect of the events occurring outside the home. However, the jury returned verdicts of not guilty to charges of assault and attempted wounding in respect of events that occurred earlier inside the house. The sentencing judge, Slicer J, commended the jury for its assessment: 'the verdicts are internally consistent and show a reasoned and sophisticated assessment of the evidence and application of legal principle, and readily permit findings relevant to sentence'.

(Sentence); Garwood, *Tasmania v Hill*, 13 November 1998, Crawford J (Sentence); *Tasmania v Bugg*, 25 July 2007, Slicer J (Sentence); *Tasmania v Hales* [2009] TASSC 100; *Tasmania v Cox*, 24 March 2010, Crawford CJ (Sentence); *Tasmania v Franks*, 7 February 1989, Underwood J (Sentence); *Tasmania v Burden*, 11 July 1989, Green CJ (Sentence); *Tasmania v Ryan*, 1 October 1990 (Cox J) (Sentence); *Tasmania v Parremore*, 3 August 1989, Wright J (Sentence); *Tasmania v Gray*, 4 December 2006, Slicer J (Sentence); *Tasmania v Bartlett*, 7 February 2008, Evans J (Sentence); *Tasmania v Rusher*, 28 July 2010, Tennent J (Sentence); *Holmes* [1993] TASSC 5; *Tasmania v Coppleman*, 22 June 2011, Porter J (Sentence); *Tasmania v Hall*, 13 September 2002, Evans J (Sentence).

¹¹¹ *Tasmania v Castanenda*, 16 April 2013, Estcourt J (Sentence); *Tasmania v Kettle*, 27 June 2012, Porter J (Sentence); *Tasmania v Maynard*, 14 December 2011, Porter J (Sentence); *Tasmania v Moss*, 26 February 2001, Crawford J (Sentence); *Tasmania v Haas*, 20 February 1997, Zeeman J (Sentence); *Tasmania v Simpson*, 1 December 2010, Blow J (Sentence); *Tasmania v Byrne*, 15 May 1997, Slicer J (Sentence); *Tasmania v Filial*, 17 November 1993, Slicer J (Sentence); *Tasmania v Perry*, 17 November 1993, Slicer J (Sentence).

¹¹² *Tasmania v Griffith*, 2 August 2010, Evans J (Sentence); *Tasmania v Krause*, 24 August 2010, Evans J (Sentence); *Tasmania v Hales* [2009] TASSC 100; *Tasmania v Burden*, 11 July 1989, Green CJ (Sentence); *Tasmania v McIntosh* [2002] TASSC 97; *Tasmania v Duggan*, 25 May 2000, Blow J (Sentence).

¹¹³ 24 March 2012, Crawford CJ (Sentence).

¹¹⁴ If there is an evidentiary foundation for self-defence, the Crown bears the onus of proving beyond reasonable doubt that the act was not done by way of lawful self-defence: *Wright v Tasmania* [2005] TASSC 113, [15] (Blow J).

¹¹⁵ See discussion at [3.1.11]–[3.1.12].

¹¹⁶ 9 September 2009, Slicer J (Sentence).

3.3.8 Similarly in *Wright v Tasmania*,¹¹⁷ the jury used a discriminating approach to a complex factual situation. Here the defendant was charged with murder. The issue at trial was whether the Crown had proved beyond reasonable doubt that the infliction of the fatal wound was not an act of lawful self-defence. The defendant and the deceased had been involved in an altercation at a hotel in the early hours of a Sunday morning. The deceased then went to the accused's home with an axe. The accused saw the deceased approaching his property and armed himself with a knife. The men met near the back door and the accused stabbed the deceased several times. The Crown case was that when he inflicted the wounds, the accused was the aggressor rather than acting in defence of himself. The accused was convicted of murder and appealed on the basis that the jury could not reasonably be satisfied to the requisite standard that the fatal wound was not inflicted in self-defence.

3.3.9 The Court of Criminal Appeal accepted that 'there were powerful arguments in favour of an acquittal', including 'evidence suggesting that the deceased was angry to the point of being practically uncontrollable' and that 'when he confronted the [defendant], he would have seemed very hostile and would have been observed by the [defendant] to be very hostile'.¹¹⁸ The deceased, in such a state, was approaching the defendant's house with an axe. The defendant had his 10-year-old son with him. He did not have his mobile phone and there was no telephone at his house. He had made preparations to leave his home but he could not find his car keys and the ignition had been rendered inoperative by a previous attempt to start the car without the keys. It was accepted that 'any reasonable jury should have concluded that, on observing the deceased approaching his back door armed with an axe', the defendant 'feared that he would be killed or seriously injured'.¹¹⁹ Nevertheless, the Court of Appeal considered that there was evidence that entitled the jury to conclude that the appellant was either not acting in self-defence but instead acting as the aggressor or that he used more force than was necessary in the circumstances as he believed them to be.

3.3.10 These cases support the contention that the subjective component of s 46 does not displace its objective elements and produce unmerited acquittals. They also suggest that the tests prescribed by s 46 are not too difficult for juries to understand and apply, even in factually complex cases.

3.4 Submissions

3.4.1 In the responses received to the Issues Paper, the submissions of the Acting Director of Public Prosecutions and the Law Society of Tasmania were the only responses that specifically addressed the operation of the *Criminal Code* (Tas), s 46 in general terms. However, the submission of Tasmania Police generally supported the submission of the Acting Director of Public Prosecutions. Other submissions received addressed issues that are discussed in Part 4. They are detailed there.

3.4.2 The Acting Director of Public Prosecutions indicated that in the vast majority of cases the current law works very well, operates fairly and results in outcomes that accord with community expectations. However, he indicated that:

it is only when the subjective perception of an accused person was unreasonable that the law operates in a way that is contrary to community expectations. It is contrary to those expectations that someone who was suffering some mistaken, deluded or otherwise unreasonable perception could be acquitted of serious crimes of violence, including murder, because of their unreasonable belief. As the issues paper has highlighted, this problem is most foreseeable when an accused is delusional or intoxicated.

¹¹⁷ [2005] TASSC 113.

¹¹⁸ *Ibid* [30] (Blow J).

¹¹⁹ *Ibid* [29].

For this reason, the Acting Director of Public Prosecutions supported the introduction of a requirement of reasonableness into s 46 of the *Criminal Code* (Tas).¹²⁰

3.4.3 The Law Society opposed any amendment to s 46 for two reasons. First, the community does not appear to have been outraged by jury decisions since the law was changed in 1986 (to remove the requirement of reasonableness in relation to the accused's belief). Second, the Law Society stated that it was not aware of any cases where the Director of Public Prosecutions had referred acquittals to the Court of Criminal Appeal where self-defence was raised in circumstances where the accused was mistaken or delusional. The Law Society cautioned against recommending reform to the law based on hypothetical concerns or rare cases.

3.5 The Tasmania Law Reform Institute's views

3.5.1 After reviewing the current operation of s 46, it is the Institute's view that there is no overwhelming evidence that the operation of self-defence is fundamentally out of step with modern standards. The current broad formulation of the statutory test for self-defence allows fact finders considerable latitude in assessing self-defence claims.¹²¹ On the one hand it permits the jury to be sensitive to the accused's situation. On the other, it requires them to scrutinise the accused's conduct according to an objective standard of reasonableness. This enables community standards and expectations to be brought to bear in judging the accused's actions.

3.5.2 The Institute's investigation of the practical operation of the defence suggests that juries are reluctant to accept self-defence claims from intoxicated offenders. However, the ability of intoxicated offenders to rely on self-defence is clearly a concern for some prosecutors. Further, it appears that the decision of the Court of Criminal Appeal in *Walsh* is operating as a brake on the availability of the defence for offenders who have a deluded belief arising from a mental illness in the need to use defensive force. However, this is also an area of uncertainty. It appears that the concern in relation to both these matters is the *potential* created by the subjective component of s 46 for intoxicated or mentally ill offenders to rely on self-defence in circumstances where no threat exists. The Institute considers that this concern arises, in part, from the current uncertainty in the law about the relationship between self-defence and the defences of intoxication and insanity. The Institute's recommendations to address this uncertainty are set out in Part 4.

¹²⁰ See further at [4.1.4].

¹²¹ A Simester and W Brookbanks, above n 34, [15.1.2].

Part 4

Relationship Between the Defences: Options for Reform

In Part 2, the Institute identified uncertainty in the law in relation to the interaction of self-defence and the laws of insanity and intoxication. This Part provides an overview of the options for reform that were canvassed in the Issues Paper and sets out the Institute's recommendations for clarifying the relationship between self-defence, insanity and intoxication. In resolving this uncertainty, the Institute has identified two broad possible approaches:

- (1) Amend s 46 to try to preclude its application in cases where the accused's belief in the need for self-defence is unreasonable. This might be achieved by removing the subjective components of s 46 and replacing them with objective tests.
- (2) Amend relevant provisions of *Criminal Code*, that is ss 16 and 17, to deal with specific areas of uncertainty.

In Part 3, the Institute reviewed the practical operation of the law of self-defence in Tasmania and concluded that there is no overwhelming evidence that the operation of self-defence is fundamentally out of step with modern standards. It appears that it is the *potential* for s 46 to enable intoxicated or mentally ill offenders to rely successfully on self-defence where no threat actually existed that is of concern rather than the actual occurrence of such scenarios. This suggests that the current formulation of the defence as a whole is not flawed but that there are aspects of the interrelationship between defences that lack clarity and therefore require reform. This view informs the recommendations of the Institute set out in this Part.

4.1 Replace the subjective components of s 46 with objective tests of reasonableness

4.1.1 As explained in Part 2 of this Report, under s 46 the accused's belief in the need for self-defence is determined on a purely subjective basis. This means that when claiming to have acted in self-defence an accused can rely upon a genuine and honest though unreasonable mistaken belief about the nature of the threat faced. One method of eliminating reliance on self-defence in such cases would be to insert a requirement in s 46 that the accused's belief in the need to use self-defence be reasonable or based on reasonable grounds. This would replace the subjective components of s 46 with an objective test.

Arguments in favour of inserting a requirement of reasonableness in s 46

4.1.2 In the Issues Paper, the following reasons were given for requiring that the accused's belief in the need for self-defence be reasonable:

- an objective test imposes more stringent conditions on the accused's perception of the threat and circumstances and this is appropriate given that self-defence is a complete defence to offences of violence, including murder.

- The current test can be criticised because it potentially allows undeserving offenders to be acquitted. The absence of any objective criteria of reasonableness in relation to the accused's belief in the need to use defensive force means that a person can rely on self-defence even if they make an unreasonable and entirely irrational mistake. This can be said to be an overly generous concession to people who resort to violence hastily and without reflection. It also has the potential to allow offenders who are intoxicated or mentally ill to rely on a genuine but unreasonable and irrational belief about the need for self-defence.
- Further, the subjective approach places no restriction on an offender who is excessively fearful or apprehensive or prejudiced, as their conduct is assessed in light of the circumstances that they believed to exist.¹²² On this basis, it can be argued that a standard of reasonableness is necessary to prevent reliance on self-defence by people who act on 'unreasonable, inaccurate and even racist perceptions of threats from others'.¹²³ It may also be necessary to prevent reliance on homophobic prejudice as the basis for self-defence.
- An objective standard for self-defence discourages violent self-help. A criticism of the entirely subjective assessment of an accused's perception of the threat is that it is said to encourage rashness and un-reflexive responses and 'unnecessary resort to violent self-help'.¹²⁴ It can be argued that the subjective approach does not reflect the value placed by the law on the sanctity of human life and bodily integrity, and the need for compelling reasons to justify the use of force, particularly lethal force. In contrast, a requirement of reasonableness is said to:

discourage a rush to use force. The desire is to defend the public against people with paranoid tendencies, who make unreasonable mistakes with regard to the existence of a factual situation that justifies private defence, and instead to encourage thought and restraint.¹²⁵

- A requirement of reasonable grounds for an accused's belief 'support[s] and reinforce[s] a code of social behaviour which deprecates failing to take due care to verify one's belief in the need to injure others'.¹²⁶ This means that requiring an accused to have reasonable grounds for his or her belief in the need to use force can be said to have an important declaratory role in affirming and supporting the values of society.
- The insertion of the requirement for the accused's belief to be reasonable may exclude self-defence claims by offenders whose perceptions of the circumstances are based on delusional beliefs that have no factual basis. In the New South Wales Court of Criminal Appeal decision in *R v Kurtic*,¹²⁷ Hunt CJ considered the application of the principles set out in *Conlon* (the relevance of intoxication to the existence of reasonable grounds in self-defence) to an offender who suffered from persecutory delusions. His Honour (with whom other members of the court agreed) stated:

[t]here may well be some problem in seeking to stretch the principle which *Conlon* ... states to apply to the present case, as the issue of whether there were no reasonable grounds for a belief that it was necessary in self-defence to do what was

¹²² This criticism was made by McSherry in response to the recommendation of the VLRC to introduce a completely subjective test for self-defence, see B McSherry, 'Self-Defence and Provocation' (1992) 66 *Law Institute Journal* 151, 151. See also S Yeo, *Compulsion in the Criminal Law* (Lawbook, 1990) 215–16; Law Reform Commission of Western Australia (WALRC), *A Review of the Law of Homicide*, Final Report No 97 (2007) 170–71; K Roach, 'A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions' (2012) 16 *Canadian Criminal Law Review* 275, 277–78, 285.

¹²³ K Roach, above n 122, 277–85.

¹²⁴ *Ibid* 278.

¹²⁵ B Sangero, *Self-Defence in Criminal Law* (Hart Publishing, 2006) 287.

¹²⁶ Yeo, above n 122, 215.

¹²⁷ (1996) 85 A Crim R 57.

done — although not wholly objective — must nevertheless be at least partly objective. Whatever the effect a characteristic personal to the accused may have upon his perception of some particular action as a threat which he faced or upon the reasonableness of his response to what he perceived to be a danger, there must, in my view, be a reasonable possibility that at least some action *in fact* took place which could have been mistaken as a threat or danger to the accused before any decision can be made concerning the possibility that his perceptions of that action were affected by that personal characteristic.¹²⁸

This decision indicates that ‘the subjective belief, however misguided or mistaken, of an accused acting in self-defence, needed to be referable at least to some actual fact within the matrix of surrounding circumstances prevailing at the time of the alleged offending’.¹²⁹ If this was the interpretation applied to a belief on reasonable grounds, this approach would prevent offenders suffering a psychotic episode as a result of mental illness and/or drug use from relying on their mistaken perception as a justification to use force against an innocent bystander.

- In some jurisdictions, concerns have been expressed that the application of a purely subjective standard to the accused’s perception of the threat and circumstances is inconsistent with human rights obligations.¹³⁰ This issue has been raised by English commentators who have asserted that the subjective approach in the law is incompatible with the *European Human Rights Act 1998*, Art 2.¹³¹ The right to life is not enshrined in Australian or Tasmanian legislation. While Australia is a signatory to the *International Covenant on Civil and Political Rights (ICCPR)*, it has not been incorporated in its entirety into Australian law. Nevertheless, it cannot be ignored when framing Australian laws, because courts charged with the responsibility for interpreting our laws may have regard to the *ICCPR* when doing so.¹³² Bearing this in mind, it might be argued that allowing self-defence where an accused has made an unreasonable mistake does not adequately protect the right to life. In this way, the subjective focus of the current law might be criticised on the basis that it fails to protect the interests of victim sufficiently.
- The imposition of a ‘reasonableness’ standard in relation to the accused’s perception of the threat still allows the court to take into account the circumstances of the accused, as it is not a wholly objective test.¹³³ Self-defence is still assessed on the basis of the circumstances as the accused perceived them to be. It is just that an objective gloss is included to prevent an accused relying on irrational and unreasonable perceptions. The ability to take into account the personal characteristics and circumstances of the accused in assessing whether reasonable grounds existed, influenced the decision of the Law Reform Commission of Western Australia to recommend that a standard of reasonableness be imposed.¹³⁴ This means that it is possible to accommodate within the test of ‘reasonableness’ the experiences of an accused

¹²⁸ Ibid 64 (emphasis in original).

¹²⁹ D Howard and B Westmore, *Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals* (Lexis Nexis Butterworths, 2nd ed, 2010).

¹³⁰ See Simester and Brookbanks, above n 34, 795–97.

¹³¹ See Ormerod, above n 31, [12.6.1.4] fn 337. See also A Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 124–25. However, others have suggested that the situation in relation to the English law is not clear-cut: Ormerod, above n 31, 384–85.

¹³² A number of interpretive principles enable courts to have regard to international human rights instruments and principles and to fundamental common law rights when interpreting and applying Australian laws. This means that they may potentially constrain the operation of Australian legislation to ensure that it does not encroach upon fundamental common law rights or that it is consistent with international human rights. See generally, J Gans, T Henning, J Hunter and K Warner, *Criminal Process and Human Rights* (Federation Press, 2012) Chapter 2.

¹³³ Yeo, above n 122, 217. See Richard Singer, ‘The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense’ (1987) 28 *Boston College Law Review* 459.

¹³⁴ WALRC, above n 122, 172.

whose perception of the threat may differ from that of the hypothetical reasonable person. This may be the case, for example, in relation to those who kill in response to prolonged family violence.¹³⁵

Arguments against inserting a requirement of reasonableness

4.1.3 In the Issues Paper, the following reasons were given for retaining the current law of self-defence in Tasmania and not inserting an additional requirement of reasonableness in the *Criminal Code* (Tas) s 46:

- The current formulation of the legal test of self-defence contained in the *Criminal Code* (Tas) s 46 contains a mixed subjective and objective test that allows the necessity of force to be assessed from the accused's point of view while still allowing community standards to be introduced in assessing the appropriateness of the accused's response.¹³⁶ It has operated for over 25 years and there is no clear indication that the defence is not working well. This assessment was supported in the submissions of the Acting Director of Public Prosecutions and the Law Society.
- The approach in the *Criminal Code* (Tas) s 46 has the advantage that it is consistent with the approach to self-defence contained in the Model Criminal Code,¹³⁷ as enacted in Commonwealth legislation, in New South Wales, the Australian Capital Territory and the Northern Territory (for Schedule 1 offences).¹³⁸ The Model Criminal Code approach reflects a view that if there are no partial defences to murder (that is, a defence that would reduce murder to manslaughter), then it is necessary to have a broad test for self-defence.¹³⁹ This means that self-defence needs to focus on the accused's belief in the necessity for self-defence and the accused's perception of the circumstances. It is also the approach in South Australia, Victoria, New Zealand and the United Kingdom.¹⁴⁰
- The current formulation has the advantage of simplicity. The simplification of the law was one of the reasons that underpinned the changes to the Tasmanian law in 1987. In Victoria, the model was adopted, in part, as it allows for greater clarity and simplicity in directing the jury than the previous test (based on the common law) that the accused's belief be based on reasonable grounds.¹⁴¹
- The retention of a subjective test demonstrates confidence in the ability of the jury to scrutinise an offender's claim that they were acting in self-defence.¹⁴² The subjective test requires the jury to be satisfied that there was not a reasonable possibility that the accused was acting in self-defence (that is, that there was not a reasonable possibility that the accused, in view of the danger that they believed that they faced, had a genuine and honest belief in the

¹³⁵ See [5.3].

¹³⁶ See VLRC, above n 30, [3.73].

¹³⁷ See Model Criminal Code Officers' Committee, *Model Criminal Code — Chapter 2, General Principles of Criminal Responsibility*, Report (1992), 70 contained in cl 313.

¹³⁸ See *Criminal Code* (Cth) s 10.4; *Criminal Code* (ACT) s 42; *Crimes Act 1900* (NSW) s 418; *Criminal Code* (NT) s 43BD. 'Schedule 1 offences' in the Northern Territory Code include homicide.

¹³⁹ I Leader-Elliott, 'Reforming and Codifying the Criminal Law (of Homicide): Reflections on the Victorian Experience', (Paper presented at Homicide Law Reform in Victoria: Prospects and Retrospect, Melbourne, 15–16 August 2014).

¹⁴⁰ See *Crimes Act 1958* (Vic), s 322K; *Criminal Law Consolidation Act 1935* (SA) s 15(1); *Crimes Act 1961* (NZ) s 48; *Criminal Justice and Immigration Act 2008* (UK) s 76; *Gladstone Williams* [1987] 3 All ER 411 (CA); *Beckford v R* [1988] AC 130.

¹⁴¹ *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic), Explanatory Memorandum, 6.

¹⁴² A criticism of the subjective test is that jurors 'are prone to being gullible in accepting an accused's assertion that he held an honest belief': S Yeo, 'The Element of Belief in Self-Defence' (1989) *Sydney Law Review* 132, 137.

need to act in self-defence). The jury considers all the circumstances that existed (including the accused's perception of the circumstances) in determining whether the accused actually held a belief in a threat that required the use of force (rather than acting for some other reason).¹⁴³ If an accused uses violence in circumstances where there was not in fact any clear imminent threat of harm, a jury may be reluctant to believe that the accused was acting in self-defence. This reluctance is certainly evident in the difficulties experienced by battered women in relying on self-defence in circumstances where they have killed their violent partner in non-confrontational situations or in response to a seemingly minor incident.¹⁴⁴

- Further, even if the jury accepts the accused's account, it is still able to apply community standards of acceptable conduct in its determination of whether the force used was reasonable in the circumstances as the accused believed them to be. This means that the 'question whether [the] response was reasonable remains ultimately *objective*'.¹⁴⁵ And this assessment allows the jury to take into account the necessity of using force (the imminence of the threat that the accused believed that they faced and other options that may have been available) and the proportionality of the force used. If a threat is merely anticipated, then it may be reasonable for an accused to seek outside assistance or to leave rather than resorting to force.¹⁴⁶ Although neither retreat nor imminence are formally necessary for self-defence to be successful, in cases where an actual threat does not exist (other than in the mind of the intoxicated or mentally ill offender) these considerations may provide grounds for the judge to withhold the defence from the jury, so that it is not considered by the jury,¹⁴⁷ or, if left for the consideration of the jury, the flexibility of the standard of reasonable force allows the jury to reject the defence. Accordingly, the retention of the current legal test can be supported on the basis that it has the capacity to allow spurious claims of self-defence to be rejected.
- Support for a model of self-defence that is based on the accused's subjective perceptions of the threat (rather than an objectively assessed model) can be found in concerns about the failure of self-defence to accommodate adequately the experience of people (typically women) who kill in response to prolonged family violence. This is discussed in Part 5.
- A subjective approach to an accused's perception of the threat has also been supported on the basis that it is contrary to principles of criminal responsibility to deny self-defence to a person who makes an unreasonable mistake.¹⁴⁸ The argument is that 'to insist on reasonableness of an accused's belief is to make her or him criminally responsible for a crime of violence when the accused's only fault was negligence, that is, a failure to take sufficient care to ascertain

¹⁴³ Although difficulties arise for the prosecution if the *Criminal Code* (Tas) s 16(3) is interpreted as applying to self-defence. If the jury accepts the delusion, then s 16(3) directs that criminal responsibility is to be assessed as if those facts were true. This means that the jury has to accept the deluded belief as true and that the prosecution has only two avenues to raise a reasonable doubt: (1) to argue that the delusion was not one of immediate/imminent harm; or (2) to argue that the force used was excessive.

¹⁴⁴ K Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 266.

¹⁴⁵ Simester and Brookbanks, above n 34, 141.

¹⁴⁶ See *Adams on Criminal Law 2013 Student Edition*, [CA48.11] for New Zealand cases where self-defence has not been successful in the context of a pre-emptive strike where there were alternative courses of action open instead of the use of force (*Wang* [1990] 2 NZLR 529; *R v Ranger* (1988) 4 CRNZ 6; *R v Terewi* (1985) 1 CRNZ 623).

¹⁴⁷ For example, in *Burgess; Saunders* [2005] NSWCCA 52 where the court considered that it was appropriate for the court to remove self-defence from the jury's consideration if the facts are not capable of giving rise to the objective requirement of the defence, despite the accused's belief that his or her actions were justified.

¹⁴⁸ See F Wright, 'The Circumstances as She Believed Them to be: A Reappraisal of Section 48 of the *Crimes Act 1961*' (1998) 6 *Waikato Law Review* 109, 117, 119; Yeo, above n 122, 206; Baker, above n 69, [21–020]. A related argument to support the subjective approach relates to the logical classification of elements of offences and defences: see Yeo, above n 122, 204; Baker, above n 69, [21–020].

whether there was an actual threat occasion'.¹⁴⁹ The defendant's culpability is said to be lacking (or very low) because there was no intention to break the law — rather the person was motivated by a desire to protect themselves and to rely on the law for that purpose.¹⁵⁰ If the subjective component of the test of self-defence is amended in Tasmania to include a reasonableness requirement, a person who kills in circumstances where they unreasonably believe that a threat exists will be convicted of murder. While it may be accepted that the offender is blameworthy to some extent, it could be argued that a murder conviction is not appropriate if the person genuinely believes that they were acting in self-defence.¹⁵¹ It can be argued that there is a significant moral distinction between murder and a killing in mistaken self-defence.¹⁵² It can also be argued that the actions of a person who makes an unreasonable mistake in relation to the need for self-defence or the appropriate response are 'conceptually much closer to manslaughter (by criminal negligence) than murder'.¹⁵³

- Support for the retention of a subjective test of belief in the need for self-defence rests on the likely circumstances that a person faces when they are compelled to act in self-defence (a fearful situation that prompts instant action) and it can be argued that to impose a requirement of reasonableness on their belief does not have a utilitarian purpose.¹⁵⁴ Where a person acts in self-defence, they are usually confronted with a situation where they must act quickly and there is little time for reflection or to check the validity of a belief that self-defence is necessary.¹⁵⁵ In this situation of fear and urgency, it is argued that 'a future threat of punishment is most unlikely to deter' and that it would be 'unjust to punish him [or her] for failing to take steps to verify his [or her] views'.¹⁵⁶ As Heath observes:

people faced with a potential self-defence situation [are unlikely to] make their decisions about what to do on the basis of the legislation for the time being in force ... As the case law recognises, people who believe they are facing a situation in which they are threatened with death or serious injury are not in a position to make calm, rational decisions. They are certainly not in a position to obtain legal advice or read [the relevant law].¹⁵⁷

- A further reason not to amend the legal test contained in s 46 through the insertion of a requirement of reasonableness is that this may not resolve the problem identified by the former Director of Public Prosecutions — that unmeritorious defendants may benefit from the subjective focus of the current defence. A belief on reasonable grounds has been interpreted by courts in comparable jurisdictions to include characteristics of the accused including intoxication and

¹⁴⁹ Yeo, above n 122, 206. See also *Williams (Gladstone)* (1983) 78 Cr App R 276, 281 (Lord Lane CJ), approved in *Beckford* [1987] 3 WLR 611, 619.

¹⁵⁰ Baker, above n 69, [21–020]; Sangero, above n 125, 288–89.

¹⁵¹ Yeo, above n 122, 219.

¹⁵² Fairall and Yeo, above n 23, [10.39]: the authors observed in relation to excessive self-defence that there is a pervasive view that 'exists [of] a significant moral distinction between murder and unlawful killing in excessive self-defence'. Excessive self-defence arises where the force used is excessive, 'either in the sense that the occasion did not call for the use of force at all, or in the sense that more force was used than was required to make effective defence': at [10.38]. In relation to excessive self-defence, see also P Fairall, 'Excessive Self-Defence in Australia: Change for the Worse?' in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 178; S Yeo, 'Revisiting Excessive Self-Defence' (2000) 12 *Current Issues in Criminal Justice* 39.

¹⁵³ WALRC, above n 122, 181 referring to P Fairall, 'Excessive Self-Defence in Australia: Change for the Worse?' in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991), 178, 184; S Yeo, 'Applying Excuse Theory to Excessive Self-Defence: Change for the Worse?' in Yeo S (ed), *Partial Excuses to Murder* (Federation Press, 1991) 158, 163.

¹⁵⁴ Yeo, above n 122, 207–8; Baker, above n 69, [21–020].

¹⁵⁵ Baker, above n 69, [21–020]; Sangero, above n 125, [21–020].

¹⁵⁶ Yeo, above n 122, 208.

¹⁵⁷ M Heath, 'Self-Defence' in D Caruso, R Buth, M Heath, I Leader-Elliott, P Leader-Elliott, N Naffine, D Plater and K Toole (eds), *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) [10.48].

mental illness that alter the accused's perception of the circumstances.¹⁵⁸ This means that 'what is being evaluated is not the reasonableness of the conclusions or actions per se, but rather the reasonableness of this accused drawing that conclusion or acting in that way given the situation she was in'.¹⁵⁹ There is a close connection between the subjectivised 'objective' test and the assessment of the accused's response on the basis of their perception of the threat faced. This was recognised by the Victorian Law Reform Commission (VLRC) which considered that the adoption of the Model Criminal Code approach (which is the same as the Tasmanian approach), 'makes some small modifications to the current [common] law' but that 'it does not differ greatly'.¹⁶⁰ Accordingly, it is unclear the extent to which the introduction of a requirement of reasonableness in relation to the accused's perception of the threat and circumstances will actually serve as a constraint on the defence of self-defence. Although, as noted at [4.1.2], the requirement for reasonable grounds may prevent an offender from relying on a mistaken belief that has no factual basis in the actual circumstances.

Submissions received

4.1.4 Three submissions addressed the issue of whether the current law of self-defence should be amended through the introduction of an additional or different requirement of reasonableness or whether the current formulation should be retained. The Acting Director of Public Prosecutions considered that an additional requirement of reasonableness should be inserted into the *Criminal Code* (Tas) s 46 to prevent an accused from relying on an unreasonable subjective perception, which would be contrary to community expectations. The Acting Director of Public Prosecutions expressed the view that '[s]uch an amendment would not have an impact on the vast majority of criminal trials when the defence is live.' However, he considered that the amendment was necessary to deal with the 'rare circumstances that a person suffers a delusion due to a psychiatric condition [where] a jury may very well find their belief was honest'. It was the Acting Director's view that '[i]t is in these circumstances that a requirement of reasonable belief would be important, therefore allowing a jury to reject self-defence but then consider the insanity provisions of the *Criminal Code*'. It was also his view that an offender should not be able to rely on self-induced intoxication to base a claim of self-defence. It was, however, noted that the Acting Director of Public Prosecutions indicated that in the vast majority of cases, the current law works very well and that in most cases the current law operates fairly and results in outcomes that would accord with community expectations.

4.1.5 In contrast, the Law Society and the SASS opposed the amendment to the *Criminal Code* (Tas) s 46. The Law Society stated that:

The pre-existing assumption, for amendment, is that an accused who relies on self-defence, and is acquitted, in cases where he is mistaken or delusional, is in fact guilty but has somehow defeated the system. Such an accused is described as 'unmeritorious'. Such characterization ignores the very basis of the criminal justice system which is the presumption of innocence.

The Law Society, as noted at [3.4.3], expressed the view that there had not been any community outrage since the amendment to the law of self-defence in 1986 (which introduced the subjective test in relation to the perception of the threat) and stated that 'care needs to be taken if changes to the law are based on hypothetical or rare case[s]' and requested that the Institute 'bear in mind that the Acting DPP agrees that the current formulation works well'.

4.1.6 In its submission, the SASS supported the retention of the current formulation of self-defence on the ground that a 'subjective test of the accused's perception of the threat is significantly more

¹⁵⁸ See [2.3.3.]–[2.3.7]; *R v Kurtic* (1996) 85 A Crim R 57; *R v Imadonmwonyi* [2004] VSCA 176; *R v Bailiff* [2002] ACTSC 79; *R v Grosser* (1999) 73 SASR 584; *Question of Law Reserved (no 1 of 1997)* (1997) 70 SASR 251.

¹⁵⁹ David Paciocco, 'Applying the Law of Self-Defence' (2007) 12 *Canadian Criminal Law Review* 25, 37.

¹⁶⁰ VLRC, above n 32, [4.111].

likely to accommodate the experience of people who kill in response to prolonged family violence.’ The SASS stated that:

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.’

The Institute’s view

4.1.7 The Institute shares the concern of the Acting Director of Public Prosecutions in relation to the potential for an offender to rely on self-defence in circumstances where his or her belief in the need for self-defence arose from a delusion caused by a psychiatric condition. The Acting Director of Public Prosecutions also expressed concerns about an offender relying on self-induced intoxication to base a claim of self-defence. While the Law Society takes issue with the description of an offender who is mistaken or delusional as ‘unmeritorious’, the Institute considers that it is appropriate to consider whether such offenders should be able to rely on self-defence and potentially obtain a complete acquittal (see [4.2] and [4.3]). However, the Institute does not consider that reform to the *Criminal Code* (Tas) s 46 by the insertion of an additional requirement of reasonableness is the necessary or appropriate response. Instead, it is the Institute’s view that the *Criminal Code* (Tas) should be amended to deal with specific areas of uncertainty. The current formulation appears to be working well and the Institute’s assessment is that currently the defence does not appear to result in acquittals in circumstances where an offender is unreasonably mistaken. The test has the advantages of simplicity and consistency in approach with most Australian jurisdictions and comparable overseas jurisdictions. In addition, inserting an additional requirement of reasonableness may not prevent an offender relying on an intoxicated mistake or a mistake arising from a delusional belief, given that in other jurisdictions, the requirement for a belief on reasonable grounds has taken into account the offender’s intoxication and mental illness. A further influential consideration is the approach taken by the Institute to self-defence claims of those who kill a violent partner in the context of a history of family violence. This is discussed in detail in Part 5.

Recommendation 4:

Section 46 of the *Criminal Code* (Tas) should not be amended to require that the accused’s belief in the need for self-defence be reasonable or based on reasonable grounds.

4.1.8 In view of Recommendation 4, that the current approach to the law of self-defence should be retained in Tasmania, the Institute has given consideration to aligning the wording of the Tasmanian provision with the Model Criminal Code approach. The wording in the Model Criminal Code forms the basis for the self-defence provisions in the Australian Capital Territory, the Northern Territory (Schedule 1 offences), New South Wales and Victoria.¹⁶¹ A useful model is found in the changes to the *Crimes Act 1958* (Vic), s 322K (as inserted by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic)), which creates a new test for self-defence in Victoria:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if —
 - (a) the person believes that the conduct is necessary in self-defence; and
 - (b) the conduct is a reasonable response in the circumstances as the person believes them to be.¹⁶²

¹⁶¹ See Appendix 1.

¹⁶² It is noted that the Victorian provision limits self-defence in the case of murder to cases where ‘the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury’:

4.1.9 In the Issues Paper, it was suggested that such an amendment would have the advantage of increased consistency with the legislative provisions in other jurisdictions and may make the different components (threat and response) of the self-defence test clearer. Alternatively, it could be argued that changing the current formulation in the *Criminal Code* (Tas) s 46, which is well understood, will create unnecessary uncertainty. Further, it can be argued that consistency does not exist in the legislation in the Australian Capital Territory, Victoria, Northern Territory and New South Wales. Although based on the Model Criminal Code, (and containing the same mix of objective/subjective test), there are jurisdictional differences between the provisions.

4.1.10 There was no support in the submissions received for adopting the Model Criminal Code approach. In addition, evidence considered by the Institute suggests that the current formulation is well understood and is generally working well. Accordingly, it is the Institute's view that the *Criminal Code* (Tas) s 46 should not be amended to reflect the wording of the Model Criminal Code. Instead, the current wording of the section should be retained.

Recommendation 5:

The *Criminal Code* (Tas) s 46 should not be amended to reflect the wording of the Model Criminal Code.

4.2 Clarifying the relationship between mental illness and the defence of self-defence contained in s 46 of the *Criminal Code* 1924 (Tas)

4.2.1 The Institute has identified that there is uncertainty in the existing law concerning the relationship between mental illness and self-defence, particularly the relationship between ss 46 and 16(3) of the *Criminal Code* (Tas). Currently, it is unclear whether:

- there are circumstances where evidence of a mental disease and its effects could be used for self-defence if the defence of insanity is rejected;
- the High Court decision in *Hawkins v The Queen*¹⁶³ undermines the authority of the Court of Criminal Appeal in *Walsh*;¹⁶⁴
- section 16(3) is limited to insane delusions or whether it applies to delusions more generally; and
- reliance on s 16(3) provides the accused with a complete or a qualified acquittal.

In clarifying the relationship between s 16 and s 46, it is necessary (as a matter of policy) to decide whether self-defence should be available to offenders whose mistaken belief in the need to use violence in self-defence is attributable to a mental illness or other psychological conditions. This involves making a decision as to whether:

- an offender can rely on delusions arising from mental illness as the basis for self-defence — that is, where the delusions give rise to the accused's belief in the need to use force and warp the circumstances as the accused believes them to be; and

Crimes Act 1958 (Vic), s 322K(3). The Victorian provision also specifies that self-defence does not apply to a response to lawful conduct if the person knew that the conduct was lawful: *Crimes Act 1958* (Vic) s 322L. This is contrary to the position in New South Wales where these restrictions do not exist.

¹⁶³ (1994) 179 CLR 500.

¹⁶⁴ [1993] TASSC 91.

- an offender can rely on evidence that their perception of the threat and the circumstances was influenced by psychological conditions that meant that they were more sensitive to a threat of danger than a person without these conditions.

4.2.2 In the Issues Paper, the Institute identified four broad approaches to the interaction of mental illness and self-defence:

4.2.3 **Model One (Exclude any evidence of the accused’s mental condition for the purposes of self-defence):** This model would exclude all evidence of any abnormality in an accused’s mental condition from consideration in relation to self-defence under s 46 of the *Criminal Code* (Tas) including evidence of delusions arising from a psychosis and evidence that, due to psychiatric conditions, offenders are more sensitive to threats.

4.2.4 This option would directly address the concerns of those who consider that it is inappropriate for self-defence to be relied upon by offenders with mental illnesses who may mistakenly believe they are threatened (due to their illness) and use violence against an innocent bystander. Self-defence could be excluded for this category of offender on the basis that the availability of a complete defence in these circumstances is out of step with community standards and expectations. This model can also be supported on the basis that the law of self-defence should not take into account an accused’s level of maturity, intelligence and mental health because ‘[d]oing so subverts the very logic in conducting an objective evaluation into reasonableness, [and] opens the door for the consideration of every personality or culturally based trait that can influence standards of behaviour’.¹⁶⁵ Adoption of this model would leave any issue in relation to the accused’s culpability, arising from a psychological condition, to be dealt with under the insanity defence in s 16 of the *Criminal Code* (Tas) or at the sentencing stage.

4.2.5 However, this approach does not accord with the approach to self-defence in any of the other comparable jurisdictions considered in this Report. It could also be argued that it unnecessarily excludes evidence of defendants’ particular circumstances that are relevant to fact finders’ assessment of their conduct. Most importantly, in cases where the accused has a heightened perception of the threat or an otherwise mistaken view of the circumstances as a result of a psychiatric condition, the jury may not accept that the accused’s conduct was reasonable. When the jury objectively considers the accused’s response in light of the circumstances it may conclude that that response was excessive.¹⁶⁶ Objection can also be made in relation to the exclusion of all evidence of an accused’s psychological abnormality on the basis that this would exclude consideration of evidence of battered woman syndrome from the jury’s assessment of self-defence, which although criticised, has proved useful in individual cases to educate the jury about the perceptions of women in situations of prolonged family violence.¹⁶⁷

4.2.6 **Model Two (Exclude evidence of delusions for the purpose of self-defence — the Commonwealth and ACT approach):** This model is less restrictive than Model One. It requires the repeal of s 16(3) of the *Criminal Code* (Tas) and the insertion of a provision that specifies that evidence of delusions that are insufficient to support the defence of insanity cannot be relied on for the purposes of self-defence. This is the approach adopted in the *Criminal Code* (Cth) s 7.3(7) and the *Criminal Code* (ACT) s 29(2). The *Criminal Code* (ACT) s 29 provides:

¹⁶⁵ Paciocco, above n 159, 38.

¹⁶⁶ An illustration of the operation of the hybrid subjective/objective test can be seen in the case of *Tasmania v Denness*, 1 April 2010, COPS, (Porter J), where the accused pleaded guilty to one count of wounding. The accused suffered complex psychiatric conditions, including post-traumatic stress disorder and a background of underlying personality damage. In sentencing, it was accepted that, as a product of a deluded mind, the accused believed that the complainant was armed with a hammer and was going to hit him, but that in those circumstances, hitting the complainant with a machete was an excessive response.

¹⁶⁷ See [5.3].

(2) If the trier of fact is satisfied that a person carried out conduct because of a delusion caused by a mental impairment, the delusion itself cannot be relied on as a defence, but the person may rely on the mental impairment to deny criminal responsibility.

The *Criminal Code* (Cth) s 7.3(7) provides that:

If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

These provisions reflect the view of the Model Criminal Code Officers Committee that ‘delusions are symptoms of underlying pathology and that such defendants should be confined to the mental impairment defences’.¹⁶⁸ While this approach precludes reliance on a delusion for self-defence, it does not prevent a person who suffers from an insane delusion from relying on self-defence in circumstances where the person is actually under threat (rather than relying solely on an imagined threat that is a product of psychosis).¹⁶⁹

4.2.7 This model accords with the approach of the Court of Criminal Appeal in *Walsh*, where it was held that expert evidence of an insane delusion was not generally admissible in relation to the defence of self-defence in the *Criminal Code* (Tas) s 46. In the circumstances, evidence of the accused’s delusions was confined to the insanity defence contained in s 16 of the *Criminal Code* (Tas). Model Two also prevents people who are suffering psychotic illnesses from relying on their deluded beliefs to obtain a complete acquittal. This approach is supported on policy grounds that the public requires protection from future potential harms.¹⁷⁰ It can also be said to accord with community sentiments that a person who inflicts violence as a result of a deluded belief of danger ‘should be confined to a place of safety but not be punished’.¹⁷¹ The dispositional options available following a finding of not guilty by reason of insanity means that the court can appropriately respond to treatment needs of the offender and the need for community protection.¹⁷²

4.2.8 Further, repealing s 16(3) of the *Criminal Code* (Tas) has the advantage of promoting clarity and the modernisation of the law through the removal of a redundant provision. The scope and operation this provision has remained obscure with some commentators, courts and law reform bodies expressing the view that it is redundant and out of step with modern psychiatry.¹⁷³ In Canada, these concerns led to the repeal in 1991 of the equivalent provision in the Canadian *Criminal Code*.¹⁷⁴ The utility of s 16(3) is particularly questionable in circumstances where a person has a deluded belief in

¹⁶⁸ MCCOC, above n 137, [43].

¹⁶⁹ See *R v Resnik* [2003] ATCSC 96.

¹⁷⁰ Child and Sullivan, above n 69, 792.

¹⁷¹ A Simester, J Spencer, G Sullivan and G Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 5th ed, 2013) 817.

¹⁷² See [2.2.5].

¹⁷³ Bronitt and McSherry, above n 23, 213–18; Fairall and Yeo, above n 23, [13.30]; Brookbanks, above n 49, 142; Williams, above n 59, [160]; Law Reform Commission of Canada, *Criminal Law, The General Part: Liability and Defences*, Working Paper 29 (Ottawa: Minister of Supply and Services Canada, 1982) 48 cited in Bronitt and McSherry, above n 23, 218; *R v Chaulk* (1990) 62 CCC (3d) 193. See also E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2011) 17.20; J Devereux and M Blake, *Kenny Criminal Law in Queensland and Western Australia* (Lexis Nexis, 8th ed, 2013) [8.115]; D Klinck, ‘“Specific Delusions” in the Insanity Defence’ (1982–1983) 25 *Criminal Law Quarterly* 458, P Fairall, ‘The Exculpatory Force of Delusions – A Note on the Insanity Defence’ (1994) 6 *Bond Law Review* 57, 59; Ormerod, above n 31, 304.

¹⁷⁴ It should be noted that the former Canadian provision, s 16(3) of the *Criminal Code*, made it clear that such an accused would receive an acquittal on the grounds of insanity (not a complete acquittal). Its repeal followed the Report of the Law Reform Commission of Canada that stated that ‘[m]edical opinion rejects the idea of partial insanity and legal scholarship stresses the injustice and illogicality of applying to the mentally abnormal a rule requiring normal reactions within their abnormality; a paranoid killing his [or her] persecutor will be acquitted only if the imagined persecution would have justified the killing by way of self-defence — the law requires him [or her] to be sane in his [or her] insanity. For this reason it is suggested that the rule on insane delusions be abandoned’: Law Reform Commission of Canada, above n 173, 218.

the need for self-defence arising from a mental illness. It is difficult to envisage a scenario where such a case would not fall within s 16(1)(ii) of the *Criminal Code* (Tas). This section has been interpreted to mean that the defendant did not know that what they were doing was wrong according to the ‘everyday standards of reasonable people’.¹⁷⁵ The possibility that the jury might reject the defence of insanity yet consider it possible that the accused acted in self-defence when under the influence of an insane delusion is problematic. As noted in the Canadian decision of *R v Chaulk*:

An accused will be able to bring his claim within the scope of the second branch of the test set out in s 16(2) [the equivalent of *Criminal Code* (Tas) s 16(1)(ii)] if he proves that he was incapable of knowing that his conduct was morally wrong in the particular circumstances, for example, if he believes that the act was necessary to protect his life. If he is not able to establish this fact, it must be concluded that he either knew or was capable of knowing that the act was wrong in the circumstances. He cannot then possibly succeed in claiming that the act would have been justified or excused had the perceived facts been true.¹⁷⁶

If the jury accepts the expert opinion evidence concerning the accused’s delusional belief in the need to use self-defence, then a qualified acquittal on the grounds of insanity is available on the basis that the accused did not know that the act was wrong. On the other hand, if the jury rejects the defence of insanity, it seems difficult (if not impossible) to argue that the accused can rely on evidence of their delusion for the purposes of self-defence on the basis that they are ‘criminally responsible for the act or omission to the same extent as if the fact which ... [they were] induced by such delusion to believe to exist really existed’.¹⁷⁷ There is no evidentiary foundation to support the contention that the accused had a genuine belief in the need to act in self-defence.

4.2.9 In contrast, some commentators suggest that arguments that s 16(3) is an anachronism fail to take account of the difference between the medical and legal definitions of insanity and the role of the jury in applying the insanity defence.¹⁷⁸ Further, retaining s 16(3) of the *Criminal Code* (Tas) acknowledges the possibility that there may well be cases where juries are able to take evidence concerning a mental disease and its effects into account when applying s 46 of the *Criminal Code* (Tas) in circumstances where the other limbs of the defence of insanity have been rejected. The Court of Criminal Appeal in *Walsh*¹⁷⁹ left unanswered the question whether there are any circumstances where this may be possible.

4.2.10 Model Two would allow for evidence of psychiatric conditions (not falling within the scope of the insanity defence) that made the accused more sensitive to threat to be taken into account for the purposes of self-defence.

4.2.11 **Model Three (Specify that delusions result in a qualified acquittal — Western Australian Law Reform Commission):** This model retains s 16(3) of the *Criminal Code* (Tas). It permits evidence of delusions to be relied on for the purposes of self-defence, but provides that, in these circumstances, only a qualified acquittal is possible (that is, not guilty on the grounds of insanity). This would mean that a person who held a deluded belief in the need for self-defence but did not meet the test for insanity contained in the *Criminal Code* (Tas) ss 16(1) and (2) could rely on s 16(3) if his or her response was reasonable in the circumstances that they believed them to be. The onus of proof would be on the defendant (as with the other provisions of the insanity defence) to establish this on the balance of probabilities. However, if the defendant discharged the onus of proof in this regard, the result would be a qualified acquittal only.

¹⁷⁵ *R v Porter* (1933) 55 CLR 182, 189–190 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

¹⁷⁶ (1990) 62 CCC (3d) 193, 236 (Lamer J). Note that Slicer J distinguished this case in *Walsh* (1991) 60 A Crim R 419, 426–27.

¹⁷⁷ *Criminal Code* (Tas) s 16(3).

¹⁷⁸ This was the view of Slicer J in *Walsh* (1991) 60 A Crim R 419, 427. See Howard and Westmore, above n 129, [6.47–6.50].

¹⁷⁹ [1993] TASSC 91, [26] (Crawford J).

4.2.12 Models Two and Three are similar in that they achieve the same end — limiting the use of evidence of delusions arising from a mental illness to the insanity defence.

4.2.13 This approach reflects the original *McNaghten* rule on delusions and arguably reflects the intended operation of the *Criminal Code* (Tas) s 16(3).¹⁸⁰ It also reflects the approach of the Western Australian Law Reform Commission (WALRC) which recommended that the equivalent Western Australian provision be retained and that it be made clear that successful reliance on it would result in a special verdict of not guilty by reason of mental impairment rather than a complete acquittal.¹⁸¹ The WALRC supported this approach on the basis that it was in the public interest and that it allowed for the appropriate treatment of a deluded offender.¹⁸² It ensures that a person with a deluded belief in the need for self-defence receives a qualified acquittal. It can be argued that this reflects community expectations.

4.2.14 As with Model Two, this approach would allow evidence of psychiatric conditions that made the accused more sensitive to threat (but not delusional beliefs) to be taken into account.

4.2.15 **Model Four (allow all evidence):** This model allows evidence of mental illness (delusions and heightened sensitivity) to be relied on for the purpose of self-defence with the result that a successful argument of self-defence results in a complete acquittal. This model reflects the case law that has allowed expert evidence of mental illness to be admitted in relation to the issue of whether the accused's belief in the necessity of their actions was based on reasonable grounds.¹⁸³ It also reflects the approach of Slicer J in *Walsh*,¹⁸⁴ that evidence of delusions insufficient to support the insanity defence could go to the issue of self-defence.

Submissions received

4.2.16 Three submissions addressed the interrelationship of self-defence and insanity. The repeal of s 16(3) and the enactment of a provision based on the *Criminal Code* (Cth) (Model Two) was supported by the Acting Director of Public Prosecutions, who expressed the view that:

An accused should not be allowed to rely on evidence of a delusion caused by mental impairment as a basis for self-defence. Evidence of delusions caused by mental impairment should be dealt with by a consideration of insanity under s 16 of the *Criminal Code*. It is contrary to community expectations that an accused person could be acquitted based on a deluded belief or view of the facts. The community would expect that such a person would be caught by the insanity provisions and in that way the community would be protected from the risk that they might behave in a similar way in the future due to ongoing delusions.

The Law Society's submission indicated that no consensus was reached on these issues within the Society. Some agreed within the Acting Director of Public Prosecutions' position and others expressed the view that 'the reasonable person standing in the shoes of the defendant ought to include any condition from which the defendant suffers' (more akin to Model Four). An approach based on Model Four would also appear to be supported by the CLC. In its submission, the CLC recommended

¹⁸⁰ The *Criminal Code* (Tas) s 16(3) substantially reproduces the statement of the House of Lords in *M'Naghten's* case about the effect of insane delusions on criminal responsibility, where the accused is not otherwise legally insane — in this case 'the defendant's responsibility is judged by reference to the facts as he supposed them to be and not the actual facts': Blackwood and Warner, above n 9, 261. See also Baker, above n 69, [27–017]; Law Commission (UK), above n 69, 4.59 fn 62. Although note *R v Oye* [2014] 1 WLR 3354 where the accused was able to rely on insanity and self-defence in tandem: see discussion in Child and Sullivan, above n 69; Mackay, above n 69.

¹⁸¹ WALRC, above n 122, 233.

¹⁸² *Ibid* 233. However, the WALRC relied on the first instance judgment of Slicer J in *Walsh* (1991) 60 A Crim R 419 as justification for a continued need for the provision and did not refer to the subsequent Court of Criminal Appeal judgment.

¹⁸³ See [1.2.3].

¹⁸⁴ See (1991) 60 A Crim R 400.

‘that evidence of mental illness should continue to be admissible as part of the accused’s claim of self-defence as held by Slicer J in *Walsh*’. This would mean that the jury should first consider insanity and then, if not satisfied on the balance of probabilities that the offender was insane (within the requirements of s 16), the jury could rely on the expert evidence of the accused’s mental illness for the purposes of self-defence.

The Institute’s view

4.2.17 The Institute’s view is that an offender should be able to rely on evidence of a psychiatric condition that makes the person more sensitive to threats in determining whether the person had an honest belief in the need for self-defence and whether the force used was reasonable in the circumstances as the accused believed them to be. On this basis, Model One goes too far in excluding evidence relevant to the accused’s subjective perception and, accordingly, the Institute does not support an amendment that would not allow any evidence of the accused’s mental condition to be considered for the purposes of self-defence. However, the Institute considers that some restriction should be placed on the ability of an offender to rely on evidence of a delusion arising from a mental illness as a foundation for self-defence.

4.2.18 It is the Institute’s view that to allow all evidence of mental illness to be relevant to self-defence is contrary to community expectations and does not reflect the respective purposes of the insanity defence and the defence of self-defence. While as a matter of policy, it may be accepted that an accused should be able to rely on sane though unreasonable mistakes for purposes of self-defence, it does not follow that an accused should similarly be entitled to rely on insane delusions. In the case of a (sane) mistake the jury can apply their common sense and may refuse to accept a patently absurd and unreasonable mistake as one that is not genuinely held.¹⁸⁵ This ‘reality testing’ is unlikely to be possible for an insane delusion. This means that the prosecution will only be able to establish beyond reasonable doubt that the offender was not acting in self-defence by proving either that the delusion was not one of immediate/imminent harm¹⁸⁶ or that the force used was excessive in the circumstances as the offender believed them to be. But exactly how would the prosecution be able to do this? It would require them to engage with the insane delusion as though it had some basis in reality. Similarly, asking jurors to assess the reasonableness of an accused’s response to an insane delusion obliges them to engage in fantastical reasoning. This begs the question, just how can a jury realistically or rationally assess the reasonableness of a response generated by an insane delusion.¹⁸⁷ Additionally, to permit complete acquittals in cases of insane delusions does not enable appropriate treatment to be provided to deluded offenders or take into account the need for community protection.¹⁸⁸

4.2.19 Accordingly, the Institute’s view is that Model Four should not be adopted. The *Criminal Code* (Tas) should not be amended to allow all evidence of mental illness (including delusions arising from mental illness) to be relied on for the purpose of self-defence (Model Four). Instead, it is the Institute’s view that an approach based on Model Two should be adopted. Section 16(3) of the *Criminal Code* (Tas) should be repealed and a provision included in s 46 of the *Criminal Code* (Tas) to the effect that evidence of delusions arising from a mental illness cannot be relied on for the purposes of self-defence. Like the Model Criminal Code Officers Committee, the Institute considers that delusions arising from mental illness should not ground self-defence but rather the defence of insanity. In forming this view the Institute has given careful consideration to Model Three; whether the *Criminal Code* (Tas) s 16(3) should be retained but amended to make it clear that evidence of delusions about the need to act in self-defence can only result in a qualified acquittal (that is, not

¹⁸⁵ See [2.1.4], [4.1.3].

¹⁸⁶ This was the situation in two Western Australian cases where the delusions did not provide basis for self-defence: see *Garrett v R* [1999] WASCA 169; *Western Australia v McDonald* [2010] WASC 355.

¹⁸⁷ This was the approach in *R v Oye* [2014] 1 WLR 3354.

¹⁸⁸ See Child and Sullivan, above n 69, 792.

guilty on the grounds of insanity). As noted, the outcome of adopting this approach would be similar in effect to repealing s 16(3) of the *Criminal Code* (Tas) as both approaches achieve the same end — limiting the use of evidence of delusions arising from a mental illness to the insanity defence and not allowing such beliefs to be relied on for the purposes of self-defence. However, it is the Institute’s view that the better approach is to repeal s 16(3) of the *Criminal Code* (Tas). This approach clearly sets out the relevance of mental disease to self-defence and removes the medical anomaly contained in s 16(3) that a person can be suffering a delusion arising from a mental illness on some specific matter but be ‘otherwise sane’. While it may be argued that there are possibly circumstances where an offender acts in self-defence under a delusional belief arising from a mental illness that does not fall within the other limbs of the insanity defence, it is the Institute’s view that this is unlikely and that s 16(3) is largely redundant.¹⁸⁹ This reflects the experience in other comparable jurisdictions and the use to date of s 16 of the *Criminal Code* (Tas) in Tasmania.¹⁹⁰ However, the Institute’s view is that s 16 in its entirety should be reviewed to ensure that the definition of mental disease accords with modern medical understanding and knowledge (see Recommendation 1).

Recommendation 6:

The *Criminal Code* (Tas) should be amended to provide if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas).

4.3 The relationship between intoxication and the defence of self-defence contained in the *Criminal Code* (Tas) s 46

Intoxication and self-defence

4.3.1 The Institute has previously made recommendations in relation to the need to clarify the existing law in relation to the relevance of intoxication to s 46 of the *Criminal Code*. In the previous work of the Institute, two main alternatives for reform were identified:

- (1) to provide that an intoxicated mistake is irrelevant for the purposes of assessing an accused’s perception of the circumstances and the response.¹⁹¹ This is the United Kingdom position in relation to the relationship between self-induced intoxication and self-defence;¹⁹² or
- (2) to provide that evidence of intoxication is relevant to an assessment of the circumstances as the accused believes them to be. This is the position in New Zealand,¹⁹³ the Commonwealth (except for crimes where the fault element for each physical element is basic intent),¹⁹⁴ the Australian Capital Territory (except for crimes where the fault element for each physical element is basic intent),¹⁹⁵ the Northern Territory (Schedule 1 offences — except for crimes

¹⁸⁹ See [4.2.9].

¹⁹⁰ See [4.2.6]–[4.2.8].

¹⁹¹ See TLRI, above n 70, [6.9.5].

¹⁹² See *O’Grady* [1987] QB 995; *Criminal Justice and Immigration Act 2008* (UK), s 76(5).

¹⁹³ See Simester and Brookbanks, above n 34, [15.1.4] citing *R v Ranger* (1998) CRNZ 6; *R v Thomas* [1991] 3 NZLR 141; *R v Terewi* (1985) 1 CRNZ 623; *Tuialli v Police* HC Auckland AP310/86, 19 March 1987; *Deans v Police* HC Christchurch AP7/87, 5 March 1987; *King v Police* HC Dunedin AP11/87, 5 August 1987 (fn 71) (New Zealand).

¹⁹⁴ *Criminal Code* (Cth) s 8.4. A fault element in respect of a circumstance or a result is not fault element of basic intent, and as most offences include circumstances or results, the exception is extremely limited: see I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners* (Attorney-General’s Department, 2002) 163.

¹⁹⁵ *Criminal Code 2002* (ACT) s 33.

where the fault element for each physical element is basic intent),¹⁹⁶ Victoria¹⁹⁷ and New South Wales.¹⁹⁸

4.3.2 The Institute asked the following questions in the Issues Paper:

- Should the position in relation to self-defence be clarified?
- Should the *Code* provide that an intoxicated belief is irrelevant to assessing an accused's perception of the need for self-defence and the response?
- Should the *Code* provide that an intoxicated belief is relevant to an assessment of the circumstances as the accused believed them to be in s 46?

4.3.3 Ultimately, the Institute's view expressed in the report on *Intoxication and Criminal Responsibility* was that for the purposes of self-defence, evidence of intoxication may be considered:

- (a) for the purposes of assessing the accused's belief in the need for self-defence;
- (b) for the purpose of determining the circumstances as the accused believes them to be; and
- (c) as a physical characteristic of the accused in determining whether the response was reasonable.¹⁹⁹

The Institute expressed the view that it was difficult to find any argument, other than those based entirely on policy, why intoxication should not be relevant to the subjective tests in the *Criminal Code* (Tas) s 46.²⁰⁰ In relation to whether the force used was reasonable, the Institute considered that the standard of reasonableness was not altered by an accused's distorted perceptions or judgment caused by intoxication. However, the Institute considered that it was appropriate for the effect on a person's physical capabilities/capacities (coordination and motor skills) to be taken into account in determining whether the force used was reasonable.²⁰¹

4.3.4 In considering the issue of intoxication and criminal responsibility, the Institute proposed a model of reform that would govern the relationship between intoxication and all criminal defences (not just self-defence). In determining whether evidence of intoxication could be relied on by an accused as an exculpatory factor, the Institute's view was that a distinction should be made between purely objective tests and tests which were not wholly objective. The general principle supported by the Institute was that intoxication was relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.²⁰² Thus, the recommendations that were made in relation to self-defence contained in s 46 of the *Criminal Code* (Tas) were based on principle and consistency. These are sound reasons to continue to support the earlier recommendations of the Institute.

¹⁹⁶ *Criminal Code* (NT) s 43AV.

¹⁹⁷ *R v Katarzynski* [2002] NSWSC 613.

¹⁹⁸ *Crimes Act 1958* (Vic), s 322T(2); Judicial College of Victoria, above n 78.

¹⁹⁹ TLRI, above n 70, [6.9.27].

²⁰⁰ *Ibid* [6.9.7].

²⁰¹ There is agreement with this approach in Canada, see Paciocco, above n 159, who writes that 'when it comes to evaluating the vulnerability of the accused and his reasonable need for violence (as opposed to the quality of his subjective judgment) intoxication will be a relevant consideration. For this purpose alone it can be considered during the objective evaluation (*R v Dorion* (1972) 18 CRNS 127, 1972 Carswell NB 1 (NBCA)). In essence, a lack of sobriety is a relevant physical characteristic, but its impact on the functioning of the mind of the accused is not to be taken into account': at 40.

²⁰² TLRI, above n 70, [6.9.28].

4.3.5 However, in view of concerns raised about the reliance by intoxicated offenders on self-defence the Institute has revisited these recommendations. It may be that broader policy concerns about the criminal responsibility of intoxicated offenders mean that the view is taken that evidence of intoxication should be excluded from a consideration of the circumstances as the accused believed them to be for the purposes of self-defence. This was the view of the Acting Director of Public Prosecutions:

It could be contrary to community expectations that an accused could rely on self-induced intoxication to base a claim of self-defence. ...

The policy reasons for allowing a jury to take into account the subjective characteristics of a person when determining what they could have reasonably believed but excluding consideration of self-induced intoxication is that self-induced intoxication is self-induced. The community would not expect someone who consumes drugs or alcohol to then be entitled to rely on the effect of their voluntary consumption as a basis for a defence, particularly to crimes of violence. The community, or at least the law, should expect those who choose to consume alcohol and drugs to be responsible for the consequences of their consumption and not to rely on those consequences to avoid liability for serious criminal conduct.

There was also some support for this view expressed by the Law Society, which indicated that:

[d]iffering and equally valid views were expressed with respect to the question of whether an accused could rely on self-induced intoxication to base a claim of self-defence. There is some support for the position taken by the Acting DPP. Against that, it is said that such a policy position fails to take account of the complexities and shades of grey in real life conflicts. Further, the Acting DPP's position presupposes that the self-induced intoxication came about with the intention to commit a violent crime. If that were the case self-defence could not arise.

4.3.6 While the Institute is mindful of concerns about violence committed by intoxicated offenders, the Institute did not find evidence that intoxicated offenders were relying on a mistaken belief arising from their intoxication to raise self-defence successfully. Instead, it appeared that intoxicated offenders were more likely to be convicted. This reflects the view expressed by Leader-Elliott that '[i]n general evidence of intoxication tends to reinforce the case for the prosecution. If the D was under the influence of alcohol, the most likely inference is that the injury was inflicted intentionally ... as a consequence of drunken aggression'.²⁰³ On this basis, the Institute does not resile from its earlier recommendations.

Recommendation 7:

The *Criminal Code* (Tas) should be amended to provide that for the purposes of self-defence in s 46 of the *Criminal Code* (Tas), evidence of intoxication may be considered:

- (a) for the purposes of assessing the accused's belief in the need for self-defence;
- (b) for the purpose of determining the circumstances as the accused believes them to be; and
- (c) as a physical characteristic of the accused in determining whether the response was reasonable.

Methamphetamine use, self-defence, intoxication and insanity

4.3.7 In addition, the Institute is aware of concerns about reliance on self-defence by offenders affected by methamphetamine. Methamphetamine (also known as ice or crystal meth) is a potent form

²⁰³ Leader-Elliott, above n 194, 135.

of amphetamine that acts as a central nervous system stimulant.²⁰⁴ There is increased community concern about the consequences of methamphetamine use and its association with criminal behaviour.²⁰⁵ There is also research evidence that demonstrates a link between methamphetamine use and violent behaviour.²⁰⁶ Although there is concern about increased methamphetamine use, it is the Institute's view that it is not necessary for the purpose of defining the relationship between self-defence and intoxication to make separate provision for methamphetamine use. There does not seem to be any principled basis for distinguishing between potential causes of an accused's intoxication. In any event, as a practical matter, if an offender has consumed other drugs such as alcohol, or cannabis (in addition to methamphetamine) it would be very difficult to unpick the effect on the psychological state of an offender that could be attributed to a particular drug and to assert that the accused's mistaken perception or psychotic state was attributable to methamphetamine alone as opposed to the combined effect of the offender's overall drug use. It follows that it is the Institute's view that the approach taken to intoxication should apply to all types of self-induced intoxication. This was supported by the Acting Director of Public Prosecutions who stated that the introduction of a special provision would be unworkable as in many cases 'it would be impossible to distinguish between the effects of one drug as opposed to another'. A special provision for one particular drug was also opposed on policy grounds. In addition, based on the Institute's assessment of the current operation of self-defence, it is also unlikely that a jury would readily accept the claim by an offender affected by methamphetamine that they were acting in self-defence rather than acting as the aggressor by engaging in an act of 'drug-fuelled' aggression or that the response was unreasonable in the circumstances.²⁰⁷

Recommendation 8:

Intoxication that is caused by methamphetamine use should not be treated differently, for the purposes of self-defence in s 46 of the *Criminal Code* (Tas), from intoxication arising from other causes.

4.3.8 Similarly, in relation to insanity, there does not appear to be any basis for making a distinction between the approach to drug-induced psychosis attributable to methamphetamine and drug-induced psychosis attributable to other drug use. Currently, s 17(1) of the *Criminal Code* (Tas) recognises that intoxication may bring an offender within the insanity rules contained in the *Criminal Code* (Tas) s 16 if the accused's intoxication has caused a disease of the mind.²⁰⁸ In assessing whether the accused is suffering from a disease of the mind, 'the distinction is between a defect of reason resulting from an underlying condition and a defect of reason caused by something external'.²⁰⁹ Psychosis that is a direct result of the ingestion of the drug would not fall within the scope of a mental disease but it is likely that psychosis that results in mental disturbance (even if initially occasioned by drug use) would fall within the law of insanity.²¹⁰ If the accused's psychosis falls within the definition of a mental disease, the relationship between insanity and self-defence will be governed by the approach taken to that issue.²¹¹ The Acting Director of Public Prosecutions supported this approach

²⁰⁴ Australian Drug Foundation, *Amphetamines* (18 November 2014) <<http://www.druginfo.adf.org.au/drug-facts/amphetamines>>.

²⁰⁵ E Hope, 'Police Call for Help on Drugs', *The Mercury* (Hobart), 27 April 2014; K Moor, "'Ice" Use Hits Pandemic proportions', *The Mercury* (Hobart), 29 April 2014; D Dingwall, 'Ice Begets Burglary Boom', *The Advocate* (Burnie), 5 May 2014.

²⁰⁶ R McKetin, D Lubman, J Najman, S Dawe, P Butterworth and A Baker, 'Does Methamphetamine Use Increase Violent Behavior? Evidence from a Prospective Longitudinal Study' (2014) 109 *Addiction* 798.

²⁰⁷ See Part 3 above.

²⁰⁸ See Blackwood and Warner, above n 9, 294. See for example, *Reilly*, unreported Serial No 62/1979, where it was accepted that alcoholic paranoid psychosis fell within the definition of disease of the mind.

²⁰⁹ A Carroll, B McSherry, D Wood and S Yannoulidis, 'Drug-induced Psychoses and Criminal Responsibility' (2008) 26 *Behavioral Sciences and the Law* 633, 635 referring to *R v Radford* (1985) 42 SASR 226. See also *Jeffrey* [1982] Tas R 199, 227 (Nettlefold J).

²¹⁰ Carroll et al, above n 209, 648–49.

²¹¹ See 2.3.

and the Institute agrees that if an offender's psychosis falls within the definition of a mental disease then the insanity defence (rather than the rules in relation to intoxication should apply).

Recommendation 9:

Methamphetamine use that causes a disease of the mind should not be treated differently, for the purposes of the *Criminal Code* (Tas) s 17(1), than a disease of the mind attributable to other drug/alcohol use.

Drug-associated psychosis

4.3.9 While the Institute does not consider that special rules need to be created for methamphetamine use, the Institute's consideration of the issue of methamphetamine use has highlighted difficulties and complexities in the interaction of intoxication, insanity and self-defence in cases where a person experiences drug-associated psychosis. This raises two key issues: (1) should an offender be able to rely on drug-associated psychosis for the purposes of the insanity defence or should the relevance of psychosis to criminal responsibility be governed by the rules relating to intoxication; and (2) if an offender is precluded from relying on insanity, should an offender be able to use a deluded belief arising from drug associated psychosis for the purposes of self-defence in s 46 of the *Criminal Code* (Tas), in the same way as other mistaken beliefs arising from intoxication. To date, much of the interest in this area has focused on the first issue — the appropriate boundaries between intoxication and insanity. Courts and politicians have been concerned to limit access to the insanity defence for such offenders.²¹²

4.3.10 In Carroll, McSherry, Wood and Yannoulidis' analysis of drug-associated psychosis and criminal responsibility, the authors have identified at least four ways in which drug-associated psychosis may arise:

- (1) a person may experience a drug induced psychotic episode that is part of an intoxication syndrome that resolves rapidly with the excretion of the drug from the body;
- (2) a person may experience relatively short-lived psychotic symptomatology due to the direct psychological effects of an ingested substance and the symptoms may persist for a short period (days or weeks) after the excretion of the substance;
- (3) a person's use of drugs may be associated with the development of a psychotic illness that then has an independent long-term existence;
- (4) a person with an established psychotic illness may engage in substance abuse, which appears to precipitate psychotic relapses.²¹³

As discussed, currently in Tasmania, an offender can rely on the insanity defence if they suffer from a disease of the mind caused by intoxication and this would encompass (3) and (4) where a person has an independent psychotic illness. As indicated, the Institute supports the application of insanity in this context. However, the issue remains as to the appropriateness of excluding an offender from the insanity defence where an offender's psychosis is attributable to the intoxicating effects of the substance or short-term symptoms associated with drug use, (the states of minds in (1) and (2)) which may give rise to 'temporary insanity'. The appropriateness of the distinction that is currently drawn between drug use giving rise to a mental disease and the temporary effects of drug use has been

²¹² See Carroll et al, above n 209; Yannoulidis, 'Drug Use and the Defence of Mental Impairment: Some Conceptual and Explanatory Issues' (2006) 18 *Bond Law Review* 165; Yannoulidis, above n 23, Ch 4; D Bourget, 'Forensic Considerations of Substance-Induced Psychosis' *The Journal of the American Academy of Psychiatry and the Law* 168; VLRC, above n 30, ch 5; NSWLRC, above n 30, [3.82]–[3.85]; R Scott, 'Amphetamine-Induced Psychosis and Defences to Murder: *R v Clough* [2010] QCA 120' (2012) 19 *Psychiatry, Psychology and Law* 615.

²¹³ See Carroll et al, above n 209, 633–34.

questioned as a matter of policy and practicality. The VLRC has argued that the focus should be on the offender's state of mind at the time of the criminal offence and that causal factors for this state of mind should be ignored on the basis that the current approach:

runs counter to the underlying conceptual purpose of the mental impairment defence. If the purpose of the defence is to ensure that people are excused from criminal responsibility when their cognitive functions are so affected that they are unable to understand what they are doing or that it is wrong, then it should not matter what the cause of the particular impairment was.²¹⁴

The distinction also creates considerably practical difficulties for mental health experts.²¹⁵ As Bourget has written, 'it is not often possible to distinguish substance-induced psychosis from a first-episode psychosis in the context of a primary mental disorder due to the very high level of comorbidity'.²¹⁶ Other commentators and law reform bodies have taken the view that the temporary effects of ingesting drugs should be excluded from the definition of mental disorder.²¹⁷ The resolution of this issue is beyond the scope of this Report, however, the Institute's view is that the operation of the insanity defence and the rules of intoxication in cases of drug-induced psychosis should be considered as part of a general review of the law of insanity (see Recommendation 1).

Recommendation 10:

The operation of the insanity defence and the rules of intoxication in cases of drug-induced psychosis should be considered as part of a review of the law of insanity.

4.3.11 For the purpose of the Report, the relevant issue is the extent to which an offender can rely on a delusion arising from drug-induced psychosis (that does not cause a disease of the mind) for the purposes of self-defence. Based on the Institute's recommendation in relation to intoxication, an offender would be able to rely on a delusion arising from drug-induced psychosis where it arises as a result of the intoxicating effects of the substances or the short-term symptoms associated with drug use (the states of minds in (1) and (2) above). However, in view of the implications of such an outcome, the Institute has given consideration as to whether, for the purposes of self-defence, it is appropriate to take intoxication into account to the extent that it causes short-term psychosis. This is a matter of policy. It could be argued that there is no need to make a distinction between intoxication resulting in psychoses and other states of intoxication because it is highly unlikely that a jury would accept that violence inflicted by a person in a drug-induced psychotic state was a reasonable response in self-defence. Alternatively, it could be argued that delusional beliefs arising from an offender's state of psychosis, however caused, should not provide the foundation for self-defence and that there is no basis for distinguishing between drug-induced psychosis and psychosis arising from mental illness. The Institute's view is that drug-induced psychosis should not provide the basis for self-defence. Accordingly, the Institute's view is that the *Criminal Code* (Tas), s 46 should be amended to provide that a delusional belief, however arising, should not provide the basis for self-defence.

Recommendation 11:

Drug-induced psychosis should not provide the basis for self-defence in the *Criminal Code* (Tas) s 46.

²¹⁴ VLRC, above n 30, [5.44].

²¹⁵ Bronitt and McSherry, above n 23, 285; Carroll et al, above n 209, 646–48.

²¹⁶ Bourget, above n 212, 168.

²¹⁷ See NSWLRC, above n 30, [3.82]–[3.85]; Yannoulidis, above n 23, Ch 4.

4.4 Partial defences to murder: mistaken or excessive self-defence and diminished responsibility

4.4.1 Unlike other Australian jurisdictions, Tasmania does not have a partial defence that operates to reduce murder to manslaughter in cases of mistaken or excessive self-defence. Neither does Tasmania have a partial defence akin to the Queensland defence of self-preservation in a domestic relationship.²¹⁸ There is also no defence of diminished responsibility in Tasmania that would operate as a partial defence to murder where the accused suffers from an abnormality of mind and where the abnormality substantially impairs the accused's mental responsibility for his/her conduct.

Mistaken self-defence

4.4.2 If s 46 of the *Criminal Code* (Tas) is amended to require that the accused's belief in the need to use defensive force be reasonable or based on reasonable grounds, it may be thought that it is desirable to introduce a partial defence to murder in cases where the accused genuinely (but mistakenly and unreasonably) believes that defensive force is necessary. Currently, under s 46 of the *Criminal Code* (Tas) such an accused would have a complete defence, provided the force used was reasonable in the circumstances as the accused believed them to be. As the Institute has recommended no change to the current test in s 46, it is the Institute's view that there is no need for a defence of mistaken self-defence. However, even if the law is changed to introduce a requirement of reasonableness in relation to an accused's belief in the need for self-defence, it is the Institute's view that such a defence is still inappropriate. The experience in Victoria in relation to the offence of defensive homicide (which operated to provide a manslaughter conviction in cases where an offender genuinely but unreasonably believed it was necessary to defend him or herself)²¹⁹ has been criticised on the basis that it reintroduced the partial defence of provocation under another guise and legitimised lethal male violence.²²⁰ These concerns were raised by the Acting Director of Public Prosecutions, who indicated that if such a defence was introduced in Tasmania it would effectively re-enact the repealed defence of provocation for murder, which would be a backward step, and would be utilised by men to justify the murder of their female partner. It was the Acting Director of Public Prosecutions' position that '[i]f it was thought that the creation of such a defence would be a necessary result of amending section 46 to require that an accused's belief was reasonable then it would be better to leave the provisions as they currently stand'. His view was endorsed by the Law Society. It is also the view of the Institute that a partial defence of mistaken self-defence should not be introduced in the event that the *Criminal Code* (Tas) s 46 is amended to introduce an additional requirement of reasonableness.

Recommendations 12 and 13:

12. A partial defence of mistaken self-defence is unnecessary under the current formulation of self-defence contained in the *Criminal Code* (Tas) s 46.
13. That a partial defence of mistaken self-defence should not be introduced in Tasmania in the event that the *Criminal Code* (Tas) s 46 is amended to introduce an additional requirement of reasonableness.

²¹⁸ This partial defence is considered in Part 5, which considers the operation of self-defence in the context of family violence.

²¹⁹ This was contained in *Crimes Act 1958* (Vic) s 9AD (now repealed).

²²⁰ K Fitz-Gibbon, 'The Victorian Operation of Defensive Homicide: Examining the Delegitimation of Victims in the Criminal Court System' (2012) *Griffith Law Review* 555; D Tyson, 'Victoria's New Homicide Laws: Provocation Reforms or More Stories of Women "Asking for it"?' (2011) 23 *Current Issues in Criminal Justice* 203; K Fitz-Gibbon and S Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 159. See also Toole, above n 144; Department of Justice (Victoria), *Review of the Offence of Defensive Homicide*, Discussion Paper (2010); Department of Justice (Victoria), *Defensive Homicide: Proposals for Legislative Reform*, Consultation Paper (2013).

Excessive self-defence

4.4.3 A partial defence of excessive self-defence exists in some Australian jurisdictions. In Western Australia, the *Criminal Code (WA)* s 248(3) reduces murder to manslaughter where the force used would be an act done in self-defence but for the fact that it was not a reasonable response in the circumstances as the person believed them to be. This is concerned with the issue of whether excessive force was used in the circumstances, as the accused believed them to be, rather than the situation where a person makes an unreasonable mistake about the circumstances that exist. There is also a partial defence of excessive self-defence in New South Wales and South Australia.²²¹

4.4.4 In the Issues Paper, the Institute asked for submissions in relation to whether such a defence should be introduced in Tasmania. The Acting Director of Public Prosecutions stated that:

there is no need for a partial defence of excessive self-defence. This is appropriately dealt with at the sentencing stage. The law as to self-defence, which applies to a high percentage of crimes of violence that are prosecuted in this State, should be kept as simple as possible. There is no demonstrated need to complicate the law so that juries must be directed in accordance with numerous defences.

The Law Society agreed with this position. This is also the view of Institute that such a defence is unnecessary whilst Tasmania has a broad self-defence provision and that this is a matter that is best dealt with at the sentencing stage.

Recommendation 14:

A partial defence of excessive self-defence should not be introduced in Tasmania.

Diminished responsibility

4.4.5 As part of its review of the interaction of mental illness and self-defence, the Institute has given consideration to whether the partial defence of diminished responsibility should be introduced in Tasmania. This was done on the basis that it could be argued that a partial defence may be appropriate for an offender who is not able to satisfy the requirements of the insanity defence and is also precluded from relying on self-defence. Diminished responsibility is a partial defence that reduces murder to manslaughter. In Australia, diminished responsibility is available as a defence in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland.²²² Although the provisions are not uniform, three common elements can be identified:

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specific cause; and
- the abnormality of mind must have substantially impaired the accused's capacity to understand their actions or to know that they ought not to do the act or to control their actions.²²³

Diminished responsibility is also a defence in the United Kingdom.²²⁴ As with insanity, the burden of proof in relation to diminished responsibility is on the accused to establish the defence on the balance of probabilities. Conditions that have been held to amount to an abnormality of the mind include psychosis, organic brain disorder, schizophrenia, epilepsy, hypoglycaemia, depression, post-traumatic

²²¹ *Crimes Act 1900* (NSW) s 421; *Criminal Law Consolidation Act 1935* (SA) s 15(2).

²²² *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 159; *Criminal Code* (Qld) s 304A.

²²³ Bronitt and McSherry, above n 23, [5.85].

²²⁴ *Coroners and Justice Act 2009* (UK) s 52. See discussion in Simester et al, above n 171, [19.2].

stress disorder, and anxiety.²²⁵ Personality disorders have also been held to come within the term.²²⁶ Diminished responsibility has been a controversial defence with divergent views expressed by law reform bodies that have examined the appropriateness of the defence.²²⁷

4.4.6 Arguments in favour of establishing a defence of diminished responsibility include that:

- it provides an appropriate ‘half-way’ or intermediate defence for those with mental conditions who cannot establish the insanity defence. This can be said to ‘reflect the reality that mental illness ranges along a continuum and so should levels of criminal responsibility’;²²⁸
- offenders who kill while suffering from mental impairment are less morally culpable than offenders who do not have such a condition and should not be labelled murderers;²²⁹
- it may encourage more guilty pleas and so reduce the number of trials;²³⁰
- it is preferable to have the issue of the accused’s mental condition dealt with at trial rather than at that sentencing stage because ‘matters of criminal responsibility are best determining by the jury’;²³¹
- allowing the jury to decide the level of culpability reinforces community participation in the justice system and community acceptance of the sentencing outcome.²³²

4.4.7 Arguments against establishing a defence of diminished responsibility include that:

- the term ‘abnormality of mind’ is ambiguous with no conformity to medical concepts;²³³
- it will be used in the context of family violence where depressed partners kill their partner and/or children when they end the relationship. It may also be used, in conjunction with evidence of battered woman syndrome, as a defence for women who kill violent partners (in circumstances where self-defence would be more appropriate);²³⁴
- there are dangers of fabrication on the basis that the psychiatrist’s opinion will be based on the history provided by the accused;²³⁵
- conflicting expert evidence brings the law into disrepute because it creates the impression that ‘[a]voiding a murder charge [can] ... be seen as a matter of merely shopping for the appropriate medical expert’;²³⁶

²²⁵ VLRC, above n 32, [5.104].

²²⁶ Bronitt and McSherry, above n 23, [5.90].

²²⁷ See NSWLRC, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997); Law Commission for England and Wales, *Partial Defences to Murder*, Final Report, Law Com No 290, (2004); VLRC, above n 30; WALRC, above n 122; Model Criminal Code Officers’ Committee, *Fatal Offences against the Person*, Discussion Paper (1998); New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001)[140]; NZLC, *The Partial Defence of Provocation*, Report 98 (2007), [12].

²²⁸ VLRC, above n 32, [5.148], [5.149]; VLRC, above n 30, [5.109]; K Woodward, ‘In Defence of Diminished Responsibility: Considering Diminished Responsibility in the New Zealand Context’ (2009) 15 *Auckland Law Review* 169, 190.

²²⁹ WALRC, above n 122; VLRC, above n 30, [5.110]; Woodward, above n 228, 190–91.

²³⁰ VLRC, above n 32, [5.148], [5.153].

²³¹ Ibid [5.148], [5.154].

²³² NSWLRC, above n 227, [3.11], [3.16]; Woodward, above n 228, 191.

²³³ Bronitt and McSherry, above n 23, [5.90]; VLRC, above n 30, [5.113].

²³⁴ VLRC, above n 30, [5.115]–[5.119]; WALRC, above n 122, 252.

²³⁵ WALRC, above n 122, 253.

²³⁶ Model Criminal Code Officers’ Committee, above n 227, 125.

- the practical difficulties that arise in directing juries in relation to a defendant who must ‘show that he or she is not fully sane, yet not completely insane’;²³⁷
- the partial defence does not reinforce community participation because often a reduction from murder to manslaughter on the grounds of diminished responsibility is the result of a plea of guilty’ or a trial by judge alone;²³⁸
- diminished responsibility was created in the context of mandatory sentencing for murder and, so, with flexible sentencing dispositions available, it is unnecessary. Any reduction in culpability can be dealt with at the sentencing stage;²³⁹
- as diminished responsibility only alleges a substantial incapacity to control a person’s actions, ‘it is difficult to envisage a situation that does not involve choice where an accused has *some capacity* to control his or her actions, but does not’.²⁴⁰ This shows ‘this illustrates the difficulty of rationalising a defence alleging less than total mental impairment and reinforces the view ... that such matters are best dealt with in the sentencing process’;²⁴¹
- it is inherently difficult to sentence an offender who successfully raises diminished responsibility.²⁴² The MCCOC expressed this concern as follows:

Lenient penalties may not be desirable for all defendants suffering from abnormalities of the mind falling short of insanity. The paradoxical situation arises whereby a defendant successfully raising diminished responsibility is to receive a shorter sentence than a defendant who fails in that regard, even though the former may be significantly more dangerous than the latter.²⁴³
- it is open to abuse as ‘practical experience suggests provocation arguments which would otherwise have been raised [in the absence of a provocation defence] will gain a voice in the form of diminished responsibility’.²⁴⁴

4.4.8 In the Issues Paper, the Institute sought feedback in relation to the introduction of a partial defence of diminished responsibility. The Acting Director of Public Prosecutions expressed the view that there was ‘no justification for enacting a partial defence of diminished responsibility. This is adequately dealt with by the current provision, in particular the insanity defence’. This view was endorsed by the Law Society. The Institute notes that diminished responsibility is a controversial defence and considers that it is unnecessary in Tasmania (given the discretionary sentencing for murder) and, accordingly, does not recommend its introduction in Tasmania.

Recommendation 15:

A partial defence of diminished responsibility should not be introduced in Tasmania.

²³⁷ Ibid 127.

²³⁸ WALRC, above n 122, 255 referring to S Dell, ‘Diminished Responsibility Reconsidered’ [1982] *Criminal Law Review* 809, 811, 817; S Indyk, H Donnelly and J Keane, *Partial Defences to Murder in New South Wales 1990 – 2004* (Judicial Commission of New South Wales, 2006) 17.

²³⁹ Model Criminal Code Officers’ Committee, above n 227, 127; VLRC, above n 32, [5.156]–[5.157]; VLRC, above n 30, [5.122].

²⁴⁰ WALRC, above n 122, 253, emphasis in original.

²⁴¹ Ibid 253.

²⁴² See VLRC, above n 32, [5.169], [5.1.70].

²⁴³ Model Criminal Code Officers’ Committee, above n 227, 129.

²⁴⁴ Ibid 129. See also VLRC, above n 32, [5.158], [5.159]; VLRC, above n 30, [5.115]–[5.119].

Part 5

Self-defence and Family Violence

5.1.1 There has long been interest in the capacity of self-defence to accommodate those who kill in response to family violence. This is important in any proposed reform of Tasmanian self-defence law. As acknowledged by McMahon, '[a] potent force — perhaps the *most* potent — underpinning both the evolution at common law and recent statutory reforms of the law of self-defence in Australia has been concern for the position of what have come to be called “battered women” defendants in homicide trials’.²⁴⁵

5.1.2 In this Part, the Institute examines the literature concerning family violence and self-defence and the law in other jurisdictions and makes recommendations for reform in Tasmania. It considers the nature and extent of family violence in order to provide a thorough understanding of the issue of self-defence in this context. Part 5 also considers whether a partial defence that is specifically directed to circumstances of family violence, such as the defence of killing in self-preservation in a domestic relationship that exists in Queensland, should be enacted in Tasmania.

5.2 Family violence and homicide between intimate partners

5.2.1 Given that many incidents of family violence are unreported, the precise extent of family violence in Australia is unknown. However, it is clear that it is a significant problem in this country and that it occurs across all cultures, ages and socio-economic groups. In Tasmania in 2014–15 (to the end of March), police responded to almost 2,000 family violence incidents (an average of 50 calls per week).²⁴⁶ The Women’s Legal Service (WLS) indicated that it ‘speaks to women weekly whose lives and the lives of [whose] children have been endangered by their partners or husbands’ and that many women it talks to suffer ‘relentless abuse ... both during relationships, and after’. Although some family conflict researchers disagree, the weight of research suggests that family violence is a gendered phenomenon with women more likely to be the victim of family violence than men.²⁴⁷ Research also suggests that in Australia one in six women and one in 19 men have experienced physical or sexual violence from a current or former partner.²⁴⁸ Research indicates that men are much less likely to be afraid of their partners²⁴⁹ and that women are more likely to suffer worse outcomes as a consequence

²⁴⁵ M McMahon, ‘Homicide, Self-Defence and the (Inchoate) Criminology of Battered Women’ 9 (2013) 37 *Criminal Law Journal* 79, 79. It is noted that there is criticism of the term ‘battered woman’ however, as noted by Sheehy, Stubbs and Tolmie, ‘it remains in common usage, is concise, and ... there is no widely accepted alternative’, above n 2, 668.

²⁴⁶ 936 ABC Hobart, *Tasmania Faces ‘Horrific’ Domestic Violence Problem, about 50 Incidents a Week, Police Commissioner Darren Hine Says* (8 May 2015) ABC News <<http://www.abc.net.au/news/2015-05-18/tasmania-police-called-to-50-domestic-violence-incidents-a-week/6477492>>.

²⁴⁷ R Braaf and I Meyering, ‘The Gender Debate in Domestic Violence: The Role of Data’ (Australian Domestic and Family Violence Clearinghouse, Issues Paper 25, 2013) 1. Family conflict researchers argue that family violence is equally perpetrated by men and women and that men and women are similarly motivated to use violence (prior aggression, substance, personality disturbance): at 1, 10.

²⁴⁸ Australia’s National Research Organisation for Women’s Safety, *Violence Against Australian Women: Key Statistics* <<http://anrows.org.au/sites/default/files/Violence-Against-Australian-Women-Key-Statistics.pdf>>, referring to the Australian Bureau of Statistics, *Personal Safety Survey Australia 2012* (2013) cat no 4906.0.

²⁴⁹ G MacKenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Report Prepared for the Attorney-General and Minister for Industrial Relations, 2009) 21, referring to L Hamberger, ‘Men’s and Women’s Use of Intimate Partner Violence in Clinical Samples’ (2005) 20 *Violence and Victims* 131, 137; E Dobash and R Dobash,

of family violence, including physical injury, homelessness, fear of their partners and fear for their own safety.²⁵⁰ Violence perpetrated by men on their female partners is much more likely to be perpetrated on multiple occasions.²⁵¹ Data also suggest that men and women have different motivations for using violence, with women typically resorting to it for ‘expressive and protective motivations’, including ‘anger and not being able to gain a partner’s attention; self-defence; retaliation for their partner’s violence (sometimes pre-emptive to ward off a partner’s violence); fear; defence of children; and retribution for real or perceived wrongdoing’²⁵² whereas men typically use violence coercively — to control their partners.²⁵³

5.2.2 The gendered nature of family violence is also reflected in homicide statistics. From 2002–12, of the 2,631 homicide incidents documented nationally, 654 (24.9%) were classified as intimate partner homicide,²⁵⁴ and in this context, women are much more likely than men to be killed than to kill.²⁵⁵ Women were victims in 75% of intimate partner homicide cases (n=488) and perpetrators in 23% (n=151) of cases.²⁵⁶ SHE observes that ‘the Australian Institute of Criminology has found that, on average, one woman is killed every week in Australia by a current or former partner’.²⁵⁷ Research shows that men typically kill their intimate partners as an attempt to exert power over them, to prevent them from leaving or as a result of jealousy.²⁵⁸ In contrast, the motivation for women killing their partners is predominantly self-preservation, as there is typically either a history of violence and/or a physical attack immediately before the killing in a significant proportion of cases where women kill their intimate partner.²⁵⁹ Victorian research examining intimate partner homicides between 2000–10 found that there was a known history of domestic violence in 60% of cases (n=81).²⁶⁰ Of the 81 cases in which there was a history of violence, the deceased had previously been the victim of the violence in 75% of cases (n=61, 55 of whom were females). The deceased was the perpetrator of violence in 22% of the homicides (n=18, 15 of whom were males) and in two cases the deceased was both a victim and a perpetrator of violence.²⁶¹

5.3 Self-defence and family violence

5.3.1 The traditional formulation of self-defence has been extensively criticised on the basis that beneath its apparent neutrality and objectivity, it has operated in a gender biased way.²⁶² Traditionally,

‘Women’s Violence to Men in Intimate Relationships: Working in a Puzzle’ (2004) 44 *British Journal of Criminology* 324, 340.

²⁵⁰ Braaf and Meyering, above n 247, 18.

²⁵¹ Ibid 17.

²⁵² Ibid 10, 20.

²⁵³ Ibid 10.

²⁵⁴ T Cussens and W Bryant, ‘Domestic/Family Homicide in Australia’ (Australian Institute of Criminology: Research in Practice, 2015) 2. Intimate partners accounted for 23% of all homicide victims recorded within the National Homicide Monitoring Project since 1 July 2003.

²⁵⁵ This differs from homicide generally, when men are more likely than women to be the victim of homicide: W Bryant and T Cussens, ‘Homicide in Australia: 2010–11 to 2011–12: National Homicide Monitoring Program Report’ (AIC Reports Monitoring Reports 23, 2015) 16.

²⁵⁶ Cussens and Bryant, above n 254, 16.

²⁵⁷ Referring to A Chan and J Payne, ‘Homicide in Australia: 2008–09 to 2009–10’ (National Homicide Monitoring Program Annual Report, Australian Institute of Criminology, 2013).

²⁵⁸ See J Morgan, ‘Who Kills Whom and Why? Looking Beyond Legal Categories’ (Occasional Paper, VLRC, 2002).

²⁵⁹ Ibid.

²⁶⁰ C Walsh, S-J McIntyre, L Brodie, L Bugeja and S Hauge, *Victorian Systemic Review of Family Violence Deaths — First Report* (Coroners Court of Victoria, 2012) 26.

²⁶¹ Ibid.

²⁶² There is extensive literature that has examined the operation of self-defence in the context of battered women who kill. Some of these critiques include the following: VLRC, above n 30; WALRC, above n 122, 164–69; Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence — A*

the interpretation and application of the defence has largely precluded the self-defence claims of those whose actions do not conform to the paradigm case of self-defence — the spontaneous one-off encounter between two males of equal strength. Consequently, the defence has not accommodated claims made by women to have acted in self-defence where they have killed in non-confrontational circumstances or in response to a seemingly innocuous threat, or have used a weapon against an unarmed victim. The focus of the literature that has critiqued the traditional formulation of the defence has been on the requirement for an imminent threat, the assessment of the options other than the use of force available to the accused (such as leaving) and the proportionality of the accused's response to the threat faced, all of which are factors relevant to the assessment of whether the accused's use of force was reasonable in the circumstances as the accused believed them to be.²⁶³

5.3.2 While the Acting Director of Public Prosecutions and the Law Society suggest that the law in Tasmania is sufficient to accommodate self-defence in the context of family violence, its operation in this context is largely untested. Certainly, Tasmania has a broad test for self-defence that focuses on the accused's perception of circumstances in assessing the reasonableness of the use of force. Nevertheless, while this might appear to be capable of accommodating self-defence in circumstances of family violence, it is unclear how the defence would operate in reality. In New Zealand, which has the same subjective/objective test as Tasmania, the availability of self-defence is restricted where the danger is not imminent and/or retreat is a reasonable possibility.²⁶⁴ This means that its availability is limited in cases where violence is used pre-emptively. For example in *Wang*,²⁶⁵ the accused stabbed her sleeping partner. Before falling asleep, the husband had threatened to kill his wife and her sister who lived with them. While it was accepted that in an appropriate case a pre-emptive strike may be justified in self-defence, particularly if the danger facing the accused was sufficiently pressing and the opportunities for avoiding it non-existent or very limited, it was not justified where the person using force had other opportunities to avoid the perceived danger. In this case, the New Zealand Court of Criminal Appeal considered that there was no imminent threat and that the accused's use of force was unreasonable because she had other courses of action open to her, such as seeking assistance from other people or leaving with her sister and going to the police.²⁶⁶ However, the New Zealand approach is much more conservative than the approach evidenced in some Australian cases, where women who

National Legal Response, ALRC Final Report 114, NSWLRC Final Report 128 (2010) [14.5]–[14.38]; Northern Territory Law Reform Committee (NTLRC), *Self-Defence and Provocation* (2000), NZLC, above n 227; Law Commission of England and Wales, above n 227; L Roth and L Blayden, *Provocation and Self-Defence in Intimate Partner and Sexual Advance Homicides*, NSW Parliamentary Research Service, Briefing Paper 5/12 (2012) [10.1]; Bronitt and McSherry, above n 23, [6.70]; Sheehy, Stubbs and Tolmie, above n 5; I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self-Defence' (1993) *Sydney Law Review* 403; J Stubbs and J Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to the Gender Bias in the Law?' in J Stubbs (ed), *Women, Male Violence* (The Institute of Criminology, 1994); J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; A Hopkins and P Eastal, 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010) 35 *Alternative Law Review* 132.

²⁶³ Traditionally, imminence, as well as a duty to retreat and proportionality of response, were formal requirements for self-defence. This is no longer the case but these factors continue to be relevant to whether the force used was reasonable, see Fairall and Yeo, above n 23, [10.23]–[10.30], [10.40]–[10.48]. For example in *Wright v Tasmania* [2005] TASSC 113, Blow J referred to factors that limited the defendant's option such as having no telephone, having misplaced his keys and being unable to leave his house, his status as a newcomer to town: at [28]. In *Rudman v R* [1997] TASSC 16 the trial judge directed the jury to consider 'the possibility that he could have done something else to avoid the attack if he felt threatened with an attack. Could he have done something less violent to deflect the attack. Could he have retreated. Could he have sidestepped. Could he have taken any form of evasive action to avoid the attack rather than using force to provide himself with a defence. ... Now again, I stress that his failure to have recourse to any one of those alternatives is plainly not decisive but they are matters that obviously would have to be considered. What could he have done other than what he did': at [21]. The Court of Criminal Appeal ruled that there was no error in the trial judge's direction.

²⁶⁴ Simester and Brookbank, above n 34, 521.

²⁶⁵ [1990] 2 NZLR 529.

²⁶⁶ *Ibid* 534 per Bisson J. The application of self-defence in cases where victims of family violence kill their abuser is currently under review, see: New Zealand Law Reform Commission, *Victims of Family Violence Who Commit Homicide*, <<http://www.lawcom.govt.nz/our-projects/victims-family-violence-who-commit-homicide>>.

have killed sleeping or drugged partners have successfully raised self-defence.²⁶⁷ In Sheehy, Stubbs and Tolmie’s examination of cases resolved in Australia within the period 2000–10, there were 11 cases resulting in acquittals on the basis of self-defence, with three of those cases involving non-traditional self-defence scenarios.²⁶⁸

5.3.3 The Institute identified three Tasmanian cases relevant to this Report. In the first, a woman stabbed and killed her partner. The prosecution did not proceed because the Crown could not disprove self-defence.²⁶⁹ In the second, a woman was acquitted of wounding on the ground of self-defence after she stabbed her abusive ex-partner who was trespassing on her property and ‘came at her hitting her with a stick’.²⁷⁰ As these stabbings occurred in confrontational circumstances, it still remains unclear how the law would operate if the violence occurred when there was no such confrontation or where it was in response to a relatively minor threat or assault. It may be that such cases (where the use of force causes death) will be dealt with by way of a plea to manslaughter rather than a trial for murder (where self-defence is relied upon). This trend has been identified in other Australian research that found that in 58.2% of cases where women killed their abusive partner (resolved within the period 2000–10), there was a plea of guilty to manslaughter.²⁷¹ This appears to have occurred in the case identified by the Institute where a woman entered a plea of guilty to manslaughter in relation to the stabbing death of her partner.²⁷² There had been a history of violence and, at the time of the stabbing, the accused was concerned for the safety of her son and herself. In sentencing, it was recognised that the Crown had accepted the plea to manslaughter on the basis that the accused did not have the requisite intention for murder. However, the sentencing judge also recognised that the accused’s conduct was defensive not aggressive:

Ms Schmidt was entitled to use force to eject Mr Jones from her home, to defend herself against him, and to protect her son from him. By stabbing him, she used excessive force. She had been provoked by his conduct, both on the afternoon in question and over a period of months. His conduct towards her, both that afternoon and over a period of months, no doubt placed a great strain on her, and interfered with her judgment.

Concerns have been raised that uncertainty about the availability of self-defence at trial means that women tend to plead guilty to manslaughter in cases that ‘demonstrate strong defensive components on the facts’ and might result in an acquittal on the basis of self-defence.²⁷³ However, it is acknowledge that not all women kill their partners in circumstances of self-defence.²⁷⁴

²⁶⁷ See *R v Secretary* (1996) 107 NTR 1; *R v Kontinnen*, unreported, SC SA, 30 March 1992 discussed in comment (1992) 16 *Criminal Law Journal* 360; See A Guz and M McMahon, ‘Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia’ (2011) *Flinders Law Journal* 79, for discussion of the cases of *Sjernerqvist* (1992), *R v MacDonald* (2006) and *R v Falls* (2010); See E Sheehy, J Stubbs and J Tolmie, ‘Battered Women Charged with Homicide in Australia, Canada and New Zealand: How do They Fare?’ (2012) 45 *Australian and New Zealand Journal of Criminology* 383 for a discussion of the cases of *R v Spurr* (2005), *R v MacDonald* (2006) and *R v Falls* (2010).

²⁶⁸ Sheehy, Stubbs and Tolmie, above n 5, 388.

²⁶⁹ P Billings, ‘Murder Charge Dropped’, *The Examiner* (Launceston), 15 August 2013.

²⁷⁰ L Beavis, ‘Stabbed Tasmanian Man Paul Shaw Fled House in Underwear After Being Attacked by Ex-partner, Court Hears’, *ABC News*, 23 July 2015.

²⁷¹ Sheehy, Stubbs and Tolmie, above n 5, 387. See also R Bradfield, *The Treatment of Women Who Kill Their Violent Partners Within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002) [4.4.2]; R Bradfield, ‘Women Who Kill: Lack of Intent and Diminished Responsibility as the Other “Defences” to Spousal Homicide’ (2001) 13 *Current Issues in Criminal Justice* 143.

²⁷² *Tasmania v Schmidt*, 15 December 2005, Blow J (Sentencing).

²⁷³ Sheehy, Stubbs and Tolmie, above n 5, 388.

²⁷⁴ See for example, *Tasmania v Sharpe*, 6 October 2000, Slicer J (Sentencing) where the stabbing took place in the context of ‘an irrational argument’, with the accused stating that she lunged at her partner with a knife to ‘show him what it’s like to be scared ... to show him that he’d just driven me, like, to the end of my tether’.

5.3.4 A further issue identified in the literature concerning family violence and self-defence is community misconceptions about the nature of family violence. It is widely acknowledged that a crucial factor in accommodating the self-defence claims of family violence victims is the jury's understanding of the dynamics of family violence and of the effect of on-going abuse.²⁷⁵ While there has been a significant shift in public attitudes to family violence since the 1990s, contemporary research shows that certain misconceptions are resistant to change and so persist. Research examining community attitudes to violence against women conducted in 2013 found that nearly eight out of ten people agree that it's hard to understand why women stay in a violent relationship and more than half agree that women would leave a violent relationship 'if they really wanted to'.²⁷⁶ Nearly one in ten people believed that a woman had a duty to remain in a violent relationship.²⁷⁷ The Sexual Assault Support Service stated in its submission to the Institute that these attitudes are likely to influence jury perceptions of the experience and dynamics of family violence. According to the SASS, 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'. Such views were evident in responses to the Issues Paper received from Peter Cartwright and Andrew Adams, which focused on women's ability to seek outside assistance from the police instead of using force. Peter Cartwright was sceptical about claims that contacting the police would not be helpful and considered that in a non-confrontational scenario, the woman had the option of going to the police. Andrew Adams considered that the use of lethal force in a non-confrontational situation was not self-defence but recognised that the response of authorities to the threat must improve.

5.3.5 The community perceptions (referred to above) of the reasons people stay in violent relationships are not borne out by research that has identified barriers to women leaving violent relationships and to reporting violence perpetrated upon them. Research reveals women's reluctance to report violence to the police, particularly violence inflicted by current partners. Eighty per cent of women who had experienced violence from a current partner did not report this to the police, compared to 58% of women who had experienced violence from a previous partner.²⁷⁸ This is supported by information provided by the WLS, which identified limitations in the formal legal protections available to people who are subjected to family violence. Such limitations include the inadequacy of police responses and the frail protection afforded by Family Violence Orders both of which contribute to under-reporting rates. The WLS also noted the underreporting of family violence. The WLS observed that '[w]e speak to women who have Family Violence Orders or Police Family Violence Orders that are frequently breached by their ex-partner, often in apparently trivial ways'. It is the experience of the WLS that it is 'very common for police not to charge the offender with a breach of an order for this type of behaviour, as they say the breach was either not a breach, a minor breach, or difficult to prove'. The WLS noted that in a survey it undertook from September 2010 to September 2012 in relation to the Tasmanian Family Violence Order system, only low numbers of Tasmanian women who had experienced family violence from their partner or former partner actually obtained an order.

5.3.6 Even if violence is reported to the police, and a restraining order obtained, Australian research demonstrates that this does not mean it will stop. Barriers to leaving a violent relationship include safety concerns, housing difficulties, financial barriers, lack of access to support, and social attitudes and beliefs, including cultural or religious attitudes.²⁷⁹ In any event, relationship separation does not

²⁷⁵ See WALRC, above n 122, 271–76, 290–93; VLRC, above n 30, [4.96]–[4.138].

²⁷⁶ VicHealth, *Australian Attitudes to Violence Against Women: Findings from the 2013 National Community Attitudes Towards Violence Against Women Survey — Research Summary* (2014) 5.

²⁷⁷ Ibid 5.

²⁷⁸ J Phillips and P Vandenbroek, 'Domestic, Family and Sexual Violence in Australia: An Overview of the Issues' (Parliament of Australia, Department of Parliamentary Services, Research Paper, 2014) 13.

²⁷⁹ See I Barrett Meyering, 'Staying/Leaving: Barriers to Ending Violent Relationships' (Australian Domestic and Family Violence Clearinghouse, Fast Facts 7, 2012); S Patton, *Pathways: How Women Leave Violent Men*, (Women Tasmania, Department of Premier and Cabinet, 2003) 47.

necessarily end the violence. Research reveals that the process of leaving and separation may be associated with a greater risk of violence. Research has shown that the end of a relationship has ‘repeatedly been associated with heightened risk of both fatal and non-fatal forms of intimate partner violence’.²⁸⁰ Australian research found that over half of the women who were killed by their male partner were killed in the process of leaving or after separation.²⁸¹ Research also identified separation as a high risk factor for children, some of whom are killed by their father/step-father at this point.²⁸² Of those women who reported violence to the police in relation to their current partner and obtained a restraining or family violence order, there was further violence in over 20% of cases. In relation to a previous partner, violence was repeated in nearly 60% of cases.²⁸³

5.3.7 The Institute accepts the views of the Acting Director of Public Prosecutions and the Law Society that the law of self-defence in Tasmania is broad enough to accommodate the self-defence claims of those who use violence in response to family violence. However, the application of self-defence in this context is largely untested in Tasmania and, based on the experience in other jurisdictions, there is concern that the nature and dynamics of family violence may not be generally recognised. The Tasmanian Government has demonstrated its commitment to support victims of family violence through the introduction of Safe at Home — a whole of government approach to family violence which is a key social policy initiative.²⁸⁴ The government has recently announced its action plan to respond to family violence in Tasmania, which includes the establishment of Safe Families Tasmania (a collaborative, multi-government agency unit), improved support to families affected by family violence including counselling and crisis accommodation and the strengthening of legal responses to family violence.²⁸⁵ There is also a review of sentences imposed for family violence offences being undertaken by the Sentencing Advisory Council, Tasmania.²⁸⁶ However, as recognised by the Australian Law Reform Commission (ALRC), an integrated approach to family violence is not just concerned with the introduction of measures to improve the safety of victims but also to ensure that the criminal law recognises the experiences of family violence victims who themselves kill. Accordingly, it is the Institute’s view that the law in Tasmania should be reformed to ensure that self-defence accommodates the claims of those who use violence in response to family violence.

Recommendation 16:

The law in Tasmania should be reformed to allow self-defence to better accommodate the claims of those who use violence in response to family violence.

5.4 Options for reform

5.4.1 A possible solution to the problems encountered by family violence victims is to make legislative changes to ensure that self-defence accommodates the claims of those who resort to violence in that context. This involves addressing wider considerations than the substantive law of self-defence, such as relevant evidentiary provisions and provisions in relation to jury directions. Several possible options were identified in the Issues Paper based on reforms in other jurisdictions. These include making legislative changes in order to:

²⁸⁰ Walsh et al, above n 260, 32.

²⁸¹ A Wallace, *Homicide: The Social Reality* (NSW Bureau of Crime Research, 1986).

²⁸² Domestic Violence Resource Centre Victoria, ‘Just Say Goodbye’: Parents Who Kill Their Children in the Context of Separation’ (Discussion Paper No 8, 2012) 32–4, 79–81.

²⁸³ Australian Bureau of Statistics, *Personal Safety Survey, 2012*, (2013), Cat No 4906DO006.

²⁸⁴ *Safe at Home* (2 September 2014) Tasmania Government < http://www.safeathome.tas.gov.au/about_us>.

²⁸⁵ Department of Premier and Cabinet, Tasmania, *Safe Homes, Safe Families: Tasmania’s Family Violence Action Plan 2015–2020*, Tasmania Government <http://www.dpac.tas.gov.au/_data/assets/pdf_file/0006/266073/Safe_Homes_Safe_Families_-_Action_plan.pdf>.

²⁸⁶ Sentencing Advisory Council, Tasmania, *Sentencing of Adult Family Violence Offenders* (forthcoming).

- (1) facilitate the reception of evidence of family violence by courts where family violence victims kill their abusers;
- (2) specify that imminence of danger is not necessary where self-defence is raised in the context of family violence;
- (3) provide for educative jury directions where self-defence is raised in the context of family violence.

Another option is the introduction of a defence that specifically applies in the family violence context, such as the partial defence of killing for preservation in an abusive domestic relationship (which exists in Queensland). This would reduce murder to manslaughter, rather than provide for a complete acquittal.

Legislative change to facilitate reception of evidence of family violence

5.4.2 As mentioned above at [5.3.4], a key factor in accommodating the self-defence claims of victims of family violence is to inform jurors about the dynamics of family violence in order to enable them to understand the lived experiences of those subjected to on-going abuse.²⁸⁷ To this end, both the Western Australian and Victorian Law Reform Commissions have made recommendations that seek to provide guidance on the application of self-defence in the context of family violence, particularly in relation to the admission of such evidence.²⁸⁸ In Victoria, legislative reforms (formerly contained in the *Crimes Act 1958* (Vic) s 9AH and now contained in the *Crimes Act 1958* (Vic) s 322J and 322M) specify the type of evidence that may be adduced about the history of the relationship and the nature of violence in that relationship to prove both the subjective (a belief in the necessity of using force) and the objective (whether the conduct is a reasonable response in the circumstances as the person perceives them to be) elements of the tests in s 46.²⁸⁹ It also allows ‘social framework evidence’ to be adduced, which explains the nature and dynamics of family violence. The aim of such evidence is to dispel jurors’ misconceptions about family violence.²⁹⁰ These provisions are set out below.

322J Family violence

- (1) Evidence of family violence, in relation to a person, includes evidence of any of the following —
 - (a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;
 - (b) the cumulative effect, including psychological effect, on the person or a family member of that violence;
 - (c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
 - (d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
 - (e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

²⁸⁷ See WALRC, above n 122, 271–76, 290–93; VLRC, above n 30, [4.96]–[4.138].

²⁸⁸ See WALRC, above n 122, Chapter 6; VLRC, above n 30, Chapter 4.

²⁸⁹ Hopkins and Easteal, above n 262, 134. This provision has been retained in the *Crimes Act 1958* (Vic) s 322J, 322M (and its operation enlarged to claims of self-defence in relation to all offences).

²⁹⁰ VLRC, above n 30, [4.96].

- (f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(2) In this section—

child means a person who is under the age of 18 years;

family member, in relation to a person, includes—

- (a) a person who is or has been married to the person; or
- (b) a person who has or has had an intimate personal relationship with the person; or
- (c) a person who is or has been the father, mother, step-father or step-mother of the person; or
- (d) a child who normally or regularly resides with the person; or
- (e) a guardian of the person; or
- (f) another person who is or has been ordinarily a member of the household of the person;

family violence, in relation to a person, means violence against that person by a family member;

violence means—

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to—
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(3) Without limiting the definition of violence in subsection (2)—

- (a) a single act may amount to abuse for the purposes of that definition;
- (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Section 322M

...

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—

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

5.4.3 This model was supported in the review of family violence and defences to homicide conducted by the ALRC and the New South Wales Law Reform Commission (NSWLRC).²⁹¹ It is noted that Queensland is the only other Australian jurisdiction that has a provision that addresses the admissibility of evidence of family violence. This is contained in the *Evidence Act 1977* (Qld) s 132B and is less detailed than the Victorian provision. It makes admissible ‘relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed’.²⁹²

Submissions received

5.4.4 In submissions received by the Institute, the Acting Director of Public Prosecutions and the Law Society expressed the view that such a provision was unnecessary, given that evidence of family violence that is relevant to self-defence should currently be admitted under the provisions of the *Evidence Act 2001* (Tas). The Acting Director of Public Prosecutions (with whom the Law Society agreed) stated that:

Evidence of family violence has been admitted as relationship evidence, motive evidence and tendency evidence in this State. This type of evidence is most commonly admitted when a male accused is being prosecuted for committing a crime of violence against his partner ...

If an accused puts self-defence in issue their prior treatment at the hands of the purported victim and the nature of their relationship would become relevant and admissible to self-defence. In those circumstances, and obviously depending on the specific evidence involved, the Crown has a duty to put that evidence before the jury in accordance with its obligation to present the full picture and not simply evidence which is favourable to the Crown case. There is no need for amendment. Such evidence is admissible but would be subject to restrictions placed on all evidence, such as the operation of the hearsay, opinion and credibility rules. Although as evidence would go to the state of mind of the accused, which would be a relevant issue at trial, it is difficult to see how the hearsay, opinion or credibility rules would limit such evidence.

Further, expert evidence of the long-term effects on an accused, in particular a heightened sense of fear and an inability to take alternative action, is admissible (see *Osland v R* 197 CLR 316).

The Acting Director of Public Prosecutions also expressed the view that if the *Evidence Act 2001* (Tas) is amended, then the reform enacted should be based on s 79(2) of the *Evidence Act 2001* (Tas). This section permits the reception of expert evidence relating to childhood behaviour including children’s behaviour in response to sexual abuse. Section 79(2) provides that the opinion rule does not apply to opinions based on specialised knowledge derived from the person’s training, study or experience. The *Evidence Act 2001* (Tas), s 79(2)(a) specifically includes ‘specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse’). This includes an opinion in relation to the development and behaviour of children generally and/or the

²⁹¹ The ALRC and NSWLRC’s examination of the relationship between homicide defences and evidence of family violence reported that ‘[s]takeholders unanimously supported the Commissions’ proposal for the enactment of legislative guidance about the potential admissibility of family-violence related evidence in the context of homicide defences’ and that ‘[t]he majority of submissions supported provisions along the lines of the *Crimes Act 1958* (Vic) s 9AH without elaboration’: above n 262, [14.87]. Recommendation 14–5 provided: ‘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. Section 9AH now of the *Crimes Act 1958* (Vic) is an instructive model in this regard’: at 654.

²⁹² See discussion in Taskforce on Women and the Criminal Code, *Report of the Task Force on Domestic Violence to the Queensland Government*, Report (2000) 140–44, where deficiencies of the provision are discussed and the Taskforce recommends its repeal and replacement with a new provision. See also VLRC, above n 30, 134–35. In their 2008 report, Mackenzie and Colvin recommended that a provision based on the Victorian provision be introduced in Queensland: Mackenzie and Colvin, above n, 249, 58–9.

development and behaviour of children who have been victims of sexual offences or offences similar to sexual offences.²⁹³ This provision was enacted to allow counter-intuitive or myth-dispelling evidence to be adduced in sexual offence trials involving children to counter community misconceptions in relation to the truthfulness of children as witnesses and how children react to sexual abuse.²⁹⁴

5.4.5 In contrast, the WLS, the CLS, the SASS and SHE all supported the introduction of provisions akin to those contained in the *Crimes Act 1958* (Vic). The WLS supported the introduction of such provisions, even if they were not legally necessary, on the basis that this would demonstrate that Tasmania takes family violence seriously and because such provisions validate the experience of family violence victims. In particular it supported the Victorian model, which lists the types of behaviour family violence encompasses and refers to a pattern of behaviour that includes acts that may appear trivial when viewed in isolation. The WLS also expressed the view that if the Victorian model were adopted, it should be amended to allow a broader interpretation of violence by changing the reference to ‘violence means’ to ‘violence includes’. The CLS also ‘strongly recommend[ed] amendments to Tasmania’s criminal law which will facilitate the reception of evidence of family violence in relation to the defence of self-defence’ and considered that the Victorian provisions provided a good model. The CLS supported the amendment suggested by the WLS to change ‘means’ to ‘includes’.

5.4.6 Similarly, SHE and the SASS supported statutory reform based on the Victorian model. SHE stated that the ‘contextual experiences of long term abuse and the impact on the psychological wellbeing of women is an essential consideration to self-defence’. SHE considered that the Victorian model should be changed to make it clear that a pattern of behaviour did not have to consist of acts that were similar in nature or perpetrated against the same person. The SASS supported the Victorian model as it allows ‘a broad examination of *all* relevant evidence with regard to both the specific case of family violence (including the cumulative impact of 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 and effects’. The SASS also stressed the importance of the provisions’ making it clear that the evidence of family violence is relevant to both the subjective and objective requirements for self-defence.

The Institute’s view

5.4.7 While the Institute recognises that evidence of family violence is currently admissible in relation to self-defence under the *Evidence Act 2001* (Tas), the Institute takes the view that the scope of evidence of family violence that can be admitted and its relevance to self-defence should be expressly set out in legislation. This would have an important declaratory function and also validate the experiences of victims of family violence. It also serves an educative function for the legal profession in relation to the breadth of evidence that may be available to provide a foundation for self-defence.²⁹⁵ Legislative clarification will make it clear that case specific evidence as well as general

²⁹³ *Evidence Act 2001* (Tas) s 79(2)(b).

²⁹⁴ See ALRC, above n 262, Chapter 27. See also A Cossins and J Goodman-Delahunty, ‘Misconceptions or Expert Evidence in Child Sexual Assault Trials’ (2013) 22 *Journal of Judicial Administration* 171.

²⁹⁵ In Sheehy, Stubbs and Tolmie’s analysis of the case of *Falls* (where a woman was acquitted in relation to the killing of her violent husband in a non-confrontational situation on the grounds of self-defence, the authors document the strategies used by defence counsel to build an evidential base for self-defence. These included: ‘an expansion of the time frame within which the danger the accused was facing was to be understood (with the result that historical and cumulative experiences of violence and the risk of future harm were both relevant); an understanding that the danger in battering cases includes an element of entrapment; an attention to detail in the range of evidence presented in court in order to describe and corroborate this danger; the provision of support for the accused’s credibility in her assessment of her situation; up-to-date expert explanations of the phenomenon of intimate partner violence and the broader social context within which it occurs; and the use of rhetorical devices to support particular normative readings of the material before the Court’: Sheehy, Stubbs and Tolmie, above n 5, 671–2.

evidence about the dynamics of family violence is relevant and admissible. By placing the accused's actions in a broader social context, 'expert evidence can tie together the varying accounts of witnesses by providing an overarching conceptual framework of domestic violence within which the individual incidents of violence can be positioned and understood'.²⁹⁶ In this regard, the Institute shares the view of the VLRC that 'the importance of this evidence in supporting a plea of self-defence has persuaded us that its status should be clarified'.²⁹⁷ It will also make it clear that the evidence is relevant to both the subjective (the accused's belief in the need to use force) and objective (the accused's response being a reasonable response in the circumstances as the accused perceived them to be) components of s 46.²⁹⁸ It is for these reasons that the Institute recommends enactment of provisions based on the Victorian approach rather than the approach in s 79(2) of the *Evidence Act 2001* (Tas). The Institute is also persuaded by the views of the WLS, the CLS and SHE that the definition of violence should be inclusive rather than exhaustive (by using 'includes' rather than 'means') and that it should be made clear that a 'pattern of conduct' does not mean that the conduct must be of the same kind or directed towards the same person.

Recommendations 17 and 18

17. The *Evidence Act 2001* (Tas) should be amended to include provisions based on the *Crimes Act 1958* (Vic) ss 322J and 322M that provide for a broad range of family violence evidence to be admitted and to make it clear that that evidence is relevant to both the subjective and objective components of s 46.
18. The amendment to the *Evidence Act 2001* (Tas), as contained in Recommendation 17, should provide an inclusive definition of violence and should make it clear that violence may include a number of acts that form part of a pattern of behaviour (whether or not the acts are of the same kind or directed towards the same person), even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

Legislative change to specify that imminence of danger is not necessary where self-defence is raised in the context of family violence

5.4.8 Imminence of danger is one of the factors relevant to the assessment of whether the accused's use of force was reasonable in the circumstances as the accused believed them to be.²⁹⁹ As highlighted in the submissions of the Acting Director of Public Prosecutions, the Law Society and the WLS, imminence is not a legal requirement for the defence of self-defence and the law does recognise that a person may resort to pre-emptive violence and does not need to wait until an attack by the victim is actually underway. However, the continued focus of self-defence is on the attack or threat that is in close temporal proximity to the accused's responsive use of force. This focus has been identified as a barrier to reliance on self-defence by women who kill in response to family violence in non-confrontational situations.³⁰⁰ '[t]he idea that a sleeping man with no threat on his lips could pose a

²⁹⁶ R Bradfield, 'Understanding the Battered Woman Who Kills her Violent Partner — The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9 *Psychiatry, Psychology and Law* 177, 193.

²⁹⁷ VLRC, above n 30, [4.29].

²⁹⁸ It is not clear in *Osland v The Queen* (1998) 197 CLR 316 that evidence of battered woman syndrome is admissible only in relation to the subjective component of self-defence or whether it can also be used in relation to whether the accused's response was reasonable: see Stubbs and Tolmie, above n 262. It would also appear that in New Zealand, evidence of BWS is relevant 'in determining imminence and degree of force that the accused might have anticipated, and also as part of a responses to any suggestion that the accused should simply have left the victim. However, the question whether her response was reasonable remains ultimately *objective*': Simester and Brookbanks, above n 34, 141.

²⁹⁹ See above n 263.

³⁰⁰ See VLRC, above n 30, [3.52]–[3.64]; WALRC, above n 122, 166–67, 274.

threat does not fit easily with traditional notions of self-defence'.³⁰¹ Yet, as recognised by the WLS, 'studies show that women responding to long-term violence by their partner do not usually respond during the actual attack. This is often because they are smaller and not as strong as the attacker'. In addition, it is argued that a focus on imminence does not acknowledge the reality that the experience of family violence is not a list of discrete and disconnected acts of violence that have a defined beginning and end — instead it is a cumulative and complex experience with the threat of violence ever present. The nature of family violence does not fit well with the focus of the legal inquiry where the most important assault or threat is that identified immediately before the use of force.³⁰² The result is that the previous violence perpetrated against the accused is relegated to the 'background' thereby minimising the prior violence in the relationship and distorting the threat faced by the accused.³⁰³

5.4.9 As a result of these concerns, the VLRC's view was that legislative intervention was necessary to make it clear that 'actions may be carried out in self-defence, where the threat is not immediate, but ... more remote in time'.³⁰⁴ The Commission recommended that the belief in the need for self-defence should explicitly encompass belief in the inevitability of harm (rather than its immediacy).³⁰⁵ The recommendations of the VLRC were enacted in the *Crimes Act 1958* (Vic) s 322M(1), which expressly provides that in circumstances where family violence is alleged, a person may be acting in self-defence:

... even if —

- (c) he or she is responding to a harm that is not immediate; or
- (d) his or her response involves the use of force in excess of the force involved in the harm or threatened harm.

This provision allows for an accused to rely on self-defence, even if the threat is not immediate and even if the response is disproportionate to the harm. In doing so, it places emphasis on the necessity of the accused using violence rather than on the imminence or immediacy of the threat in assessing the accused's conduct.³⁰⁶

5.4.10 Western Australia has also made legislative reform to the defence of self-defence contained in the *Criminal Code* (WA) s 248 to provide that a person acts in self-defence if he or she believes that his or her act is necessary to defend himself or herself or another person 'from a harmful act, including a harmful act that is not imminent'.³⁰⁷ This means that imminence is no longer a decisive factor in self-defence. It is noted that, unlike the Victorian provision, this provision applies generally and is not restricted to circumstances of family violence.³⁰⁸

Submissions received

³⁰¹ Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners within the Australian Criminal Justice System* above n 271, 21.

³⁰² S Tarrant, 'Something is Pushing Them To the Side of Their Own Lives: A Feminist Critique of the Law and Laws (1990) 20 *University of Western Australia Law Review* 573, 599.

³⁰³ J Tolmie, 'Provocation or Self-Defence for Battered Women Who Kill' in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 69.

³⁰⁴ VLRC, above n 30, [3.61].

³⁰⁵ *Ibid* Recommendation 4.

³⁰⁶ Guz and McMahon, above n 267, 111–12. This provision was formerly contained in the *Crimes Act 1958* (Vic), s 9AH.

³⁰⁷ *Criminal Code* (WA) s 284(4)(a). It is noted that the WALRC concluded that it was not desirable to specifically refer to imminence within the self-defence test (as the Victorian provision does). Instead, it was considered that the concepts of imminence and proportionality should be dealt with by jury directions: WALRC, above n 32, 290–91. See also Recommendation 22.

³⁰⁸ Guz and McMahon, above n 267, 112–13.

5.4.11 The Law Society and the Acting Director of Public Prosecutions opposed the introduction of a provision that would specify that in the context of family violence a person may act in self-defence even if the person is responding to a harm that is not immediate on the basis that such an amendment is unnecessary (as the law already permits pre-emptive acts of violence) and that imminence is a jury question. The Acting Director of Public Prosecutions stated that:

juries should be trusted to assess evidence of family violence as relationship evidence or context evidence when deciding if the circumstances as reasonably believed to exist by the accused excused their conduct. The immediacy of the threat is a legitimate consideration. These are matters of degree but if a jury is provided with appropriate evidence, whether direct testimony or expert evidence, which suggests that despite the lack of an immediate threat it was reasonable for an accused to do what they did it should acquit, and there is no reason to believe that a jury would not acquit in that appropriate case.

The Acting Director of Public Prosecutions also expressed concern that men who kill their female partners may be able to rely on the expanded provision to claim self-defence when ‘she posed little or no immediate threat to him at the time’ and if imminence is not required, a direction by the judge ‘could be seen by the jury to give judicial weight to an unjustified claim of self-defence’.

5.4.12 In contrast, the CLS, SHE, the SASS and the WLS all supported the introduction of a provision based on the Victorian model because it accurately reflects the nature and dynamics of family violence. The CLS stated that ‘without express legislative reform that clearly identifies that the threat does not have to be immediate, it is likely that perceptions around immediacy, the seriousness of the threat and the accused’s ability to escape may detrimentally sway jury members in their decision-making’. SHE considered that ‘to impose any requirement of imminence ignores the reality that the threat of family violence is on-going, pervasive and uncertain in terms of when violence will be inflicted’. Further, it was explained that ‘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’. The WLS considered that such a reform was necessary to shift the focus from the issue of a woman’s failure to leave a violent relationship as an appropriate response to acceptance that, while ‘there need to be significant reasons for taking the law into one’s own hands’, the reality is that some women ‘living in constant fear of family violence can be faced with the situation where they have no other option’. The WLS stressed the limitations of legal protections currently available to women who are living in situations of family violence.³⁰⁹ The WLS also referred to studies that have shown that ‘victim fear is the most reliable predictor of future family violence and that women generally overestimate their safety, and underestimate the risk of violence’ and that, given the history of the relationship, ‘victims can read cues and note changes in the perpetrator’s behaviour which signal escalating violence’.

The Institute’s view

5.4.13 While the Institute acknowledges that the law of self-defence in Tasmania does not expressly require an immediate threat and does recognise the legitimacy of a pre-emptive attack, the Institute takes the view that a provision based on the Victorian model better reflects the nature and dynamics of family violence and has the potential to re-frame the legal inquiry in cases where victims of family violence use force in self-defence. In specifying that a person may believe that their conduct is necessary in self-defence and that the conduct may be a reasonable response in the circumstances as the person perceives them, even if harm is not imminent, the focus of the jury inquiry can be placed on the cumulative threat faced by the victim rather than on the abuser’s conduct immediately before the use of violence (when the threat may appear to be trivial or non-existent). It is the Institute’s view that such an approach gives recognition to the fact that family violence ‘is best understood as a pattern

³⁰⁹ See [5.3.5].

of behaviour with a cumulative impact rather than a series of isolated assaults'.³¹⁰ In forming its view, the Institute acknowledges the concern of the Acting Director of Public Prosecutions that a legislative direction that a response may be regarded as reasonable in the absence of an immediate threat, might allow abusive men to claim self-defence unjustifiably in relation to their female partners. However, the Institute considers that abusive men are unlikely to be able to establish a probative evidentiary foundation for self-defence in such circumstances. The Institute does, however, consider that the operation of the new provision should be monitored to ensure that it operates according to its legislative intent.

Recommendation 19:

The *Criminal Code* (Tas) should be amended to provide that a person may have an honest belief that they are acting in self-defence and that their conduct may be regarded as a reasonable response in the circumstances as the person perceives them to be even if the person is responding to a harm that is not immediate or that appears to be trivial (based on the Victorian model).

Legislative change to provide for jury directions where self-defence is raised in the context of family violence

5.4.14 As shown at [5.3.4], community misconceptions persist about family violence. Accordingly, the trial judge has a crucial role to play in 'assisting juries to recognise the significance of prior violence and to make the necessary connections between expert evidence [about family violence] and the issues at trial'.³¹¹ Even if expert evidence is not adduced, an important function for the trial judge is to 'address possible juror misconceptions about family violence' and to explain the relevance of family violence to the elements of self-defence.³¹² In Victoria, there is provision under Part 6 of the *Jury Directions Act 2015* (Vic) for a specific jury direction to be given at the start of the trial (or at any time during the trial) where self-defence or duress are raised in the context of family violence.³¹³ The 'directions are designed to proactively address any misconceptions jurors may have about family violence at the start of a trial so that self-defence claims in such cases can be fairly assessed in context'.³¹⁴

5.4.15 The *Jury Directions Act 2015* (Vic) provides as follows:

58 Request for direction on family violence

- (1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with section 59 and all or specified parts of section 60.
- (2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 60 if so requested, unless there are good reasons for not doing so.
- (3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this Part if the trial judge considers that it is in the interests of justice to do so.
- (4) The trial judge—

³¹⁰ Sheehy, Stubbs and Tolmie, above n 2, 677.

³¹¹ VLRC, above n 30, [4.4].

³¹² Ibid [4.140].

³¹³ The provisions were initially introduced into the *Jury Directions Act 2013* (Vic) by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic). On 29 June 2015, the provisions were revised and included in the *Jury Directions Act 2015* (Vic): see Judicial College of Victoria, *Criminal Charge Book*, [8.9.3.1] <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#49662.htm>>.

³¹⁴ *Jury Directions Bill 2015* (Vic), Explanatory Memorandum, 33–4.

- (a) must give the direction as soon as practicable after the request is made; and
 - (b) may give the direction before any evidence is adduced in the trial.
- (5) The trial judge may repeat a direction under this section at any time in the trial.

59 Content of direction on family violence

In giving a direction under section 58, the trial judge must inform the jury that—

- (a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and
- (b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and
- (c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending; and

...

60 Additional matters for direction on family violence

In giving a reaction direction requested under section 58, the trial judge may include any of the following matters in the direction—

- (a) that family violence—
 - (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;
 - (ii) may involve intimidation, harassment and threats of abuse;
 - (iii) may consist of a single act;
 - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
- (b) if relevant, that experience shows that—
 - (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
 - (ii) it is not uncommon for a person who has been subjected to family violence—
 - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
 - (B) not to report family violence to police or seek assistance to stop family violence;
 - (iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—
 - (A) family violence itself;
 - (B) cultural, social, economic and personal factors;
- (c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.

The aim of the directions is to counter community misunderstandings about ‘how the dynamics of family violence may impact on the behaviour of family violence victims, such as why victims of

family violence remain in abusive relationships'.³¹⁵ They offer flexibility for the judge to tailor the direction to the circumstances of the particular case. Further, the directions expressly provide that a person may be acting in self-defence even if they have previously used violence against the other person. Research has highlighted the difficulties that have been experienced by women who do not conform the stereotype of the passive 'battered woman' in relying on self-defence. Women who have previously fought back have largely been excluded from self-defence as the relationship tends to be categorised as one of mutual violence.³¹⁶

Submissions received

5.4.16 The Acting Director of Public Prosecutions and the Law Society opposed the introduction of jury directions provisions based on the Victorian model. The Acting Director of Public Prosecutions stated that '[t]here is no demonstrated need for additional special directions in relation to self-defence in the context of family violence'. The Law Society considered that judges are better placed than the legislature to formulate appropriate directions that there is 'a real and substantial risk a jury would misuse the "special directions" proposed'.

5.4.17 In contrast, the CLS, the WLS, SHE and the SASS supported the introduction of special jury directions for self-defence in the context of family violence. The WLS said that the introduction of jury directions where self-defence is raised in the context of family violence is 'vital' given the range of conduct that may constitute family violence. The WLS wrote that '[d]irections need to be more substantial than merely reading out the relevant law to the jury: juries need to understand the lived experiences of women in this situation'. Otherwise, 'it will be difficult for them to appreciate the constant state of fear and alert women live with and to understand why women may use force that in any other circumstance may seem extreme'. The CLS endorsed the views of the WLS. The SASS also considered that the introduction of jury directions is a 'critical aspect of the potential reforms' given that 'gross community misconceptions regarding family violence still exist in Australia'.

5.4.18 SHE also supported the introduction of jury directions on the basis of widespread community misunderstanding about family violence. However, SHE considered that the direction should be mandatory in those cases where family violence is raised as an aspect of self-defence

The Institute's view

5.4.19 Research has demonstrated that stereotypes and misconceptions do exist about family violence. Accordingly, it is the Institute's view that a provision based on the Victorian model should be enacted in Tasmania. This is consistent with the approach taken in Tasmania in relation to delayed complaint in sexual offences cases where provision is made for judicial directions to be given to counter community misconceptions about the behaviour of genuine sexual assault complainants in relation to delay in complaint.³¹⁷ The Institute's view is that, as with the Victorian approach, there needs to be flexibility in relation to the content of the direction and that the accused's counsel should retain control of whether a direction is requested (other than where the accused is unrepresented in which case the trial judge should have discretion to give the direction if it is in the interests of justice to do so).

³¹⁵ See *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 11 and *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic) Explanatory Memorandum, 21–3.

³¹⁶ See VLRC, above n 30, [4.1.49]; Sheehy, Stubbs and Tolmie, above n 2, 672–73; Stubbs and Tolmie, above n 262, 736–39; Bradfield, above n 301, 227–28; E Wells, 'But Most of All, They Fought Together' (2012) 36 *Psychology of Women* 350.

³¹⁷ *Criminal Code* (Tas) s 371A. See TLRI, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006).

Recommendations 20 and 21:

21. The *Criminal Code* (Tas) should be amended to provide that a trial judge must give a direction on family violence, if requested by defence counsel or the accused (if unrepresented), unless there are good reasons for not doing so. If an accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction if it is in the interests of justice to do so.
22. Part 6 of the *Jury Directions Act 2015* (Vic) should provide the model for the jury direction on family violence.

‘Defence of preservation in an abusive domestic relationship’

5.4.20 Another possible approach to the problem of those who kill in response to on-going family violence, is to enact specialised defences that apply in the context of family violence.³¹⁸

5.4.21 In Queensland, a partial defence (contained in the *Criminal Code* (Qld) s 304B) applies to reduce murder to manslaughter if the killing is for self-preservation in an abusive domestic relationship. This provision was enacted following a review of the criminal law relating to women who kill violent partners.³¹⁹ It provides that a person is guilty of manslaughter only if:

- (a) the deceased had committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
- (b) the person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
- (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

5.4.22 This provision has been criticised on the basis that the only difference between reliance on the complete defence of self-defence and the partial defence of the abusive domestic relationship is the absence of the requirement for a triggering incident — in the self-defence provision under the *Criminal Code* (Qld) s 271(2) it is necessary for there to be a triggering assault.³²⁰ The similarity between the partial defence in Queensland and the complete defence of self-defence in other jurisdictions has also been observed.³²¹ However, some commentators have supported the defence in the context of the mandatory sentencing regime for murder that exists in Queensland. The existence of a ‘safety net’ partial defence has allowed some women to run concurrent self-defence and self-preservation defences at trial (rather than negotiating a plea).³²²

Submissions received

5.4.23 The Institute received no submissions supporting the introduction of a partial defence that applies in the context of family violence.

5.4.24 The Acting Director of Public Prosecutions stated that a partial defence of killing for self-preservation is unnecessary in Tasmania and that the enactment of such a defence would

³¹⁸ See VLRC, above n 30, 64 for a discussion of possible models for a specific family violence defence.

³¹⁹ See Mackenzie and Colvin, above n 249.

³²⁰ M Edgely and E Marchetti, ‘Women who Kill their Abusers: How Queensland’s New Abusive Domestic Relationship Defence Continues to Ignore Reality’ (2011) 13 *Flinders Law Journal* 125, 140. For criticism of the Queensland approach, see also: Sheehy, Stubbs and Tolmie, above n 5, 480; Hopkins and Easteal, above n 263, 135–6.

³²¹ Hopkins and Easteal, above n 263, 135.

³²² H Douglas, Panel Discussion (Homicide Law Reform in Victoria: Prospects and Retrospect, Melbourne, 15–16 August 2014).

unnecessarily complicate the law and the required jury directions. He was also concerned that the defence could be used inappropriately by men who kill their female spouse. The Law Society also opposed the introduction of a partial defence and stated that the arguments advanced by the Acting Director of Public Prosecutions were persuasive. While the WLS recognised that there may be advantages in having a partial defence as a ‘safety net’, it had ‘concerns about what impact this would have on self-defence as an absolute defence’. The WLS was concerned that the existence of such a defence may cause women to enter a plea of guilty to manslaughter or the jury to enter a compromise verdict rather than acquitting on the basis of self-defence. Similarly, the SASS opposed the introduction of a partial defence on the basis 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’. The SASS were concerned that a partial defence would prejudice ‘defendants who could otherwise have qualified for a full acquittal if they had successfully raised self-defence’. In addition, it may also confuse jurors given that they would be required to consider the same essential elements for both defences.

5.4.25 In contrast, SHE supported the creation of a separate defence for women who have been subjected to family violence. It was concerned that ‘[i]ncorporating 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 was used’. SHE considered that the separate defence should be a complete defence resulting in an acquittal.

The Institute’s view

5.4.26 After considering the submissions received and the literature in relation to specific defences for family violence, the Institute’s view is that a partial defence should not be introduced. It is unnecessary in a jurisdiction, which unlike Queensland, has a broad and flexible self-defence test and discretionary sentencing for murder. Similarly, the Institute does not support a separate, complete defence for self-defence in cases of family violence but considers that procedural changes should be made to allow the current defence to more accurately and thoroughly recognise the circumstances of those who use violence in response to prolonged family violence.

Recommendation 22:

A partial defence of killing for self-preservation in a domestic relationship should not be introduced in Tasmania.

Part 6

Defence of Property

*'Before he is "cast into the world" ... man is laid in the cradle of his house'*³²³

6.1 Consistency between s 46 (self-defence), s 39 (prevention of commission of a crime) and s 40 (defence of dwelling-house)

6.1.1 A separate issue raised in the Issues Paper was the separation of the defences of self-defence (s 46), prevention of the commission of a crime (s 39) and defence of dwelling-house (s 40) into discrete provisions and the question of whether, in the interests of consistency, it was desirable to consolidate them into a single section.

6.1.2 The *Criminal Code* (Tas) s 39 provides:

It is lawful for any person to use such force as he believes on reasonable grounds to be necessary in order to prevent the commission of a crime, the commission of which would be likely to cause immediate and serious injury to any person or property, or in order to prevent any act being done which he believes on reasonable grounds would, if done, amount to any such crime.

This contains both subjective and objective requirements. The person must believe that the force used is necessary in order to prevent the commission of a crime (or an act being done that would amount to a crime), which would be likely to cause immediate and serious injury to any person or property (subjective). In addition, the belief must be based on reasonable grounds (objective).³²⁴

6.1.3 Section 39 may be raised as an additional or alternative defence to self-defence contained in s 46 of the *Code* in some cases — fending off an imminent assault for example. In these circumstances, there is a clear overlap between self-defence and the prevention of the commission of a crime because if a person is acting in self-defence, then they are usually preventing a crime being committed. However, there are differences in the scope and operation of self-defence and the defence of prevention of a crime. Section 39 only makes lawful, force that is used to *prevent a crime* and so does not operate if a person defends themselves against conduct which is not criminal (such as if the person likely to cause serious injury to any property or person is not committing a crime on account of their infancy or mental disease).³²⁵ This restriction does not apply to self-defence. There is also a statutory requirement that the belief relates to a crime that is likely to cause both immediate and serious injury (whereas there is no requirement of law that there is a threat of immediate harm for self-defence and neither is there a requirement as to the seriousness of the perceived threat). In addition, unlike s 46, s 39 includes a requirement of a belief on reasonable grounds that the use of such force was necessary.

6.1.4 The *Criminal Code* also separately provides for defences relating to the protection of both movable and real property. These defences are potentially available where force is used to resist trespass to property. Since most cases which call for action to defend property will also involve actual

³²³ G Bachelard, *The Poetics of Space* (Beacon Press, Boston, 1964) 7.

³²⁴ See *Goss v Nicholas* [1960] Tas SR 133, 135 (Crawford J).

³²⁵ A Simester et al, above n 171, 782.

or perceived threats to the person, defence of property is relied upon as the single justification for the use of force much less frequently than self-defence.

6.1.5 Whilst claims of self-defence and defence of property share some similarities in that they both arise in circumstances where the conduct of the accused occurs in response to an actual or perceived attack, justifications for the use of force are perhaps less convincing when the threat is to property rather than personal safety. This is because it is generally agreed that an intruder's right to life prevails over a homeowner's rights in relation to property. This hierarchy of rights is reflected in the separate legislative provisions. The central difference between the defences is that, whereas s 46 sanctions the use of such force as is reasonable in the circumstances as the accused subjectively perceives them to be, the sections dealing with defence of property prescribe an objective assessment both of the accused's belief in the need to use force (which must be based on reasonable grounds) and the degree of force used to defend his or her property (which must also be based on reasonable grounds).

6.1.6 Defence of dwelling-house in s 40 of the *Criminal Code* (Tas) provides:

It is lawful for any person who is in peaceable possession of a dwelling-house, and for any person lawfully assisting him or acting by his authority, to use such force as the person using the same believes on reasonable grounds to be necessary to prevent the forcible breaking and entering of the dwelling-house by any person whom he believes on reasonable grounds to be attempting to break or enter the dwelling-house with intent to commit any crime therein, or to eject therefrom any person who has unlawfully entered the dwelling-house, and whom he believes on reasonable grounds to intend to commit a crime therein.³²⁶

Section 40 is similar in some respects to s 39. Both defences impose a requirement of a subjective belief that the use of force is necessary and a requirement that the belief is based on reasonable grounds. However, whereas s 39 contemplates the lawful use of force in an attempt to prevent the commission of a crime which threatens serious injury, s 40 is instead concerned with the use of force to prevent forcible entry into a dwelling-house with intent to commit any crime.

6.1.7 Sections 41 to 45 go on to deal with defences relating to the protection of both real and movable property other than dwelling-houses. For these sections there is a limitation on the permissible use of force which does not apply in cases involving the prevention of crime or defence of the home — the force used must not be intended nor be likely to cause death or grievous bodily harm. This contrast is evident in common law traditions which draw a distinction between the home and other types of property.

6.1.8 The difference in the permissible use of force in s 40 and ss 41 to 45 is perhaps explained by the suggestion that different considerations are brought to bear where the property in question is the home.³²⁷ These include that people are more vulnerable in the home and that 'an intrusion into one's premises involves a threat to one's privacy, dignity, and honor, analogous to the threat present in crimes such as rape and kidnapping against which deadly force is considered justified.'³²⁸ It may also be the case that a homeowner, confronted by an intruder in the middle of the night, is not in a position to know their intentions and may respond with an apparently disproportionate degree of force fearing that the intruder intends physical harm to them or the other occupants of the dwelling. A number of arguments have been advanced to justify the use of even lethal force in protection of the home³²⁹ and

³²⁶ The equivalent Queensland *Code* provision is effectively the same: see *Criminal Code* (Qld) s 267.

³²⁷ It is not only in self-defence situations that the special status of the home is recognised. For example, the offence of burglary is said to be aggravated where the place where the burglary is committed is used for human habitation (see s 245 *Criminal Code* (Tas)).

³²⁸ Stuart P Green, 'Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' (1999) *University of Illinois Law Review* 1.

³²⁹ *Ibid* 3–5.

the notion that the defence extends to the use of lethal force is not unsupported by case law. For example, in *R v Porritt* Ashworth J stated:

At the trial it was conceded on behalf of the Crown that if the jury took the view that it was necessary for the protection of the stepfather, then the proper verdict was one of not guilty, and a similar concession was made in regard to the possibility of an honest belief that it was reasonably necessary to protect the house by shooting.³³⁰

6.1.9 Legislative modifications to the law of self-defence in the UK have confirmed the special status of ‘householder cases’ in that jurisdiction (see [6.3.15] below).

6.1.10 As part of the review of self-defence, the Institute considered whether the requirements of the defences of prevention of crime and defence of dwelling-house should be the same as the requirements for the defence of self-defence — whether a more subjective approach to the assessment of the accused’s conduct (as per s 46) should be adopted or whether the defences are sufficiently different from self-defence to justify the retention of the requirement of objectively reasonable grounds both for the belief that the person is attempting to break into the house and for the belief in the need to use force to prevent that. Although consistency is often desirable, there may be good reasons why different standards should apply to self-defence in s 46 and the defences provided in ss 39 and 40.

6.2 Protection of property vs right to life

6.2.1 The view of the home as sanctuary or refuge has been mentioned above. However, it is also sometimes claimed that the importance of the home is even more elemental, that there is a ‘profound relationship between the home and the occupier’s self-identity’.³³¹ ‘[W]hen we come to give content to our concepts of ourselves and to the idea of our own self-identity, place and locality play a crucial role.’³³² Quite apart from the question of physical harm, the psychological effects can be extremely damaging for the victims of a home invasion since their sense of security and confidence in their ability to control access to their private sphere are destroyed by the intruder.

6.2.2 The importance of the home and the right to adequate housing and associated rights to privacy in the home are recognised in a number of human rights instruments.³³³ Housing is recognised in the Universal Declaration on Human Rights as a right in itself alongside other human rights such as the right to liberty and the right to freedom of expression. However, a resort to violent action to defend property brings these rights directly into conflict with the fundamental right to life and security of the person. Claims of self-defence involve a weighing of the relative rights to life and physical safety of the aggressor and the person attacked. One explanation for the justified use of even lethal force in self-defence situations is that by unjustly threatening the life of an innocent victim aggressors forfeit their right to life. The use of force in self-defence is, of course, also limited by the principles of necessity and proportionality. Where force is used to protect property, however, it is no longer a question of weighing competing claims to life and an assessment of the boundaries of necessity and proportionality must take into account the fact that what is at stake (property) is intrinsically less valuable than a human life.

³³⁰ [1961] 1 WLR 1372, 1375.

³³¹ Lorna Fox, *Conceptualising Home* (Hart Publishing, 2007) 137.

³³² Jeff Malpas, *Place and Experience: A Philosophical Topography* (Cambridge University Press, 1999) 176.

³³³ See eg, *Universal Declaration on Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 11; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

6.3 Approaches in other jurisdictions

Common Law (Australia)

6.3.1 All domestic jurisdictions have statutory formulations of the defence of property but the common law position is included here for the sake of completeness. There is scant case law on defence of property in Australia. Perhaps the leading case is *R v McKay* [1957] VR 560. McKay was a chicken farmer who had been troubled by thefts of poultry over a number of years. Early one morning he was alerted to the presence of an intruder and shot and killed him as he was making off with a number of birds. McKay claimed his intention was merely to wound the thief and that he intended to do so as an exercise of his right to protect his property or to prevent the commission of a crime. The trial judge directed the jury that,

[a] man is entitled to use such force as is reasonable in the circumstances to prevent the theft of his property, but he is not permitted under the law to take the life of a thief — to do so when the thief has not shown violence or an intention to use violence.³³⁴

McKay unsuccessfully appealed his conviction, with the Supreme Court taking no objection to the trial judge's direction in these terms. Lowe J stated, '[i]t is in the highest public interest that the view of the trial judge as to the sacredness of human life should be upheld'.³³⁵

6.3.2 In principle, despite the decision in *McKay's Case*, the lawfulness of a killing in defence of property may be judged under the general rule which applies to claims of self-defence. The test set down in the leading Australian authority on self-defence, *Zecevic v DPP*, is 'whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did'.³³⁶ However, in practice such claims will invariably fail this test since *Zecevic* justifies the use of fatal force *only* where the threat or attack causes a reasonable apprehension of death or serious bodily injury — circumstances which would enliven a claim of self-defence rather than defence of property.

6.3.3 Ultimately, in these times of organised policing, common law authorities line up against taking the law into one's own hands and conclude that lethal force will never be necessary in the protection of property on the grounds that a human life, even that of an aggressor, is more valuable than any property.³³⁷

South Australia

6.3.4 Section 15A of the *Criminal Law Consolidation Act 1935* sets out the rules relating to the use of lethal force to defend property. It is a complete defence to argue that the defendant genuinely believed that the force was necessary and reasonable and the force used was, in the circumstances as the accused believed them to be, reasonably proportionate to the threat that was perceived to exist. The defence is only available, however, where the death was accidental and not where the accused intended or was reckless as to the likelihood of causing death.³³⁸ Whilst this may appear to extend the right to use force beyond that provided for in the Tasmanian legislation (as s 15A expressly contemplates the possibility of the justified use of fatal force in such circumstances), in effect the right is likely to be extremely limited. Arguably, the requirements in s 15A that the accused held a

³³⁴ *R v McKay* [1957] VR 560, 563.

³³⁵ *Ibid* 567.

³³⁶ See *Zecevic v DPP* (1987) 162 CLR 645.

³³⁷ However, the authors of one of the leading texts on criminal law note, 'it is not obviously a categorical truth that any individual's life is of more intrinsic value than any item of property' and then give the somewhat prescient example of the killing of a terrorist to prevent the destruction of priceless historic artefacts: Simester et al, above n 171, 708.

³³⁸ *Criminal Law Consolidation Act 1935* (SA) s 15A(1)(b).

genuine belief that it was necessary and reasonable to use force and that the fatal consequences were ‘accidental’ are likely in most cases to present an insuperable barrier to raising the defence successfully.

6.3.5 Where the force used was not reasonably proportionate this provides only a partial defence, reducing the offence from murder to manslaughter. However, in cases of innocent defence against home invasion, the complete defence operates even in circumstances where the force used was disproportionate and potentially even where lethal force is used. Section 15C to this effect was inserted by the *Criminal Law Consolidation (Self Defence) Amendment Act 2003* (No 28 of 2003) cl 6. Once again, the defendant must not possess the mental state for murder, ie, the accused neither intended to cause death nor was reckless in that regard, and s 15C does not operate where the accused was engaged in criminal conduct that gave rise to the threat or where his mental faculties at the time of the alleged home invasion were substantially affected by the voluntary consumption of alcohol or other non-therapeutic drugs. The onus of proof in relation to the belief that the victim was committing a home invasion rests with the defence.

6.3.6 The *Criminal Law Consolidation (Self Defence) Amendment Act 2003* was enacted against the backdrop of continuing public debate about the rights of householders to protect themselves against burglars. Similar concerns can be discerned in the enactment of the *Crime and Courts Act 2013* (UK) (see [6.3.15] below).

Western Australia

6.3.7 The West Australian *Code* also makes express provision for property defence in cases of home invasion. Generally, the use of force which is intended or likely to cause death or grievous bodily harm is not permitted solely in defence of property³³⁹ however the use of lethal force may be justified against a home invader if the requirements of s 244 are met. Section 244 is cast in relatively wide terms. It permits the use of *any* force that the homeowner believes necessary on reasonable grounds to repel or eject a home invader. A home invader is defined as someone whom the occupant believes on reasonable grounds intends to commit an offence in the dwelling or associated place,³⁴⁰ and, in turn, ‘associated place’ is defined to include land, buildings or structures used ‘exclusively in connection with, or for purposes ancillary to, the occupation of the dwelling’.³⁴¹ The Law Reform Commission of Western Australia has expressed concern that the provision is drawn too widely and that it may sanction the use of unreasonable force in a pre-emptive strike. They give the example of a householder who might resort to violence against a person (who may actually be outside the boundaries of the property) that they believe (on reasonable grounds) intends to steal a car from the driveway. Should the householder also have reasonable grounds to believe that lethal force is necessary to prevent entry onto the property, even if the degree of force itself is not objectively reasonable, he or she may be acquitted.³⁴²

Unified provision jurisdictions

6.3.8 Several Australian jurisdictions have moved to a unified provision model which deals with both self-defence and defence of property.

Model Criminal Code

6.3.9 The Model Criminal Code provision (in part) reads:

³³⁹ See *Criminal Code* ss 251–256.

³⁴⁰ *Ibid* s 244(2).

³⁴¹ *Ibid* s 244(6)(a).

³⁴² Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 97 Final Report (2007) 174.

2.3.17 Self-defence

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person, or
...
 - (c) to protect property from unlawful appropriation, destruction, damage or interference, or
...
 - (e) to remove from any land or premises a person who is committing criminal trespass, and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
 - (a) to protect property, or
 - (b) to prevent criminal trespass, or
 - (c) to remove a person who is committing criminal trespass.

The Model Code provision prohibits the intentional use of lethal force or force intended to cause really serious injury solely to protect property.

Victoria

6.3.10 In Victoria, recent amendments to the law of self-defence have created a single provision which mirrors the Model Criminal Code provision. Section 322K provides:

A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

The notes to the section state that a person may carry out conduct in self-defence if they act in protection of property. A successful defence requires a genuine belief by the accused in the need to act in self-defence and that the conduct was a reasonable response in the circumstances as the accused believed them to exist. Section 322K is essentially a statutory enactment of the common law rule, hence it limits the defence in cases of lethal force to situations where the accused believed the force was necessary to prevent death or really serious injury.

New South Wales

6.3.11 The equivalent New South Wales provision is in similar terms. Essentially it differs in only one respect. Whereas, in both the Model Code provision and the Victorian provision, self-defence is not available where death or really serious injury is inflicted intentionally in protecting property³⁴³ the New South Wales provision is more liberal in that self-defence may still be available where really serious injury is intentionally inflicted.³⁴⁴

³⁴³ Model Criminal Code s 2.3.17(3); *Crimes Act 1958* (Vic) s 322K(3).

³⁴⁴ *Crimes Act 1900* (NSW) s 420.

6.3.12 Section 420 of the *Crimes Act 1900* (NSW) expressly provides that the defence of self-defence is not available where the person uses force that involves the intentional or reckless infliction of death only to protect property. This section was inserted by the *Crimes Amendment (Self-defence) Act 2001*. This Act also repealed the *Home Invasion (Occupant Protection) Act 1998* which had treated self-defence and defence of property without distinction and which placed no additional limits on the use of force in defence of property. In the second reading speech, Minister Tebbutt acknowledged that s 420 was modelled on the equivalent South Australian provision (s 15A *Criminal Law Consolidation Act 1935*), noting:

[t]here can be no circumstances where it is appropriate to intentionally or recklessly take a human life in the protection of property or to prevent criminal trespass, though it may be permissible to do serious bodily harm in certain circumstances if necessary and reasonable. The South Australian legislation also has taken this view of the value of human life.³⁴⁵

6.3.13 Since the commencement of s 420 South Australia has amended its legislation to provide for the use of disproportionate force to protect property (see [6.3.5] above) however there have been no similar moves in New South Wales to relax the proscription against reckless or intentional killing in such circumstances.

United Kingdom

6.3.14 In the UK, the permissible use of defensive force is governed by both the common law and by statute. A limited statutory defence is provided by s 3 of the *Criminal Law Act 1967* which applies to the use of force in the prevention of crime or in effecting an arrest. Self-defence is regulated by s 76 of the *Criminal Justice and Immigration Act 2008*. Section 76 guides the assessment of the reasonableness of force used in self-defence and provides a statutory footing for the common law principles established in such cases as *Gladstone Williams*³⁴⁶ and *Faraj*.³⁴⁷ Amendments effected by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, extend the principles set out in s 76 to the assessment of the lawfulness of force used in defence of property. Reliance on the defence requires that the accused genuinely believed the use of force was necessary and that the force used was reasonable in the circumstances as the accused believed them to be. As originally enacted, s 76(6) provided that ‘reasonable’ meant not disproportionate so the availability of both self-defence and defence of property was conditioned on the use of force which was not *disproportionate* in the circumstances as the accused believed them to be.³⁴⁸

6.3.15 However recent amendments effected by the *Crime and Courts Act 2013* have reshaped the law of self-defence as it relates to home owners acting against intruders. The amendments created a two-tiered assessment of reasonableness, with a distinction drawn between cases of ‘public’ self-defence and those involving ‘private’ self-defence. A separate category of self-defence cases, namely ‘householder cases’, has been created where the availability of the defence depends instead on the use of force which is not *grossly disproportionate* in the circumstances as the accused believed them to be.³⁴⁹ The amendments may provide greater scope for the acceptance of the use of even lethal force as a reasonable response, allowing as they do disproportionate force which is not grossly disproportionate. A ‘householder case’ means that the accused uses force in self-defence against an intruder in their own residence.³⁵⁰ Therefore the new statutory test will have no application in circumstances where the accused relies solely on a claim of defence of property.

³⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 12 December 2001, 20074 (Carmel Tebbutt).

³⁴⁶ (1984) 78 Cr App R 276.

³⁴⁷ *R v Faraj* [2007] EWCA Crim 1033.

³⁴⁸ *Criminal Justice and Immigration Act 2008* (UK) s 76(6).

³⁴⁹ *Ibid* s 76(5A) as amended by *Crime and Courts Act 2013* (UK) s 43(2).

³⁵⁰ *Criminal Justice and Immigration Act 2008* (UK) s 76(8A). The definition of ‘householder case’ in (8A) is as follows:

6.3.16 Arguably, these changes were a politically expedient response to apparent public disquiet over the case of *R v Martin* [2002] 1 Cr App R 27. Tony Martin was convicted for shooting two men who were burgling his isolated farmhouse, wounding one and killing the other. He claimed to have been the victim of numerous burglaries over many years. In the public arena his case was characterised as one of an ordinary man forced to take drastic measures to defend his own property in the face of police inaction. The need for a provision of this nature must be questioned however, given the very small number of cases where homeowners have been prosecuted for using violence against intruders. An informal study undertaken by the Crown Prosecution Service in the UK found only 11 cases over 15 years where people were prosecuted for attacking intruders and only 7 of these would have been classified as householder cases under the definition provided in s 76(5A).³⁵¹

Canada

6.3.17 The Canadian law relating to both self-defence and defence of property was amended in 2012 with the aim of reducing the existing multi-faceted defences to two simplified provisions: ss 34 and 35 of the *Criminal Code*.³⁵² Defence of property is dealt with in s 35. No distinction is made between dwelling houses and other forms of property. The requirements of the defence are that the accused held a reasonable belief in a claim of right to the property, that they had a reasonable perception of a specified type of threat to the property, that the accused's conduct was committed for the purpose of defending the property and that the accused's actions were reasonable in the circumstances.

6.3.18 The former provision (s 41) stipulated the use of 'no more force than is necessary' which was interpreted by the courts to mean that the force used was proportionate to the harm thereby avoided. The question of proportionality is likely now to form part of the jury's assessment of the reasonableness of the accused's response, in which case the jurisprudence on proportionality in the context of the former provision should be influential. For example, the Supreme Court in *R v Gunning* indicated that 'the intentional killing of a trespasser could only be justified where the person in possession of the property is able to make out a case of self-defence.'³⁵³ However, in *R v Mackay* the Court was unable to conclude that, in every case, 'the defence of property alone will not justify the intentional use of a weapon against a trespasser.'³⁵⁴ It remains to be seen whether, in light of the amendments to this defence, the courts will read in a requirement of a proportionate response or whether the lack of an express proportionality requirement in s 35 will open up the possibility that intentional lethal force may be justified in the defence of property.

6.4 Conclusion

6.4.1 A number of observations can be made from an examination of the various legal approaches to the use of force in the defence of property. Where the threatened property is a dwelling place, the law may be prepared to sanction the use of a considerable degree of force due to its special status as a place of sanctuary and the close identification that people have with their homes; claims justifying the use of force to protect property must satisfy a more exacting test of reasonableness which may not be

For the purposes of this section "a householder case" is a case where—

- (a) the defence concerned is the common law defence of self-defence,
- (b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),
- (c) D is not a trespasser at the time the force is used, and
- (d) at that time D believed V to be in, or entering, the building or part as a trespasser.

³⁵¹ See Crown Prosecution Service (UK), 'Homeowners and self defence – DPP issues further details of cases' (Media Release, 13 January 2005) <https://www.cps.gov.uk/news/latest_news/106_05/>.

³⁵² *Criminal Code*, RSC 1985, c C-46.

³⁵³ *R v Gunning* [2005] 1 SCR 627, 640.

³⁵⁴ *R v McKay* [2007] 1 SCR 793, 794.

required in relation to claims of self-defence; and there is a presumption that human life is intrinsically more valuable than any property.

6.4.2 In Tasmania, the legislation does not expressly forbid resort to lethal force in defence of property. However, in light of the sanctity of life arguments presented above, in a case where a trespasser is killed in a violent confrontation with a home-owner, unless the death is accidental, the defence is likely to founder on the reasonable belief requirements in s 40. Ultimately, the suggestion that the home's special status as a refuge justifies the use of lethal force in its defence is probably out of step with modern sensibilities where 'the sanctity of life takes precedence over the sanctity of possession'.³⁵⁵

6.4.3 The Institute's Board considers that self-defence and the defences relating to protection of property and prevention of crime should not be consolidated into a single provision. The principles which underpin these defences are sufficiently unlike to warrant the retention of separate provisions in the *Code* and the retention of a more objective test than that stipulated in s 46.

Recommendation 23:

There should be no change to the current approach to the defences relating to prevention of crimes and defence of property contained in ss 39–40 of the Tasmanian *Criminal Code*.

³⁵⁵ D Lanham, 'Defence of Property in the Criminal Law' [1966] *Criminal Law Report* 368, 372.

Appendix 1: Overview of the law of self-defence in Australia, Canada, New Zealand and the United Kingdom

Jurisdiction	Section	Belief in need to use defensive force	Appropriateness of response
Cth	<i>Criminal Code</i> , s 10.4	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused perceives them (subjective/objective)
ACT	<i>Criminal Code</i> , s 42	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused perceives them (subjective/objective)
NSW	<i>Crimes Act 1900</i> , s 418	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused perceives them (subjective/objective)
NT	<i>Criminal Code</i> , s 43BD (Sch 1 and declared offences); ³⁵⁶	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused perceives them (subjective/objective)
	s 29 (all other offences)	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused reasonably perceives them (subjective/objective)
QLD ³⁵⁷	<i>Criminal Code</i> , s 271(2) (response to unprovoked assault resulting in death or serious injury)	Accused must: (a) have a reasonable apprehension of death or grievous bodily harm for the victim's assault and (b) must believe, on reasonable grounds, that he or she cannot otherwise preserve the person defended from death or grievous bodily harm (subjective/objective)	Accused must have a belief on reasonable grounds cannot otherwise preserve the person defended from death or grievous bodily harm (subjective/objective)
SA	<i>Criminal Law Consolidation Act 1935</i> , s 15(1)	Belief that conduct was necessary and reasonable for self-defence (subjective/objective)	Conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the accused genuinely believed to exist (subjective/objective)
TAS	<i>Criminal Code</i> , s 46	Belief that acting in self-defence (subjective)	Force is justifiable where it is reasonable to use in the circumstances as the accused believes them to be (subjective/objective)
VIC	<i>Crimes Act 1958</i> , s 322K	Belief that conduct was necessary (subjective)	Conduct is a reasonable response in the circumstances as the accused perceives them (subjective/objective)
WA	<i>Criminal Code</i> , s 248	Belief based on reasonable grounds that the harmful act was necessary (subjective/objective)	The person's harmful act is a reasonable response in the circumstances as the person believes them to be (subjective/objective)

³⁵⁶ Schedule 1 offences include murder, manslaughter, causing serious injury, and endangerment offences. Offences not covered by Schedule 1 include 'assault and related offences against the person, including for example the offence under s 181 of the *Criminal Code* of unlawfully causing serious harm': S Gray and J Blokland, *Criminal Law: Northern Territory* (Federation Press, 2nd ed, 2012) 159. For a discussion of the Northern Territory position, see Gray and Blokland, Chapter 8.

³⁵⁷ It is noted that different rules apply in relation to unprovoked assaults where the force used is not intended to cause death or grievous bodily harm (s 271(1)) and in relation to provoked assaults (s 272). For more detail see Devereux and Blake, above n 173, [13.81]–[13.98].

United Kingdom	Common law (<i>Gladstone Williams</i> [1987] 3 All ER 411 (CA); <i>Beckford v R</i> <i>Criminal Justice and Immigration Act 2008</i> (UK), s 76)	Belief that acting in self-defence	The response was reasonable in the circumstances as the accused believes them to be (subjective/objective)
New Zealand	<i>Crimes Act 1961</i> , s 48	Belief that acting in self-defence (subjective)	The force is reasonable to use in the circumstances as the accused believes them to be (subjective/objective)
Canada	<i>Criminal Code</i> , s 34	Belief on reasonable grounds that force used against them and that acting in self-defence (subjective/objective)	The force is reasonable in the circumstances contextualised to reflect the accused's characteristics and history

Appendix 2: Details of acquittals obtained from online search on *NewsBank* database of *The Mercury*, *The Advocate* and *The Examiner*³⁵⁸

Legend: D = accused; V = victim

Name	Reference	Charge	Details
Shane Smith	<i>The Examiner</i> , 25 March 2014	Assault	D hit V, his cousin, after they had been drinking together and V was asked to leave. V hit him twice in the face and so D punched him. V was drunk but no information to suggest that D was affected by alcohol. Outside residence.
Justin Lange	<i>The Examiner</i> , 5 February 2014	Grievous bodily harm and wounding	D stabbed a man in the back several times during a fight and said that he was defending his friend who was being hit with a bat. Prior history between D and V, with V previously punching D and knocking him out. At a residence. No information that alcohol was involved.
Dimity Brown ³⁵⁹	<i>The Examiner</i> , 16 August 2013	Murder	Murder charge dropped against woman accused of killing her partner. She stabbed partner in the chest and relied on self-defence.
Beaumont Cowdery	<i>The Examiner</i> , 14 August 2013	Assault	D punched a cyclist from a passing car after telling him to move off the road. D relied on self-defence and said that the cyclist was the aggressor.
Cameron Riley	<i>The Examiner</i> , 24 April 2013	Assault and wounding	D punched his father and hit him with a fire poker and hit his stepmother with a mattock. D relied on self-defence saying that his stepmother had pursued him with a knife at the time and his father had grabbed him by the throat. At a residence and victims had been drinking.
Adam Walker	<i>The Examiner</i> , 27 September 2012	Assault	D, a bouncer at a hotel, punched a drunken patron as D came to the aid of another bouncer who was evicting the patron from the hotel. The patron was approaching D 'throwing haymakers'.
Jon Shaddock	<i>The Advocate</i> , 13 September 2012	Assault	D punched his partner in the face and then picked her up and dropped her on the ground on her head twice while she was unconscious. D claimed he was acting in defence of himself and his daughter. In context of an argument and at a residence. No information that alcohol was involved.
Craig Jones	<i>The Advocate</i> , 2 August 2012	Wounding and assault	D struck his partner in a heated argument. Then smashed a coffee cup into her head and then struck her with broken cup. D said woman had threatened to cut off his penis and also threatened his parents. At a residence and no information about alcohol.
Joshua Wilkinson	<i>The Advocate</i> , 24 April 2012	Assault	Fight at nightclub. D said that he had told V to go away and had moved away from V several times when V hit him.
Nicholas McWilliams	<i>The Mercury</i> , 20 April 2011	Assault	D met a group of men in the street at night. One of the group (V) bumped D. D abused the man before he was punched by V. He then punched V. Evidence that D had slept with V's former girlfriend but unclear whether V knew this. No information about alcohol.

³⁵⁸ The search period covered the following periods: *The Mercury* (1/1/1998 – 1/4/2014), *The Advocate* (28/8/2006 – 1/4/2014 (unavailable 1/1/2011 – 18/5/2011)) and *The Examiner* (2/1/1998 – 1/4/2014 (unavailable 1/1/2011 – 18/5/2011)).

³⁵⁹ Case not proceeded with.

Alphabeta Isaako	<i>The Examiner</i> , 29 November 2010	Assault and committing an unlawful act intended to caused bodily harm	D, an off-duty police officer, became involved in an altercation with men at a nightclub. D said he was confronted by three men and smashed a glass onto one man's head. D had had a brief relationship with a former girlfriend of one of the men and there was a dispute about this prior to the assault. No information about alcohol.
Andrew Richards	<i>The Advocate</i> , 25 November 2010	Grievous bodily harm and wounding	Two men arrived at D's house and he heard smashing noises and voices saying 'come out here we are going to kill you' (directed to D's brother-in-law). D had an altercation with the men and then ran into a shed and picked up a panel saw. D struck one man and then met other man with fists raised saying 'have a go' and struck him with the saw a number of times. The background to the incident was that there had been acrimonious text messages between one of the V's and D's brother-in-law (who was at D's house) about the welfare of one of V's children.
Geraldine Carter	<i>The Examiner</i> , 4 November 2009	Wounding	D and V had been at the local RSL. D slashed her partner in the arm with a knife following an argument about 'silly things'.
Martin Cooper	<i>The Mercury</i> , 19 June 2008	Wounding	Dispute with drunken neighbour over loud music. Neighbour came to his house to continue verbal abuse and D hit him twice on the head with a homemade waddy.
Mark McMahon	<i>The Mercury</i> , 3 May 2008	Grievous bodily harm	D was intoxicated. V came to the D's house and there was an argument about money that was owed. V was 108 kg and was tapping D's head going 'watch right, watch left'. There was a brawl and then D hit V with an iron bar.
Angela Berry	<i>The Mercury</i> , 19 March 2008	Wounding	D stabbed V in a wrestling match over a mobile phone. D had a phone that V had lost several months before. V had sent D a threatening text message and D armed herself with a knife. Confronted by V and there was a physical fight during which V was stabbed. D said she was acting in defence of herself and her young child.
Terrence Butt	<i>The Mercury</i> , 26 February 2008	Murder and wounding	D had been the victim of a series of beatings from the deceased and his wife since revealing the deceased's wife's extra-marital affair. There was an altercation outside the deceased's house where D was hit over the shoulders with a piece of wood and the deceased threatened to kill him. D got out of the vehicle with a knife in his hand. Stabbed the deceased 8 times.
David Lee	<i>The Advocate</i> , 10 October 2006	Assault	Ongoing altercations with neighbour. Neighbour arrived at D's house and D hit him repeatedly with a stick with nails in it.
Joseph Tonner	<i>The Mercury</i> , 6 December 2006	Grievous bodily harm	D shot V in the stomach. They came across each other at night while driving on Bridgewater causeway and V became worried and called friends to assist. The vehicles parked and V got out of the vehicle and approached D in another car. D pulled out rifle and shot V.
Kirkhope	<i>The Examiner</i> , 27 October 2005	Assault	Punched player in football match but said that he had been hit first.

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Anthony Eastley	<i>The Mercury</i> , 1 March 2005	Attempted murder	V had previously made threats towards D's children and D and had pointed a gun at one of the D's children. On the day of the shooting, V had threatened D and his partner with a knife. Later that day D got out of his vehicle and pointed his gun at V and told V to leave him alone or he would shoot. V started running towards D and D shot him.
Jason Wombwell	<i>The Examiner</i> , 3 May 2004	Assault	Off duty police officer hit postman and relied on self-defence.
Jason Freeman	<i>The Mercury</i> , 24 June 2003	Assault	V went to D's home and demanded to see him. D found V in the back garden and a struggle ensued. D hit the V several times with a totem tennis pole.
Michael Henderson	<i>The Mercury</i> , 9 February 2001	Assault	D punched a member of staff in a hotel. D said that V began the physical altercation and had his arms up and coming at him.

Appendix 3: Self-defence cases, Supreme Court of Tasmania, 1988–2013

Legend: D = accused; V = victim

Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Smith</i> , 19 June 2013, COPS (Estcourt J)	Wounding	A physical altercation between D and V and D bit V's ear. V was father of D's partner's child and waiting at Redline depot for return of child from shared custody arrangement.	No — even if V was holding D immobile (which not satisfied beyond reasonable doubt) it was not objectively reasonable to bite off an ear. The 'scrap' could have been resolved verbally and there were other people to assist.
<i>Tasmania v Connors</i> , 7 June 2013, COPS (Porter J)	Wounding	Occurred outside nightclub. D struck V with a broken bottle. A number of people involved. V insulted D and she became enraged. Unclear whether V hit D. Both V and D were intoxicated. V and D were strangers.	No — sentenced on basis that D did not believe a situation of self-defence arose. D was the aggressor (even if V had previously hit D) as there was time to retreat and no immediate threat.
<i>Tasmania v Castaneda</i> , 16 April 2013, COPS, (Estcourt J)	Assault	Occurred at a bar when D and some friends were involved in a scuffle with a drunken patron. Soon after, D approached V and punched him.	No — either D punched him to the head in a manner described as a 'king hit', or used excessive force in the circumstances as D believed them to be.
<i>Tasmania v Andrews</i> , 14 February 2013, COPS (Evans J)	Grievous bodily harm	D was intoxicated and at a hotel when two of his associates were involved in an incident with V. DA did not witness it but was told that V pulled a knife. A few minutes later, D saw V and verbally and then physically attacked him. V then lunged at D with a knife. D punched, kicked and kneed V. V suffered serious head injuries.	No — not acting in self-defence.
<i>Tasmania v Halfacre</i> , 20 December 2012 COPS (Wood J)	Assault	V1, V2 and others were leaving a cricket ground after an evening function and D (with others) offered them a lift. V1 sat in the vehicle while the other two sat in the back of van. D was driving erratically and V1 aggressively asked D to stop. D stopped to let the men out and a tense situation developed with D's brother being hit by V2. V1 was in vicinity and D hit V1 with a bat. V1 then tried to break up the fight and D hit him again. D hit V2 and then V2 rolled off D's brother. D continued to hit V2, while V2 was cowering. The victims were strangers.	No — the first hit on V1 was a pre-emptive strike that not reasonable in the circumstances. Numerous hits of increasing force on V2 with a bat (who had D's brother pinned down and had eye gouged him) were lawful defence of another. Subsequent hits, when V2 rolled off D's brother and D hit him again, were not defence of another but blows inflicted as retaliation.
<i>Tasmania v Cunningham</i> , 13 September 2012, COPS (Blow J)	Assault	D was travelling in his sister's car and became angry with her boyfriend (who was in the car). D damaged the car and then D's sister drove the car to her parents. D was fighting his father and his sister, called for V (her boyfriend) to assist. D then began fighting V and bit him near the mouth. Intoxicated offender.	No — bite not in lawful self-defence.
<i>Tasmania v Cooper</i> , 3 September 2012 COPS (Crawford CJ)	Assault	V was D's father. D's parents did not want him to take their ute and his mother got into the driver's seat of the vehicle. D threatened his mother and then approached his father and hit him in face. D said he was acting in self-defence.	No — V was the attacker.

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Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Kettle</i> , 27 June 2012, COPS (Porter J)	Assault	D hit V in the face with a glass outside a hotel. There was a group outside the hotel and V's partner (B) got into a fight with a friend of D's (DB). V tried to separate them and then started to punch DB. D yelled at V to stop and was grabbed by the hair by V. D hit V with glass.	No
<i>Tasmania v Heywood and Mannie</i> , 30 January 2012 (Crawford CJ)	Assault	D hit a man and kicked another man in the face during a drunken fight.	No — D was the aggressor.
<i>DPP v Finnegan</i> [2011] TASCCA 3	Assault	Several accused assaulted V. Crown case was that D was driving in a car erratically and noisily and V came out onto street carrying a piece of wood. V threw a piece of wood at the car One of the Ds (Watkins) hit V with wood and he fell to the ground. Other Ds (including Finnegan) kicked him on the ground. Self-defence raised.	Successful appeal against directed acquittal (on basis that there was no evidence identifying the D) and retrial ordered. No sentencing record (unknown whether there was a retrial or an acquittal).
<i>Tasmania v Petersen</i> , 6 April 2011, COPS (Evans J)	Murder	D met deceased in street by chance and argued. D and V were strangers. Both were intoxicated and deceased aggressive and belligerent. A physical altercation ensued. D stabbed deceased. D had consumed cannabis and alcohol.	Court did not accept that D was acting in self-defence. Even if D had been acting in self-defence, the force used was unreasonable.
<i>Tasmania v Wahl</i> , 4 August 2011, COPS (Blow J)	Grievous bodily harm by dangerous driving	D's son and another man had broken into the V's son's house. There was a history of animosity between them and D had driven her son to the house so that he could assault V's son. V's son chased D's son down the road with a piece of wood and V stood in front of D's car. There were other people around the car and D said that someone reached in and grabbed her.	No
<i>Tasmania v Maynard</i> , 14 December 2011, COPS (Porter J)	Grievous bodily harm	D hit V in the men's toilet at a hotel. D said that there had been a disagreement about a joke that D had tried to make and later V grabbed D in the toilets. No indication of prior relationship.	No — jury satisfied that not acting in self-defence.
<i>Tasmania v Coppleman</i> , 22 June 2011, COPS (Porter J)	Assault	At a nightclub celebrating 18 th birthday, D became involved in scuffle with V where V bit D's hand. Later, outside the nightclub, there was an incident involving a number of people including V who was punched by another person. D was standing nearby and also punched and head-butted V. Evidence that alcohol involved. No indication of prior relationship.	No
<i>Tasmania v Garwood and Cooney</i> , 10 August 2011, COPS (Tennent J)	Assault	Ds went to confront V, after sending a text message telling V they were coming. V was armed with crowbar. V tried to retreat and was followed and hit by Ds. Ds had consumed alcohol but no suggestion that significantly under the influence.	No

Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Simpson</i> , 1 December 2010, COPS (Blow J) (same incident as Finnegan [2011] TASCCA 3)	Assault	Ds driving in car erratically and noisily and V came out onto street carrying a piece of wood. V threw a piece of wood at car. One of the Ds (Watkins) hit V with wood so he fell to ground. Other Ds (including Simpson) kicked him on the ground. Self-defence raised.	No — V was angry and violent and it was reasonable for D to use force, both in self-defence and in defence of companion, who ended up on the ground with the angry V on top of him. However, D continued to use force when it was not reasonable to do so for defensive purposes.
<i>Tasmania v Cox</i> , 24 March 2010, COPS (Crawford CJ)	Assault	D entered property belonging to others (ex-partner's home) and assaulted 3 occupants (ex-partner, her sister and ex-partner's new partner). D said that he was attacked and acting in self-defence. D had consumed alcohol.	No
<i>Tasmania v Byrne</i> , 24 February 2010, COPS (Wood J)	Assault	D had been drinking with co-Ds and had consumed a considerable amount of alcohol. D arranged to meet V by indicating that Ms C (co-D) would have sex with him. D said acting in defence of Ms C.	No — jury verdict rejected any suggestion that D was acting in defence of Ms C.
<i>Tasmania v Rusher</i> , 28 July 2010, COPS (Tennent J)	Assault	D and others (including brother) drinking at hotel. V intoxicated and obnoxious and in a verbal argument with V's brother. D said acting in defence of brother because of threat V made. D was affected by alcohol as had consumed approximately 14 or 15 beers.	No — not satisfied that V made threat and that there was a need to assist brother.
<i>Tasmania v O'Loughlin</i> , 17 February 2010, COPS (Tennent J)	Assault	D finished work as an assistant manager at nightclub and had been drinking. Returned to nightclub where V was being argumentative and refusing to leave area outside nightclub. D approached V and subsequently punched him.	No
<i>Tasmania v Perry</i> , 2 June 2010, COPS (Blow J)	Assault	D was arguing with his fiancée and hit her. V (and others) spoke firmly to D. D was intoxicated. The confrontation became more violent, with D hitting V. D claimed was in self-defence.	No — not acting in self-defence but angry at intervention in quarrel with his fiancée.
<i>Tasmania v Krause</i> , 24 August 2010, COPS (Evans J)	Assault and wounding	D had been abusing cannabis for some time and developed a 'fuming anger' at V (probably due to paranoia). D was 'stoned' and confronted V and there was a fight in which D hit V with knuckle dusters and V hit D in the head with a rock. After D left, V sent a text message saying he was going to seriously hurt D and a friend warned D. V arrived at D's house and D left the house armed with a knife and got in vehicle and tried to drive away. D stabbed V.	No — stabbing conviction based on using more force than was necessary to defend himself.
<i>Tasmania v Griffith</i> , 2 August 2010, COPS, Evans J	Wounding	D was intoxicated and tried to gatecrash a party. D asked V whether he was going to glass him and V said no, and then D hit V with bottle.	No
<i>Tasmania v Young</i> , 15 April 2010, COPS (Crawford CJ)	Wounding	Group drinking in public place. D and V intoxicated and both alcoholics. D claimed to act in self-defence when he stabbed V.	No — beyond reasonable doubt that the act of stabbing was an unjustified and unreasonable response.

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Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Montgomery</i> , 5 February 2010, COPS (Crawford CJ)	Murder	<p>An altercation in a public place. D and V hardly knew each other. Prior to the murder, D was arguing with his girlfriend in town and V knew her and intervened. D called V a dog and V grabbed him and forced him backwards. This made D very angry and he made a threat to V about next time they met.</p> <p>D saw V in town about 10 days later. D said that he was frightened of V because of fight that had taken place previously. D stole a knife in case he was attacked, after unexpectedly meeting V in town. D said that V attacked him first but this was contradicted by other witnesses.</p> <p>Evidence given at sentencing hearing that D suffered PTSD which would make him ‘hyper-vigilant’ and that he perceived his life would be at risk in town. Judge did not accept this because he did not accept D’s version of events.</p>	No — not acting in defence of himself. D had other options available to him if he was genuinely afraid.
<i>Hales v Tasmania</i> [2009] TASSC 100	Murder (convicted of manslaughter)	Altercation involving several people at a party. Background of animosity between D and his group and V and his group. D claimed to have been defending himself against several people, including the deceased. D stabbed the deceased and two others.	No — ‘use of knife ... must have been a product of anger, bravado and fear, but anything other than an exchange of blows with the fist was unforgivable’.
<i>Tasmania v Leggett</i> , 29 April 2009, COPS (Tennent J)	Wounding	Argument between D and V, who were strangers at a bar. D said he believed V was going to punch him and when he pushed out at V he was simply defending himself and did not realise he was holding glass. D had been drinking.	No — did not accept that D was acting in self-defence because D was not facing any threat.
<i>Tasmania v Collins</i> , 5 August 2009, COPS (Crawford CJ)	Wounding	Verbal disagreement in relation to a comment that V made about friend of Ds. D said that V attacked him and D picked up a knife to defend himself. V’s version was that D initially attacked V. D had mild brain damage due to alcoholism.	No — sentenced on basis of excessive force even if D was acting in self-defence. But in any case, not satisfied on balance of probabilities that D acting in self-defence.
<i>Tasmania v Sims</i> , 9 September 2009, COPS (Slicer J)	Wounding and assault	D was intoxicated and behaving irrationally and was violent to her partner, V, on journey home from pub. At home, D tried to end the relationship. D went outside and damaged V’s car. V intervened and D stabbed him in the back.	D suffered from bipolar disorder and her condition was exacerbated through intoxication. The offence was the product of disturbance and not criminality.
<i>Tasmania v Pullen</i> , 3 June 2009, COPS (Blow J)	Assault	Argument arose between D and V, who were friends, while V was at D’s mother’s house celebrating his birthday. D was intoxicated. Argument became physical and D drew a knife.	No — but only convicted of assault and not wounding. Jury not satisfied that D intended to apply force or foresaw knife wound was likely: ‘they probably made allowance for the fact that you were intoxicated’.
<i>Tasmania v Ransley</i> , 2 December 2008, COPS (Blow J)	Assault	There had been a prior incident between D’s brother and V, where D’s brother was driving on grass in a dangerous way near a teenage birthday party that V was in charge of. V threw object at vehicle and damaged it. D accompanied brother and others back to park to confront V. V did nothing before D hit V.	No — but accepted for sentencing that D feared V would harm him and that D punched for the purpose of self-defence but used unreasonable force: ‘in my view you over-reacted as a result of an unfortunate experience you had had on a previous occasion when a man lacerated your face with a broken glass.’

Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Bartlett</i> , 7 February 2008, COPS (Evans J)	Assault and wounding	D and V were both drunk. They had been drinking at D's residence and got into an argument about V's father. D punched V several times. V responded by grabbing D and throttling him and D inflicted small knife wound on V.	Not guilty of wounding but guilty of assault.
<i>Tasmania v Bugg</i> , 25 July 2007, COPS (Slicer J)	Assault	D hit and kicked V as they were leaving a nightclub. D intoxicated and possibly thought (mistakenly) that V had earlier assaulted him within the nightclub. Said that V had offered to continue with confrontation outside. Relied on self-defence.	No
<i>Tasmania v Bray</i> , 21 March 2007, COPS (Evans J)	Wounding	V, a stranger, went to D's house demanding the return of a friend's ute. The ute had been security for a debt that had been repaid. D came out and confronted V. V was a big man and D armed himself with a knife for his own protection. V grasped and held D and punched him to the face and then also punched D's partner who had come to his assistance. D stabbed V with knife in an effort to escape. D then slashed V again after he had got away.	The initial stabbing was excused in self-defence but not the later stabbing.
<i>Tasmania v Gray</i> , 4 December 2006, COPS (Slicer J)	Wounding	D and V were recent acquaintances who had been drinking heavily. D stabbed V and said in self-defence.	No
<i>Tasmania v DM, Ciampa and Ciampa</i> , 19 December 2005, COPS (Evans J)	Assault and unlawful act intended to cause bodily harm	D went armed with a knife and a samurai sword to V's house after earlier altercation. V's partner had raised her finger at a friend of D's brother and V returned to find the friend, who was with D's brother and threatened them with knife. The friend, D's brother and D went to V's house. V had armed himself with a knife before he opened the door. V said D attacked first and D said V attacked first. Both had stab wounds.	No — sentenced as a home invader.
<i>Wright v Tasmania</i> [2005] TASSC 113	Murder	D and V had an altercation at the pub. Later, V approached D's house with an axe. D had been making preparation to leave with his son and had a knife with him. D stabbed V, who died.	No
<i>Tasmania v Maddox</i> , 9 May 2005, COPS (Underwood CJ)	Aggravated assault	Preceding evening, D had taken a vest with two knives to party. D was asked to take it off and another man took it home. Once D discovered this, he went armed with a sword to his house and demanded its return. This was refused so D damaged car with sword. The knife vest was returned. The damage to car enraged V1 who went to D's house with V2 to 'sort the matter out'. V1 took a blockbuster handle. Abusive language from V1 and V2 outside D's house and V1 smashed window with handle. D got a gun and fired through door and window. No one was hit but V2 injured by glass. D fired again at car as it drove away.	Not guilty of first count aggravated assault (firing of shots from inside the house) because of self-defence.

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Name	Charge	Circumstances	Was self-defence successful?
<i>Tasmania v Navaro</i> , 9 December 2003, COPS (Evans J)	Assault	D went to confront occupants of noisy party, armed with a baseball bat. A fracas ensued and D struck V with bat. After fracas ended, one of the occupants who he had struck was sitting stunned on the floor. D struck him in leg.	Self-defence in relation to striking during fracas but not subsequent hit.
<i>Smith v R</i> [2003] TASSC 56	Murder	D went to house to confront man who was having affair with his wife. D said a fist fight ensued and he acted in self-defence	No
<i>AG v McIntosh</i> [2002] TASSC 97	Assault and grievous bodily harm	Drinking in a group with V1 and D made derogatory remark about V1's father and then D struck V1. V1's family had heard about the assault and wanted to know where V1 was located. D and one member had baseball bat. V2 grabbed him around the head and shoulders and D stabbed him.	No — force used was unreasonable.
<i>Tasmania v Balsley</i> , 27 May 2002, COPS, (Evans J)	Assault	D assaulted girlfriend's father by punching him several times to the head and hit him with axe handle. Also pushed girlfriend and kicked her and struck her to head with hand.	No
<i>R v Hall</i> , 13 September 2002, COPS (Evans J)	Grievous bodily harm	D was intoxicated and stabbed V in pub after being asked to leave by the publican.	No
<i>R v Johns</i> , 25 June 2001, COPS (Crawford J)	Murder	D went to the house of his neighbour and friend to ask for money to pay a gambling debt. Attacked him in a fit of rage after being refused.	No — complete rejection of self-defence
<i>R v Daniels</i> , 12 April 2001, COPS (Blow J)	Wounding	D had been victim of serious assault where V had punched him repeatedly to head. There was a short interval between the cessation of V's assault and D stabbing V. D had been drinking.	No — sentencing judge said that 'I do not regard this as a case of using excessive force in self-defence I regard it as a case of retaliation to provocation'.
<i>R v Moss</i> , 26 February 2001, COPS (Crawford J)	Assault	D punched a 'nuisance drunk' to the face. V had been behaving obnoxiously and would not leave. In a public place at night (reference in sentencing comments to need to deter violence that goes on after people have been drinking).	No
<i>Duggan v R</i> [2001] TASSC 5	Murder	There was a dispute between D and his ex-wife's new partner (R). V drove R from Launceston to the accused's house in Perth in the company of another man. D was alerted to fact that men were coming and armed himself with firearm. There was a confrontation and V kept walking towards D and his companion (V unknown to D). D fired several warning shots as he was walking backwards. Shot V in abdomen.	No — force excessive and unreasonable.
<i>R v Haverland</i> , 10 September 2001, COPS, (Crawford J)	Murder	D said that he shot his partner because partner had said that he would rape him and that he had been assaulted by his partner before. Also evidence of premeditated killing.	No — planned murder and court did not accept that there was a threatened rape.
<i>Ozkilinc v R</i> [2000] TASSC 59	Wounding	Altercation between several people in street. V's group provoked D by offensive behaviour. D chased V with knife.	Not guilty but 'far from persuaded that self-defence would have been a live issue for the jury' (this was a costs application).

Name	Charge	Circumstances	Was self-defence successful?
<i>R v Morrow</i> , 28 November 2000, COPS (Crawford J)	Assault	D went with a friend to find those who had broken into his friend's house. Found those responsible and struck V over head with walking stick.	No — said that D struck V 'without any real thought' and to teach V a lesson on the spur of the moment.
<i>R v Duggan</i> , 25 May 2000, COPS (Blow J)	Wounding	D cut V's throat with a knife after a scuffle on a bus. V was first to get out of his seat and challenge D to a fight and D was a willing participant. Both had been drinking alcohol before the incident. D said that V first produced the knife.	No — the accused overreacted to the challenge and violence offered by V.
<i>R v Crowden</i> , August 5, 1999. COPS, Cox CJ	Manslaughter	D killed his girlfriend's husband after the deceased had confronted him at his home. The deceased had previously stalked, harassed and assaulted his estranged wife and he had also assaulted and threatened to kill D. The two men had a fight and then the deceased obtained a shovel. D went into the house and got a gun and shot the deceased while he was apparently retreating.	No — sentencing judge said that D was in no imminent danger and that the response was disproportionate.
<i>R v Howell</i> , 16 April 1999, COPS, (Underwood J)	Wounding	V snatched prescribed morphine based medication and ran off to his car. D confronted him and V refused to give it back. Stabbed V.	No — sentencing judge said that jury was satisfied to the requisite degree that not acting in lawful self-defence and/or in lawful recovery of property.
<i>R v Hill</i> , 13 November 1998, COPS (Crawford J)	Assault	D had been drinking and went up to complete strangers and was rude to them. D would not leave and one of the people hit him. D struck out and hit back with glass in hand.	No
<i>R v Bell</i> , 28 July 1998, COPS (Underwood J)	Assault	D thought that V had stolen his outboard motor. An altercation occurred and V struck D with a piece of wood and D retaliated by kicking him in the groin (no charge in relation to this). Then disarmed V and beat him severely about the head with the piece of wood.	No — 'this is more than a case of using excessive force in self-defence. In my view, you were not acting in self-defence at all at the time the crime was committed'.
<i>R v Williams</i> , 3 July 1998, COPS (Slicer J)	Grievous bodily harm	A group of youths went to the flat of a friend of the D's daughter's and assaulted her and caused extreme damage to property. Daughter notified D's friend and D and his friend went to assist. They went in search of the intruders and located them. There was a heated discussion between the youths and D. V pushed D and D stabbed V during course of ongoing altercation. Issue was whether D had been hit over the head by the V with a piece of wood.	No — sentencing judge said, 'despite reservations, sentence will be imposed on the basis that there [was no previous blow] delivered by V. Nevertheless, it is open to conclude that the offender acted in self-defence but in the circumstances it was not reasonable to so do'.
<i>R v Truswell</i> , 12 June 1998, COPS (Cox CJ)	Assault	Family feud with neighbour. D entered V's backyard and punched V. D said that V had punched him first.	No — sentencing judge said, 'whatever the position, you came onto his property and commenced to assault him by punching him. There was no question of self-defence in your doing so'.
<i>R v Byrne</i> , 15 May 1997, COPS (Slicer J)	Wounding	D stabbed V during a street confrontation at night in public place. V commenced fight and seemed to be getting the better of the fight.	No — 'the jury verdict is consistent with the finding that the offender produced the knife at a stage when the complainant had the advantage and that the acts of 'cutting' occurred in self-defence but were out of proportion to the need of the offender'.

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Name	Charge	Circumstances	Was self-defence successful?
<i>R v Haas</i> , 20 February 1997, COPS (Zeeman J)	Assault	At a hotel, D hit V with a glass in his hand.	No
<i>Rudman v R</i> [1997] TASSC 16	Murder	Confrontation as a result of long standing grievance between P and PA. D went to house with P to confront PA about “ripping” P off. P armed with pickaxe handle and D with knife. The deceased intervened to assist PA, armed with an axe. D said that very shortly before the stabbing, the deceased was striking P with axe in the back.	No — on appeal said that the jury ‘were entitled to reject his claim that he used the knife only when the deceased took a swing at him with the axe, and to infer that he used it in the course of a continued demonstration of aggression’.
<i>Simpson v R</i> [1996] TASC 137	Murder	Altercation at night in Launceston streets between 2 groups. Some dispute as to who initiated physical violence, but on D’s version, the deceased hit him and he responded by stabbing with knife.	No
<i>R v Dando</i> , 17 May 1995, COPS (Green CJ)	Wounding	D struck the V with a metal bar. A felt aggrieved as a result of previous altercation.	No
<i>Kinniburgh</i> [1995] TASSC 139	Assault	D sought out and confronted complainant with claim that V had sent drug purchaser to D’s house. Repeatedly kicked and punched V.	No
<i>Cashinella</i> [1994] TASSC 177	Assault	Dispute between D and a group of men that involved D putting a gun into one of men’s faces. D said it wasn’t a gun but a piece of PVC pipe and that he was showing that he was able to defend himself as the men were advancing in an aggressive way.	Jury unable to decide and Crown filed a nolle prosequi.
<i>R v Foley</i> , 23 November 1994, COPS (Crawford J)	Assault	Deep seated dispute between D and his brother, V. D went to V carrying a metal bar and assaulted him.	No — ‘I reject any suggestion that this was in self-defence, a self-defence which went too far’.
<i>Holmes</i> [1993] TASSC 5	Assault	Domestic altercation and D said that acts were consensual. Although D did not rely on self-defence, trial judge directed on self-defence. D had been drinking and there was a physical exchange between D and V.	No
<i>R v Allen</i> , 12 November 1993, COPS (Slicer J)	Grievous bodily harm	D travelled to V’s house with a shotgun. D relied on self-defence.	No
<i>R v Filial</i> , 17 December 1993, COPS (Slicer J)	Grievous bodily harm	D slammed the head of the V against a wall and kicked and punched him, in part whilst V was lying helpless on the ground. D initiated acts of violence. Occurred in a hotel.	Some of the initial blows were delivered in self-defence but the rest went beyond what is reasonable.
<i>R v Perry</i> , 17 November 1993, COPS (Slicer J)	Assault	Occurred as part of circumstances of Filial’s conviction. D struck V.	No
<i>R v Lomas</i> , 15 October 1992, COPS (Wright J)	Wounding	Confrontation between D and a number of friends and the V, who was a stranger, at night in public place. Stabbed V with letter opener.	No
<i>R v Bellinger</i> , 7 August 1992, COPS (Cox J)	Assault	D pulled V out of bed and punched him several times.	No

Name	Charge	Circumstances	Was self-defence successful?
<i>R v Ryan</i> , 1 October 1990, COPS (Cox J)	Assault	Struck V several times with a stubby. D intoxicated and claimed that acting in self-defence.	No
<i>Walsh</i> (1991) 60 A Crim R 419; [1993] TASSC 91	Murder	No animosity between D and the deceased. Unarmed deceased approaching D and D shot him. Evidence from psychiatrist that D suffering PTSD and believed that he was being approached by enemy soldier in Vietnam War.	No — On appeal, conviction quashed and not guilty by reason of insanity.
<i>R v Parremore</i> , 3 August 1989, COPS (Wright J)	Wounding and assault	D intoxicated and struck a man in the face with a beer glass. D said that V had punched him and manifested an aggressive intent.	No
<i>R v Burden</i> , 11 July 1989, COPS (Green CJ)	Grievous bodily harm and assault	Intoxicated D wounding three people using a knife as a result of hostility that D felt towards another. V1 lunged at D in what D would have perceived as an assault and in the case of V2 the accused was responding to a battery. In relation to V3, D felt threatened by those who were trying to subdue or pacify him.	No — ‘The accused’s response grossly exceeded the bounds of lawful self-defence’.
<i>R v Franks</i> , 7 February 1989, COPS (Underwood J)	Wounding	D and V both intoxicated. Offence prompted by drunken quarrel over statements made by the V to D’s wife. D and V friends.	No — sentencing judge said ‘not surprised the jury rejected self-defence for your attack on your friend with a stick was nothing less than a deliberate and savage beating’.