Women and the Criminal Code Chapter 5

WOMEN AND VIOLENCE

PART 1: INTRODUCTION

Just as the Taskforce was beginning its serious work and prioritising subjects to be addressed, the Courier Mail provided Queensland with a vivid example of what happens when women, violence and the legal system come together.

On 25 February 1999 the front page story was about Christine Nunn who was forced to fatally shoot her de facto partner, Roger Williams, to stop him from killing her adult son. Williams was standing over the son and stabbing him. Ms Nunn had lived with Williams for about six years. She recognised the "mood" he was in as it had ended with her being beaten by him previously on two occasions.

Ms Nunn was charged with murder and committed for trial. The DPP, Royce Miller QC, discontinued the charges because the DPP could not "prove to a jury's satisfaction beyond a reasonable doubt that she acted otherwise than in defence of her son". Ms Nunn was released from the burden of a trial because of the clear and unambiguous circumstances and possibly the fact that, in this case, there was a witness to the event - the son whose life had been saved.

Taskforce consultations and research have demonstrated that, when a woman enters the formal justice system, one of her greatest barriers to justice is the failure of the system to hear her story.

The next page of the Courier Mail demonstrated the risks that women and children face from violent men. It told the story of a woman who was stabbed outside the Newcastle Family Court by her estranged husband. The four-year old son witnessed the crime. The man was charged with attempted murder, malicious wounding and breaching an apprehended violence order (in Queensland a "protection order").

Again this attack resonates with our information. Women are at severe risk from their partners at a time of separation. This is one of the reasons why women stay with violent men - leaving can be fatal. It also explains why, when some women kill or attack a violent partner, they are acting in self-defence - to save themselves or their children from death or serious injury that they believe will happen whether they stay or whether they try to leave.

Violence against women in Australia

One of the difficulties in analysing violence against women in Australia is the lack of data available. There have been many calls for a "system of national and consistent data collection.... on violence against women" but so far to no avail. Due to a chronic lack of reporting of violence by women, police statistics only represent a small fraction of the violence that occurs.

Non-fatal violence

In 1996 the Australian Bureau of Statistics (ABS) published the results of the Women's Safety Survey which canvassed women's experiences of violence during their lives. Only 19% of the women who said they had experienced a physical assault by a man in the last 12 months had reported that incident to the police.

Under-reporting is particularly likely in sexual violence cases, domestic violence and violence in workplaces.

A 1998 analysis focusing on Queensland women demonstrates the patterns of violence that women experience - their greatest risk being from those to whom they are closest. Results for women's most recent experience of physical violence and their relationship to the perpetrator were as follows:

- 45 % former partner;
- 17% current partner;
- 11% other known;
- 11% stranger;
- 8% boyfriend/date;
- 7% family member.

Although much violence against women occurs in the home, it also occurs at work, in educational institutions, in public places and other locations. The women may be young or old, have disabilities, be Aboriginal or Torres Strait Islander women, women of non-English speaking backgrounds, lesbian, bisexual or transgender. Women from more marginalised and vulnerable groups have more difficulty finding assistance and taking effective action against violence.

A 1995 Report commissioned by the New South Wales Police Department states that lesbians living in Sydney are six times more likely than other Sydney women to experience physical assault in a 12 month period. Lesbian-specific research suggests that one third of incidents reported by lesbians involve violence and abuse committed by older men, men acting alone, and men who are acquainted with the woman. Such hostility may take place within a home or work environment and may involve an on-going campaign of harassment.

QPS Statistics for 1997-98 show that over 9,500 Queenslanders were charged with assault offences in that year (not including sexual assault) - 80% of those charged were men.

Homicide

The experience and perpetration of violence is highly gendered. Men far outweigh women as perpetrators and victims of serious physical violence. Because nearly all homicides are reported to the police, investigated, and are at the most serious end of the crime continuum, it is useful to examine information about homicide in understanding the gendered nature of violence in our society.

Research by the Australian Institute of Criminology (AIC) shows that between 1989 and 1998 the homicide victimisation rate in Australia fluctuated between 1.7 and 2.0 per 100,000 population. There is a stable pattern of gender differentiation across the nine years with the rate for males being consistently higher than for females - about 3:2.

An earlier examination of homicides by the AIC in 1997 revealed that:

- just over half of all incidents are male-to-male;
- female offenders account for only 10% of incidents;

- 80% of male victims are killed by a man;
- 90% of female victims are killed by a man;
- Aboriginal and Torres Strait Islander people are seven times more likely to be a homicide victim than other Australians.

The Judicial Commission of New South Wales conducted a study of "sentenced homicides" between 1990 and 1993. It does not include cases where the accused was acquitted (for example on the grounds of self-defence). The typical offender was found to be male, aged between 15 and 34, born in Australia and with prior convictions. They were often single, unemployed and had a history of alcohol abuse.

Women homicide offenders were in stark contrast:

They usually had no prior record (76.2%), were married or in a defacto relationship, (66.7%), and were on average four years older than male homicide offenders... In comparison to males, women rarely kill; when they do, the victim is more likely to be their current partner (spouse or defacto)....

Only 29.8% of the males were in marital or defacto relationships at the time of the offence. In terms of the relationship of the victim to the offender the high-risk relationships for women are personal ones; the killers are likely to be their spouses, ex-spouses, or ex-partners (41.2%). However, the greatest risk for men comes from their friends and other associates (42.5%).

An analysis of male violence against women is not complete if women are considered as a homogenous group. While there is no question that the experiences of women subjected to male violence can have much in common, they can also differ.

The difference is not hierarchical - violence against some women is not 'worse' than violence against others. However, the nature of the power inequity between men and women in relationships is not solely because of gender. It is the intersection of many influences including gender, race, ethnicity, class, socio-economic power, literacy and education levels.

In their excellent Report Violence Against Filipino Women , prepared for the Race Discrimination Commissioner and the Institute of Criminology (University of Sydney), Cunneen and Stubbs sought to examine empirically and qualitatively the incidence of homicide of Filipino women in Australia. While the Report focused on Filipino women, it made many observations and found trends relevant to women of South East Asian origin generally.

Their findings in relation to the incidence of violence are confronting:

- Unlike other immigrant groups in Australia, South-East Asian women have higher homicide victimisation rates than men, and with the exception of the Vietnamese, they are more likely to be killed by someone who was born in a country different from themselves.
- Filipino born women aged between 20 and 39 were found to have a homicide victimisation rate which is almost six times that of other Australian women in the same age group (excluding Indigenous women who have a victimisation rate of ten times). Filipino men in Australia

actually have homicide rates substantially lower than that of Australian born men.

- Filipino women's access to legal protection, service delivery and the justice system is limited in numerous ways.

As to the nature of the violence -

- the homicides were almost exclusively domestic killings committed by male partners or ex-partners;
- all the men involved in the homicides were non-Filipino. However, they came from a variety of ethnic backgrounds;
- there were significant age differences between the male perpetrators and the Filipino women (the mean age for the women was 35.8 years; for the men 51.7 years); and
- domestic violence prior to the killing was a known feature in the majority of homicides. In many cases there was an escalation of violence prior to the killing.

Cunneen and Stubbs argue that it is the perception of Filipino women in terms of male desire that underpins their post-arrival victimisation. They believe that the commodification, marketing and sale of 'Asian' and Filipino women gives an insight into this process: that the advertising of 'Asian' women is concerned with constructing and satisfying fantasies.

The authors pose the question: What happens when men attempt to live out these fantasised relationships and the women involved refuse to comply, refuse to be treated as commodities? They conclude that the killings are a heightened or extreme instance of domination that has been mediated by representations of race and gender. The representation of 'Asian' women in general, and Filipino women in particular, as both passive and sexual beings and the embodiments of male desire, provides the context for this violence.

One of the significant factors the authors noted in relation to homicides of Filipino women was that in all cases the perpetrator was non-Filipino. This factor correlates with other evidence relating to violence against 'Asian' women. The Easteal study on violence against women from non-English speaking backgrounds, cited in the Cuneen and Stubbs report, found that generally the violent partner was of the same ethnicity as the woman. The exception to this general rule were cases involving 'Asian' women where the male was more likely to be non-Asian. Kliewer, also referred to in the report, found similar research results with women from South-East Asia (except Vietnamese).

We have already noted that Indigenous women are 10 times more likely to be a homicide victim than other Australian women. The Taskforce recognises that the Aboriginal and Torres Strait Islander Women's Taskforce has been examining the high incidence of violence against Indigenous women, and will be reporting and making recommendations based upon the considerable expertise of that Taskforce.

Recognising women's experience of violence

Many women are unwilling to report incidents of violence, in part because of their lack of confidence in police responses, support structures and the legal system.

Taskforce consultations reveal that women believe their stories are not properly told or understood within the legal system in general, and in the courtroom in particular. Many women who enter the criminal justice system do so in the context of having been subjected to violence. Where women are victims of crime they feel that their story is often presented in an isolated manner which masks the true gravity of what they experienced. Where they have committed offences, or acts of violence, they often have a story of violence that they have experienced which may explain, and even justify, their actions.

However, the law is not about telling stories. The rules of evidence tend to limit the story telling in courts to the circumstances that surround the crime in terms of time, location and conduct. Women have made it clear to the Taskforce that the whole context in which a crime occurs should be presented so that judges, magistrates and juries can properly assess the criminality and seriousness of what occurred.

Further, where women have been subjected to repeated violence they believe that this should be fully charged and presented so that the offender is found responsible for the real nature of his/her violence. The legal system should not quarantine one incident and artificially deal with that alone.

PART 2: DOMESTIC VIOLENCE

Overview of domestic violence

Despite increasing public discussion about domestic violence, it still remains a largely hidden and misunderstood crime. Domestic violence is sometimes referred to as "family violence", particularly in Indigenous communities. Both the victims/survivors and perpetrators conceal it - victims/survivors, because of their sense of shame and embarrassment, perpetrators, through denial and probably their own deep sense of shame and fear of public exposure.

Fundamentally, domestic violence is a manifestation of power and control usually directed by a man at his female partner and sometimes his children. It is generally recognised that domestic violence consists of a number of forms of abuse and not all are present in all relationships. It includes physical, emotional, sexual, social, psychological and financial abuse.

Domestic violence also occurs in gay and lesbian relationships and this issue is only recently being explored in these communities in Australia. A paper presented at the First National Conference on Violence in Lesbian Relationships in 1997 discussed the role of research in understanding lesbian domestic violence:

The issue of the violence in couple relationships being perpetrated by lesbians, challenges our hitherto explanations of violence. We have tended to apply frameworks developed to explain domestic violence between heterosexuals, to domestic violence between lesbians.... We need to develop our own explanations about lesbian domestic violence... The challenge is to undertake research that accounts for both gender and sexuality and attempt to make sense of the contradictions that emerge .

Although domestic violence can be lethal, the consequences of non-lethal violence should not be underestimated. Of the 661 respondents to a phone-in conducted by the Queensland Domestic Violence Taskforce (QDVTF), 144 reported broken bones as a result of the violence which they had experienced, 229 reported facial injuries and 63 reported loss of consciousness. Other violence included kicking,

biting, hitting, and choking, and 126 women reported threats with a knife or gun.

Criminal charges

Throughout the Taskforce consultations it became clear that many of the legal issues about domestic violence concern the operation of the Domestic Violence (Family Protection) Act 1989 (the DV Act). Few women had experiences of the criminal justice system and domestic violence because men are rarely charged with criminal offences relating to acts of domestic violence. The only "criminal" charges generally laid were for breaches of protection orders - an offence created under the DV Act.

However, on the issue of breaches women regularly made the following complaints:

- police often refuse to lay charges - particularly where they consider the breach to be "minor";
- where charges are brought, the men are not dealt with seriously in the Magistrates Court. The sentences often involve no actual penalty although the women believe that a fine or imprisonment would be a deterrent for some men;
- men are not referred or required to attend programs which may assist them to reduce their violence.

Women who experience these kinds of responses often feel let down by the legal system. Such responses appear to trivialise their fear and injury while showing sympathy to the violent man. They lose confidence in approaching the police or courts for assistance in leaving or being protected from a violent man.

The issue of police practices in relation to domestic violence is discussed further in Part 3 of Chapter 3.

Should there be gendered crimes?

One suggestion to ensure women's stories are told is to rename or redraft some offences, so that the real nature of the offence and what is relevant to the case is not camouflaged. Renaming some crimes may have policy, as well as legal benefits. For example, it may provide a new policy framework for considering the funding of some support services. It may also allow for better identification of offences in official records, better information and may enhance community recognition and condemnation of violence against women.

Because the nature of assault differs, depending on the gender of the victim and the offender, and the frequency with which assault against women by men occurs in the home, New Zealand has created an offence which specifically identifies the gender of the victim and the offender. It also covers situations where a young child is assaulted.

A number of written submissions to the Taskforce suggested the introduction of such an offence in Queensland and cited the New Zealand model as a successful legal reform initiative and a powerful statement to the community. However, other submissions point out the possible disadvantages of separating crimes against women from the mainstream and potentially stereotyping women as perpetual victims.

Specific domestic violence offence

The introduction and identification of a more appropriate offence may encourage police to lay charges. As we have stated, women need the context for criminal violence against them to be understood - looking at offences of violence against women as separate events often masks the reality of their situation. This raises the need to examine offences relating to a course of conduct. Offences of this type already exist in Queensland in areas other than domestic violence, for example, maintaining a sexual relationship with a child and trafficking in a dangerous drug.

In the context of domestic violence, the Queensland Criminal Code already has an offence that could be useful. The offence of torture in section 320A seems to describe many of the types of domestic violence with which women live. The offence makes "torture" a crime and defines it as "the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion". "Pain or suffering" includes "physical, mental, psychological or emotional pain or suffering, whether temporary or permanent".

As far as the Taskforce is aware, in almost all cases in which this offence has been charged, the victim has been a child. The section was introduced in 1997 following the decision in R v Griffin where a child was subjected to electric shocks as a means of inflicting punishment. The only available charge at the time was common assault. As a result it appears that the offence has largely been associated with child abuse situations.

Deliberations

Options

The Taskforce released the following options for discussion -

1. Introduce a crime of male assault female into the Criminal Code, in the same way that assaulting persons over the age of 60 years or persons who rely on a guide dog, wheel chair or other remedial device is a " serious assault" in section 340.
2. Include the gender aspect as a circumstance of aggravation.
3. Introduce a separate but similar offence to section 320A aimed specifically at situations of domestic violence.
4. Amend section 320A to include a relevant "example" to demonstrate how the offence could be used for domestic violence.

Results of Consultation

- "Male assault female"

While a number of submissions to the Taskforce supported the introduction of a specific offence of "male assault female", submissions on the Taskforce Discussion Paper were overwhelmingly against the creation of such an offence.

Solicitors Gilshenan and Luton argued that a new offence would be "unnecessary and unwarranted". They argued that a power imbalance between the assailant and victim is always taken into account as a factor in sentencing. If any legislative change were to be made, it should only be to make "male assault

female" a circumstance of aggravation (that is, a factor making it liable to a more serious penalty). With respect to the issue of arrest rates, they argued that a more appropriate response would be an education campaign for police and lawyers to insist on criminal charges being laid where a criminal act has occurred in the context of a domestic relationship.

The QPS also thought it was unnecessary to include gender specific circumstances of aggravation.

In her submission, Linda Baccaul-Petrie stressed the need to refer to "a person" rather than to a man or a woman. Specifically on the issue of an offence of "male assault female", she says "assault is assault is assault just as rape is rape, no matter who is the subject, since the implications of both to male or female may well be as great for each depending more on the "nature" of the individual rather than any features generalised as those being of one sex or another". The impact of the crime on the individual should be recognised at the sentencing stage.

Many members of the Queensland Domestic Violence Council (QDVC) did not support the introduction of a crime of "male assault female". There was concern that such an offence would "perpetuate stereotypes of women as victims and would not act as a deterrent to perpetrators". The QDVC believes that women will not support the use of these types of charges. There are many reasons why women do not choose to access the criminal justice system, such as they do not want their partners charged or sent to jail; they do not want to give evidence in court; or want the circumstances of the violence publicly revealed.

The QDVC was also concerned about the impact of this offence on specific communities, for example non-English speaking and Indigenous communities. Indigenous communities would be particularly affected by higher rates of arrest.

Young Mothers for Young Women (YMYW) preferred to see an offence similar to section 320A of the Criminal Code aimed at domestic violence, rather than an offence of male assault female. YMYW also believed this would reinforce the stereotype of women as victims. An offence of "violence in an intimate relationship" would also allow for the development of more specific sentence management programs, as violence against intimates needs to be responded to differently from violence against strangers.

Heather Douglas from QUT did not support the creation of an offence of male assault female, or the option to include the gender aspect as a circumstance of aggravation. Again her concern was the stereotyping of women as victims.

A similar argument was raised in the submission from DFYCC -

The Paper suggests that creating gendered crimes would enhance community recognition and condemnation of violence against women. It is of concern, however, that such a proposal could lead to stereotyping of women as victims. The proposal assumes that power imbalances will only exist between men and women, and does not recognise that power imbalances may occur in many other contexts eg abuse in same sex relationships and abuse of people with disabilities.

The stated intention behind the creation of a specific domestic violence charge is to encourage an increase in the laying of criminal charges. When considering this, it is important to recognise that many acts of domestic violence constitute criminal offences under the existing criminal law. As indicated above, however, barriers exist which prevent women from making complaints when an act of

domestic violence has been committed against them. These barriers include a reluctance to bring criminal charges against partners. In addition, these offences often occur behind closed doors, in the absence of witnesses, and it can be difficult to prove an offence has been committed to the criminal standard of proof.

The barriers outlined above are likely to apply to any 'domestic violence' offence or 'gendered offence', which is created. Merely creating a new offence will not overcome these barriers, and consequently it is unlikely that there will be an increase in the number of criminal charges brought for offences involving domestic violence.

They said it would be more effective to train and educate police to ensure there is a greater understanding of domestic violence. Given that family violence is a significant issue for rural and remote areas, creating new offences could lead to further criminalisation of people in those communities without addressing the causes of the violence.

The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service (ATSIWLAS) suggested that there should not be a gender based distinction, but that where the person assaulted is at a disadvantage to the accused the assault should be more serious (that is, a circumstance of aggravation). Sometimes when a man assaults a woman there is not a power imbalance, or any other control issues.

By contrast, Women's Legal Aid (WLA) supported both the creation of a specific offence and the inclusion of the gender aspect as a circumstance of aggravation. In doing so, they recognised the potential disadvantages of stereotyping women as perpetual victims.

- A specific domestic violence offence

Some members of the QDVC supported the suggested change to section 320A (adding an example) while others thought this would be better addressed by education of the police and staff of the DPP.

However, other members of the QDVC thought "making domestic violence a distinct criminal charge would improve the public perception that domestic violence is a criminal offence".

YMYW submitted that -

Young women identified the need to position domestic violence as a public issue and to emphasise the role of the criminal justice system in defining violence in intimate relationships as an unacceptable norm. The inclusion of domestic violence as %5Ban offence%5D in the Criminal Code would reinforce this and unburden victims of the responsibility to set the norm. Domestic violence needs to be named as violence in a personal intimate relationship and as different to other forms of assault.

Gilshenan and Luton had no objection to the inclusion of a relevant example in section 320A.

Heather Douglas from QUT felt that there were already too many sections in the Criminal Code so preferred the option of including a relevant example in section 320A.

The QPS argued that there were sufficient offences in the Criminal Code to charge behaviour of a criminal nature arising out of domestic violence, but supported including an example in section 320A.

WLA supported the creation of a separate but similar offence to section 320A, as it would "make a strong statement that it is a crime to commit acts of domestic violence".

DFYCC did not support the creation of a specific domestic violence offence for the same reasons discussed in relation to the offence of male assault female. However, they did support an example being added to the offence of torture to complement training and education of police.

ATSIWLAS supported a separate offence to cover ongoing domestic violence, but thought that it should be different from the offence of torture. They suggest an offence that does not require proof of intentional infliction of severe pain and suffering (which they believe would be hard to prove in a domestic situation), and which could be prosecuted in the Magistrates Court, would be more appropriate. They note that many Indigenous women want a domestic violence order but do not want charges to be laid. They often become unwilling witnesses in a criminal trial.

Detective Inspector D J Alcorn of the Child and Sexual Assault Investigation Unit supported the option of adding an example to section 320A.

Discussion

One Taskforce member suggested that an offence of "male assault female" might address the difficulties faced by women when police refuse to lay criminal charges in circumstances of domestic violence. It was suggested that domestic violence workers in New Zealand noticed a cultural change in the practice of charging for criminal offences arising out of incidents of domestic violence through the use of this offence.

The major aims of such an offence would be increasing the use of criminal charges in domestic violence situations (instead of just using a protection order), and allowing better information and identification of offences in official records. A change in legislation can lead to a change in practice.

The opposing argument was that the creation of a new offence would not necessarily achieve these aims. An offence of "male assault female" would have much wider application than to offences involving domestic violence. A special offence might also have the effect of trivialising violence against women in the same way that the old "aggravated assault" offence could be used to summarily dispose of serious assaults against women. It is also unclear where in the range of assaults such an offence would sit, and whether it would be an offence that could be dealt with summarily.

It was also argued that an offence of "male assault female" would not assist victims/survivors of domestic violence in same-sex relationships, or other victims/survivors of "family violence".

Some members of the Taskforce argued that education of police would be a more effective means of encouraging police to lay criminal charges at the same time as taking out a protection order.

The Taskforce considered a number of options - to leave the law as it stands, to add the gender aspect as a circumstance of aggravation, to create a new offence of "domestic assault", and to create a new offence of "male assault female". Another suggestion was to include an example of a domestic assault in the definition of assault to show how it might apply. The contrary argument was that women would not necessarily identify with a specific offence and that the risk in listing certain behaviours or potential victims is - what or who do you leave out?

By majority, the Taskforce believes it is worth investigating the creation of a specific offence of domestic or family violence, in order to specifically name the behaviour and encourage the prosecution of it. Examples of relationships could be included. The investigation should also canvass the creation of a course of conduct offence, similar to section 320A (torture) for domestic violence.

The Taskforce also notes the need for research to establish whether or not criminal charges are being laid when a domestic violence incident occurs. If charges are not being laid, is this because of the reluctance of the police, or because women do not want their partners charged with criminal offences? What reasons do police give?

The Taskforce unanimously agrees that section 320A (torture) should be amended to include an example to demonstrate how the offence could be used for offences involving domestic or family violence.

Recommendation 52

52.1 That JAG investigate the creation of a specific offence of domestic or family violence.

52.2 That such an investigation should include research into the extent to which criminal charges are laid in situations of domestic and family violence.

52.3 That section 320A of the Criminal Code (torture) be amended to include an example to demonstrate how the offence could be used for offences involving domestic or family violence.

PART 3: EVIDENCE OF BATTERING AND ITS EFFECTS - WOMEN AS ACCUSED

When women kill or commit violence in the context of a violent personal relationship, one might assume that the history of violence will be relevant to explaining her state of mind and conduct. Legally, however she faces a number of obstacles in presenting such evidence. These are:

- Is the history of domestic violence legally "relevant" and can it be fully presented?
- Do the rules of evidence operate to exclude information that is important to understanding the woman's conduct?
- What role do expert witnesses have in telling the story?

Many people question whether the law works for women who kill or hurt their violent partners. There are cases which are now famous in Queensland and Australian legal history where women have claimed that their story of abuse was not told and therefore the legal system failed to recognise (or fully appreciate) their defence. These women include Violet Roberts, Beryl Birch, and Robyn Kina. There are many others whose cases are not famous but whose stories are similar.

Existing Research and Law Reform Work

In 1994 the USA Congress called for a report on what had been commonly called, "battered woman syndrome" (BWS). Three issues were to be addressed:

- A medical and psychological assessment of the validity of BWS as a psychological condition.
- A compilation of cases at all levels (federal, state and tribal) where BWS testimony had been offered in criminal trials.
- An assessment by judges, prosecutors and defence attorneys of the effects of that evidence in a trial.

Representatives of the Department of Justice, the Department of Health and Human Resources and the National Association of Women Judges were involved. Their excellent report, Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials, provides the basis of much discussion in this section.

The cases show that raising the history of battering to explain the behaviour of the accused does not necessarily lead to an acquittal. It is not tantamount to a "female defence" which cloaks women who are guilty of murder in an aura of innocence. It is merely a different kind of evidence, which some women can introduce to assist the jury to understand the circumstances that faced them and thereby enhance its ability to assess their conduct.

It is interesting to note what has happened in jurisdictions that have examined these issues. In the USA the question of admissibility into evidence of the history of domestic violence has been addressed through the development of case law precedent and legislative reform of evidence and procedure laws. All 50 States had admitted such evidence in criminal trials in some manner and twelve States had introduced statutes by 1996. There has been a particular focus on the admission of expert testimony.

On the other hand, the Canadian Minister of Justice ordered a review of all women serving sentences of imprisonment who may have been denied the appropriate use of defences in their case. Law reform proposals that followed were directed at the substantive legal defences but not at the evidence laws.

Australian law reform bodies have followed the Canadian approach with the Law Reform Commission Victoria (LRCV), the New South Wales Law Reform Commission (NSWLRC) and the Model Criminal Code Officers Committee (MCCOC) all considering the defences during the 1990s. We are not aware of any formal Australian law reform report containing proposals for dealing with the evidentiary issues although recommendations were made in Rougher Than Usual Handling.

There seems to have been no specific research on the issues in Britain and the courts there have shown a reluctance to shift ground. Research conducted in

1996 in England found no case in which a battered woman successfully pleaded self- defence.

How can the evidence be used?

There are many ways in which a defendant could use evidence of a history of domestic violence. Some have already been successfully put forward in Australia, others, not yet tried here, have been successful in the USA. This list attempts to describe the major current and potential uses:

- to support a complete defence of self-defence against an offence of personal violence, including homicide - acquittal;
- to support the partial defences of provocation and diminished responsibility in a homicide case - murder reduced to manslaughter;
- to support or explain lack of intent in a homicide case - manslaughter;
- to support accident against an offence of personal violence, including homicide - acquittal;
- to support a defence of duress in a variety of offences (for example, stealing, robbery, fraud, unlawful imprisonment, drug offences) - acquittal;
- to support a complete defence of provocation in an assault case - acquittal;
- to mitigate sentence;
- to support a defence of insanity (USA only);
- to support clemency applications (Canada); and
- to establish whether a woman was living in a "'relationship in the nature of marriage' with the man who is battering her" in a social security fraud case (New Zealand).

Kinds of evidence

There are, potentially, four kinds of evidence relating to a history of domestic violence that could be used by a battered woman in a trial:

- evidence from ordinary people who witnessed or heard the violence, saw the consequences of the violence or were told about it (the latter category is usually inadmissible because it is hearsay). This evidence could come from the children or other family members, neighbours or friends;
- "professionals" who had contact with the family in a way which brought the violence (or the possibility of the existence of violence) to their attention - doctors, nurses, dentists, teachers, counsellors, refuge workers etc. This evidence may include documents such as medical or dental records;
- "expert" witnesses who are engaged for the purpose of providing evidence at the trial to support a defence being raised by the woman;
- documentary evidence of previous or existing protection orders or criminal court proceedings (again, admissibility questions arise).

Role of expert testimony

The cases show that expert testimony in relation to the domestic violence is not necessary to support a defence or partial defence. It is not possible to know what factors most influence jury decisions. It may well be that juries exercise moral judgments as much as they technically apply the law.

In Queensland there have been cases where women have been acquitted of killing a violent partner on the basis of self-defence where no expert evidence of domestic violence was tendered. Two examples are the cases of Dagmar Stephenson and Irene Stjernqvist. In both cases the trial judges summed up in a way that allowed the jury to understand the relevance of the evidence of domestic violence to the defence of self-defence. This is a vital aspect if the legal system is to work effectively for women.

American researcher and commentator Holly Maguigan warns about relying too heavily on experts at trial level. She makes the point that their most useful contribution can often be during the preparation stage. This is what occurred in Ms Stephenson's case where a domestic violence worker liaised with defence counsel during the preparation phase.

One advantage of calling expert testimony in these cases, however, is that apparently inexplicable behaviour can become comprehensible when understood to be common among women who have suffered domestic violence.

In a recent Queensland case Moynihan SJA succinctly captured the purpose of introducing testimony, especially expert testimony, about domestic violence:

... the evidence, which seeks to explain why people do not leave a relationship with a violent partner and which suggests a heightened sensitivity on the part of the subject of the violence to prospective or threatened violence, was admissible particularly as to the latter issue. It was relevant to the issues of intent, 'reasonable apprehension' and 'belief on reasonable ground' raised by self-defence and to the evaluation of the deceased's conduct relied on as constituting provocation.

Finally, it is critical the defence counsel and trial judge draw connections between the expert evidence and the defences upon which the defendant is relying. The Canadian Supreme Court has set out certain principles requiring the trial judge to instruct a jury that evidence of battering may be of use in explaining:

- why an abused woman might remain in an abusive relationship;
- the nature and extent of the violence that may exist in a battering relationship;
- the accused's ability to perceive danger from her abuser. In particular whether, for the purposes of self-defence, she has a reasonable apprehension of death or grievous bodily harm;
- whether the accused believed on reasonable grounds that she could not otherwise save herself from death or grievous bodily harm.

Criticism of the term "battered woman syndrome"

One of the most contentious issues in this area is the term "battered woman syndrome". This requires the woman's lawyers to prove through expert testimony that the woman suffered from the "syndrome". While such evidence

could sometimes be helpful in explaining why the woman has stayed in the relationship despite the violence, it is not so useful in explaining her lethal conduct in killing her spouse.

One of the central tenets of BWS is "learned helplessness". This is an idea social scientists have borrowed from studies of animal behaviour to explain some kinds of human behaviour. It has been used to explain why some women stay with violent men, particularly when previous attempts to leave have failed because of a lack of financial support, housing and other services, or because the woman was relentlessly pursued by the man. However, the neat descriptions of BWS do not always fit women who killed their partners and its use has tended to create an image that the woman had to fulfil if her defence was to be accepted.

Some of the problems with the use of term BWS include:

- conflicting precedent has developed using this term. It is "used to refer to both the dynamics of battering and to the psychological effects of battering";
- its applicability to same sex relationships;
- the appropriateness of the "learned helplessness" concept when a woman acts in a resourceful way; and
- "...the question of 'BWS' is not the ultimate issue in a criminal case involving a battered woman. Rather, testimony about battering and its effects is offered to assist fact finders in their determination of the ultimate issues, which are case-specific and reflected in questions such as:
- Did a battered woman reasonably believe she was in danger of harm when she assaulted her abuser?
- Did a batterer threaten or coerce the battered woman into participating unwillingly in a crime?"

Because of the difficulties with the concept "BWS", the expression "evidence of battering and its effects" is used where possible in this Report. We believe this term more appropriately reflects the types of evidence and the different circumstances in which it might be applied.

There is some misunderstanding about this issue, which has led some to believe that feminists are advocating that all women who kill violent partners should be acquitted - as if being battered is in itself a defence. However, this is not the case. As long ago as 1984 American lawyer Roberta Thyfault explained:

The defence which is asserted is self-defence, not that the woman was a battered woman. What must be proved is that at the time of the incident, the woman reasonably perceived her life to be in imminent danger. Thus, while the history of abuse does not justify the use of deadly force, it does provide the woman with the knowledge to reasonably perceive that she is in imminent danger of death or grievous bodily harm .

Evidence regarding the history of violence, and expert testimony about battering and its effects, become relevant because they allow a jury to bring a new insight into their deliberations about whether self-defence applies in a particular case.

Social framework evidence

Julie Stubbs and Julia Tolmie have undertaken some of the most comprehensive

Australian research on the subject of domestic violence evidence in cases where women are on trial for offences committed in response to that violence. They have formed the opinion that there is a fundamental difference between the way Australian courts use the evidence and the way it is used in the USA and Canada. In North America the evidence is not directed at "was the accused a battered woman?" or "did she suffer from learned helplessness?". Rather it examines "what was the nature of the threat she faced?" and "what lawful protection did she realistically have available to her?"

They argue that a broader type of social framework evidence may be preferable to focusing on the woman's psychological state and her perception of danger - as if it springs from an abnormal mind. The Australian tendency to concentrate on the woman's perceptions means that it is harder to argue for the admission of social context evidence. Although her perceptions are shaped by the violence, they need to be understood in a broader context that takes into account a range of social, legal and resource realities.

Social framework evidence is also important in same sex cases. The evidence in a case where a gay man killed his abusive partner was criticised because:

There was no social context given of the particular nature or causes of same sex battering nor any political context of the discrimination which isolates gay and lesbian victims of domestic violence .

Content of expert evidence

It is not necessary to canvass in detail all the possibilities on which an expert witness could give evidence. However, it is useful to consider some of the possible issues to appreciate the breadth of information that could be included, the level of expertise required, and the depth of preparation that should ideally occur. Expert testimony could be given:

- "...about the general dynamics of abusive relationships";
- about the "cycle of violence" and the complex reasons why women stay in relationships with violent men;
- on cultural or racial issues which may be relevant in the particular case;
- to explain the coexistence of certain behaviours and battering. For example, juries may expect battered women to be "deserving victims" and this causes problems for women with alcohol or drug problems, who use profane language or who are involved in illegal activities such as drug dealing. "This stereotype may work more harshly against women of colour, Aboriginal women, and poor women.";
- to explain women's violence. Battered women are not necessarily always passive - many fight back. A recent USA Bureau of Justice Statistics study revealed that 40% of battered women fought back physically and another 40% fought back verbally. An expert witness can explain evidence from other witnesses that the woman is "the violent one" or is "also violent";
- to explain aspects of women's offending including issues related to timing - often women use passiveness to defend themselves most of the time. When they do react or retaliate it is not always when they are under immediate threat in a classic sense. The man may be asleep, have his back turned or be otherwise in a non-combative position. This creates difficulties in claims of self-defence;

- to explain the reasonableness of the woman's fear of danger at the time, her perceptions of the imminence of danger;
- to explain why a woman had to plan the killing to protect herself. Women who plan to kill or who hire others to do the killing have great difficulty in establishing self-defence, but planning is not necessarily inconsistent with self-defence. In the 1988 case of Yaklich in the USA a woman who had hired killers relied on BWS to support a successful self-defence claim;
- to explain a woman's conduct after the homicide which might otherwise be difficult to understand, for example sometimes women panic after the homicide and hide the body, or lie to police.

Who is the expert?

A US commentator Mary Dutton says:

Having a theoretically and conceptually sound analysis of battering and its effects relevant to the criminal courts, together with direct contact working with battered women in some way, provides the foundation for the necessary expertise.

To this she adds the necessity of having familiarity with any relevant cultural, regional and ethnic group and says that an "expert" does not necessarily need academic qualifications to talk about the common experiences of battered women and to debunk myths about domestic violence.

The issues that arise are:

- traditionally, psychologists and psychiatrists have given evidence about the applicability of defences and partial defences to the defendant's conduct, because the evidence has focused on the state of mind of the defendant;
- in fact, it is often refuge workers or domestic violence workers who hold the relevant expertise on domestic violence, particularly the "social framework evidence" about domestic violence (that is, evidence about the legal, social or financial context);
- many refuge workers and domestic violence workers do not hold university degrees. Some are social workers or psychologists but many have diplomas or no tertiary qualifications;
- in Queensland there is a scarcity of people who have:
    - genuine expertise in the social issues surrounding domestic violence;
    - sufficient clinical expertise to allow an assessment of an individual defendant's conduct; and
    - qualifications that are acceptable in our criminal courts.

In fact, the most suitable expert will often be:

- a social worker or "domestic violence worker" who has experience in working in women's refuges or domestic violence or counselling services;
- able to provide "social framework testimony" to address questions such as "why didn't she just leave"; and
- appropriately skilled to hear and analyse the personal history of the defendant.

In appropriate cases the defence may instead (or also) wish to call a psychologist or psychiatrist to present evidence about the state of mind of the defendant and about BWS. It would be useful if relevant legislation acknowledged that a broad range of skills could qualify people as experts.

Problems with evidence for specific groups

Same sex relationships

In Osland's case Kirby J referred to the need to use care in how we think about the "evidence tendered to exculpate an accused of a serious crime" and to avoid stereotyping. As an example he mentioned "same-sex relationships of analogous dependence and prolonged abuse".

One American study "found that 12.1% of gay men had been raped by their partners, whilst the figure for lesbians reached 30.6%" . But domestic violence in gay and lesbian communities is rarely discussed and poorly understood:

The issue of same sex battering has been silenced to some extent in gay and lesbian communities as a way of minimising the already negative images and stereotypes levelled at homosexual relationships. Kimberle Crenshaw has likened the violence against women in lesbian communities with violence against women of colour, where secrecy shrouds issues of abuse for fear of embarrassing other members and of being ostracised.

In her commentary on McEwen's case, Simone laments the fact that the legal system could only explain "the phenomenon of same sex battering ... by reference to traditional heterosexual active/passive gender roles". Describing McEwen's condition as "dysfunctional coping" - fails to address the difficulties specific to battered gay men including the fear of leaving or even of publicising a gay relationship in the face of a homophobic society, exclusion from women's domestic violence refuges, reluctance to hand over a partner to the police, stigma and disapproval from within gay communities, as well as the mainstream social acceptance of male-to-male physical aggression as a 'conflict of equals'."

Race and culture

For some, BWS is a "white" concept, which most comfortably sits with descriptions of the circumstances and responses of white women. Aboriginal and Torres Strait Islander women in Australia confront many different issues in their lives and these influence their responses to violence. Further, these women are often even more reluctant than white women to enlist police assistance because of the long history of distrust of the police by Australia's Indigenous communities.

Immigrant women also have additional hurdles. Their actions are more likely to be misinterpreted and their lack of understanding, and sometimes suspicion, of our legal system can lead them to make damaging decisions.

Julia Tolmie links the apparent lack of credibility in court of a Cambodian immigrant woman, Muy Ky Chhay, with cultural issues. She believes that the woman's lack of credibility particularly related to the fact she lied to the police about her husband's death, saying that they had been robbed and that the robbers had killed him, and that there may be an obvious cultural explanation for this. Tolmie examines the reasons why the woman, who had lived through the trauma of the Pol Pot regime in Cambodia, might have instinctively lied to the police:

One obvious explanation is that lying is an instinctive and natural response in crises for someone who had survived a holocaust and who, in order to survive it, needed to lie to authority figures about their identity and history.

She also notes additional cultural and structural barriers to the woman leaving her husband and impediments to her use of support services.

Tolmie discusses another case, Zhou, where a Chinese friend of Zhou "was not permitted to present evidence about Chinese culture as an explanation for Zhou's silence about the violence she suffered because she did not have any formal qualification in sociology, psychology, or anthropology." This is a serious problem because often people with the most expertise about the communities from which Asia's immigrants are drawn, have little formal education.

PART 4: EVIDENCE OF BATTERING AND ITS EFFECTS - WOMEN AS VICTIMS

Introduction

Evidence of domestic violence may not only be relevant in cases where women survivors of violence have become offenders in the criminal justice system. Where men are charged with offences related to the violence, evidence of the history could also be important.

Where the woman is the victim, it would usually be the prosecution who would wish to lead the evidence to throw doubt upon a defence or partial defence being raised by the accused. For example, when a batterer is on trial for murder or assault and the defence suggests provocative conduct by the woman or to show that a batterer was not insane or suffering from an abnormality of the mind when he is making that claim.

This part examines three major issues that arise in the use of history of violence evidence in this context:

- relevance and admissibility of the evidence of the history of domestic violence in the case for the prosecution;
- hearing the woman's story where she has been killed; and
- use of expert testimony.

Criminal prosecutions - use of history of violence evidence

Although much domestic violence does not lead to criminal prosecutions, there is nearly always a prosecution where there has been a homicide (unless the offender commits suicide or is unidentified) and sometimes one occurs where there has been serious injury. The offences charged include assault, grievous bodily harm, unlawful wounding, attempted murder and murder. Men charged with the murder of their partners will often admit the homicide but plead the complete defences of accident and self-defence, or the partial defences of provocation and diminished responsibility.

Non-fatal violent offences

Members of the Taskforce have experience of clients agreeing to pursue assault prosecutions of their male partners, which have then turned disastrous for the woman when the man has successfully pleaded provocation (a complete defence to assault) and been acquitted. Sometimes the assault is presented as an isolated event in the relationship of the couple. The man's violence can then be treated as "out of character" and provocation is a comprehensible explanation for his aberrant conduct. The woman feels that the criminal justice system blames her for her partner's violence.

Homicides

Families of female domestic homicide victims are horrified when they perceive that an unrealistic and dishonest defence is being offered because of the limited evidence presented. In 1994 the Women's Coalition Against Domestic Violence in Victoria published Blood on Whose Hands? The Killing of Women and Children in Domestic Homicides. Through personal interviews and searches of official records the Coalition examined the killings of nine women and three children by their partners and fathers:

Families were extremely angry that an accused would claim his actions were entirely unpremeditated when clearly there had been a long history of violence... Taken out of context, the murder is explained as spontaneous and provoked.

The Coalition described two opposing arguments relating to admissibility:

1. The past history of domestic violence should not be mentioned in court because it prejudices the chances of the accused who is being tried for the murder and not for his past behaviour.
2. Such evidence can be introduced, particularly to challenge a defence of provocation. It is relevant where the accused relies heavily on portraying his actions as spontaneous, atypical and provoked. In the absence of information in court about prior domestic violence, the focus is on the woman's behaviour and on finding justifications for the murder. This approach fails to recognise the continuum of violence, in which murder is simply the end point.

Unfortunately there have been no Queensland studies that examine the kinds of defences which men use when charged with crimes of violence in a domestic context. Studies of homicide cases in Victoria and New South Wales reveal strikingly different results.

In 1991 the Law Reform Commission, Victoria, (LRCV) published a study of homicide prosecutions between 1981 and 1987. Provocation was raised as an issue in 30 of the 64 cases in which men were charged with killing a female partner. The men were convicted of manslaughter in 20 (66.7%) of those cases. Although the provocation plea is not necessarily the only explanation for this result, over 30% of the men (of the total of 64) were nonetheless successful in obtaining the lesser verdict of manslaughter. In the New South Wales Homicide Study only five of the 47 men (10%) charged with domestic homicide successfully established provocation.

Recently Queensland has observed the case of Leslie Brown who stabbed his first wife, Denise, to death in 1991. He was convicted of manslaughter on the basis of diminished responsibility. A psychiatric report suggested that he was unlikely to reoffend and he was sentenced to eight years imprisonment. During that time he

met and married his second wife, Doreen. Within 10 months of his release on parole in 1996 he strangled her to death and has now been convicted of murder.

According to the Gold Coast Bulletin, the children from the first marriage have said the jury was not allowed to hear about their father's violent history:

We wanted the jury to be told that this was not a man who had been a nice guy all his life and just flipped out.

In their report on violence against Filipino women, Cunneen and Stubbs note from their case studies that evidence of prior domestic violence was not adequately considered in a number of cases, particularly where there was considerable escalation of violence prior to the killing and where there appeared to be considerable planning involved in the homicide.

They also observed that two interwoven processes became apparent in some of the case studies. Firstly, violence emerges as a resolution to conflict for the male when he attempts to assert absolute dominance and authority and the women resist. Secondly, the Filipino women are re-invented as manipulative and self-seeking who simply marry Western men to leave the Philippines. In other words, the women's actions are reinterpreted through the lens of a stereotype of Filipino women as sexually promiscuous 'gold diggers' seeking foreign nationalities. They are seen at best as complicit in the violence against them, or at worst the cause of the violence. The men are presented as victims.

How else could we explain the extraordinary construction of women in %5Btwo of the%5D cases. Cases which, once deconstructed, defy rationality. A young woman married at 15 years of age, subjected to abuse and killed within two years by a man more than twice her age is presented as the controlling dominant partner in the relationship. Another woman, separated because of abuse, threatened, forced to leave her child behind and then strangled is represented as seeking 'the good life' and using her husband to gain entry to Australia.

The authors' conclusions deserves to be quoted in full:

The research concluded that Filipino women are represented within the confines of particular stereotypes. On the one hand Filipino women are presented as 'perfect marriage partners'. This stereotype reinforces images of Filipino women as loyal and obedient women within the mould of a 'traditional' wife. There is a particular emphasis on young Filipino women being eager to marry first world men, and there is also a view that Filipino women make compliant sexual partners.....

However, there is also another related stereotype of Filipino women which comes into play particularly when those women leave their non-Filipino partners. These women are portrayed as manipulative and self-seeking, as women who abuse the naivety of their Australian husbands, and as women who abandon their children. Within this stereotype the extent to which the women have been subjected to domestic violence and their resourcefulness in taking the initiative to end an abusive relationship is ignored.

A particular concern in the research is the way in which men who killed Filipino women were at times recast as the victim and that women were seen as complicit in the violence which they experienced. It was apparent in some cases that the men who killed received considerable sympathy in media reports and from the

court. A significant part of this sympathy derived from the racial and gendered stereotypes about the nature of Filipino women.

Relationship evidence

Where a crime of personal violence, including homicide, occurs in the context of a relationship in which the woman has experienced years of physical and other forms of abuse, it is arguable that defences should not be able to be advanced in a factual vacuum - that is, without the full story of domestic violence being told.

There is well-supported authority for the proposition that evidence of the relationship between the victim and the accused is admissible in a homicide case. In R v Wilson a man was charged with the murder of his wife by shooting. He claimed that the gun had discharged accidentally but there was evidence available from witnesses who had seen violent arguments and heard the deceased say to the accused that she knew he wanted to kill her.

Barwick CJ made it clear that he considered the nature of the relationship between the parties relevant to the jury's assessment of the credibility of the defence. His opinion was described by Gleeson CJ in a later New South Wales case:

Evidence of a close and affectionate relationship could have been accepted by the jury in favour of the accused, and evidence that there had developed mutual enmity could be used to support the conclusion that the accused had deliberately killed his wife.

The position in Queensland

In 1997, section 132B of the Evidence Act 1977 was introduced. It provides -

Evidence of domestic violence
132B.(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
(2) Relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in evidence in the proceeding.

Arguably, this provision merely confirms the position at common law, as stated in R v Wilson.

Hearing the voice of a homicide victim

One of the most significant problems identified by women's groups and victim advocates in homicide cases is - how does the jury hear the story of the dead woman? At present the hearsay rule makes it difficult for the court to admit evidence of statements or complaints which the women may have made about the accused. The hearsay rule is a complex legal rule that means, in general, a witness may not give evidence of statement made outside of court for the purpose of showing that the statement was true.

The cases where evidence of the relationship between the parties has been admitted have carefully limited its use. Where the evidence includes statements made by the deceased they are not admitted as evidence that what was said was true. Rather, the fact that such statements were made is admitted to

demonstrate the state of the relationship. For example, in Wilson's case, part of the evidence from one witness was that during an argument between the accused and the deceased he heard the deceased say that she knew the accused wanted to kill her for her money. That was not admitted to prove that the accused wanted to kill the deceased but to show the nature of the relationship that existed between the parties.

New South Wales

Interesting developments have occurred in the law on hearsay in the last few years, particularly in New South Wales. In the 1993 case of R v Frawley, Maurice Frawley stabbed to death his de facto partner of three years, Maree Goodwin. The defence was that he did not intend to kill her, which would reduce murder to manslaughter. Hearsay questions arose over the admissibility of a note found amongst Ms Goodwin's possessions and statements that she had made to her daughter. The note was headed "Reasons for Ending Relationship with M" and listed extreme jealousy and anti-social behaviour. It said he was "definitely unbalanced when drinking" and a "potential threat" to the deceased. The statements included telling her daughter on a number of occasions that she was afraid of the accused and that he had been physically violent towards her.

Evidence of the note and statements was led at trial, but not as evidence of the truth of the written and spoken words, as this would clearly be hearsay and inadmissible. The Court of Criminal Appeal found that the evidence should not have been admitted. Gleeson CJ says:

If the evidence in question were to be received as evidence of the truth of what the deceased asserted it would provide a good illustration of the unfairness and danger of receiving hearsay material. As was noted, the evidence is an admixture of fact, opinion and statements of apprehension, some of it expressed in colourful and emotive language by a person whose own emotional state at the relevant time is unknown, but which may have been not uncomplicated. The inability to test the assertions made by the deceased is of particular importance in the light of their form and content.

As Christopher Maxwell QC points out in his excellent article on spousal homicide cases:

In the prosecution of such murders the secondary tragedy is that the best evidence has been effectively eliminated by the crime itself.

Gleeson CJ in Frawley recognises that the rule creates an uneasy situation:

To some, it may seem unfair that the law should exclude evidence which shows that the appellant's victim regarded him as a person of violent propensities, especially where he was concerned to present to the jury a very different picture.

Taskforce consultations made clear that women consider it essential the context of crimes is placed before juries. The whole story must be told, whether the woman is the victim or the accused. The artificial way in which the law isolates pieces of evidence as inadmissible and removes them from the picture is incomprehensible to most ordinary people who encounter the criminal justice system. The jury is often asked to decide what happened in a situation when they have only been given some of the jigsaw pieces. And they do not even know what proportion of the pieces they have!

In 1995 New South Wales introduced a new Evidence Act which includes certain legislated exceptions to the hearsay rule. One of these is where "a person who made a previous representation is not available to give evidence about an asserted fact" (section 65(1)).

Section 65(2) provides -

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

(a) made under a duty to make that representation or to make representations of that kind, or

(b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) made in circumstances that make it highly probable that the representation is reliable, or

(d) against the interests of the person who made it at the time it was made.

These provisions were applied in R v Mankotia, a case in which a man fatally stabbed his "girlfriend", Helena. The parties had only known each other for three months at the time. The accused claimed that the relationship was close and happy and that Helena had agreed to marry him. The prosecution sought to lead evidence from various witnesses about statements made to them by Helena suggesting that she did not want to enter a serious relationship with him and that he had threatened to kill her.

The trial judge, Sperling J, held that most of the evidence was admissible and made a number of observations about "relationship evidence" and the operation of section 65 of the Evidence Act:

- Relationship evidence is generally relevant where it helps to prove what the accused did or did not do as an element of the alleged crime, or the accused's state of mind (for example, that the act was or was not deliberate or was or was not done in self-defence or under provocation).
- What the victim thought about the relationship is not generally relevant, but there are exceptions. (For example, in R v Matthews Bollen J found that the victim's fear of the accused tended to prove that sexual intercourse was without her consent).
- He limited the "circumstances" referred to in section 65(2)(b) to the factual setting at the time the representation was made. He excluded subsequent events "notwithstanding that such considerations might logically fortify the unlikelihood of concoction or (in the case of inconsistent representations) have the opposite effect." This view is contrary to that taken in some other cases.
- It is important that the evidence not be used as "evidence of a tendency to violence".

This case shows that legislative provisions that allow some hearsay evidence to be admitted in homicide cases are avenues for hearing the voice of a deceased victim. There are no equivalent provisions in Queensland where the admissibility

of such statements is limited to those which fall under the common law category of "relationship evidence".

In the Queensland case of R v Babsek, Moynihan SJA canvassed a great deal of evidence given by people as to Caroline Babsek's alleged violence towards her partner. He found that evidence that the deceased had applied for a domestic violence order the day before his death should have been excluded as hearsay. Similar comments were made about the evidence of a social worker who said that the deceased had spoken of "harassment and intimidation" by Babsek:

As a general observation when there are issues such as self-defence and provocation, evidence by a witness of what others said to them is unlikely to be admissible, as the issue will be the truth of the matter stated.

This case illustrates the barriers that the prosecution faces in Queensland in presenting such evidence - particularly when the best or only evidence is words spoken by the homicide victim. Consideration needs to be given to the risks and benefits of creating a statutory basis for the admission of hearsay statements in particular situations.

The New South Wales Evidence Act 1995 also gives the court general discretion to refuse to admit evidence in certain circumstances (section 135); discretion in criminal cases to exclude evidence if its probative value is outweighed by the risk of unfair prejudice to the defendant (section 137); and general discretion to limit the use of the evidence if there is a danger that the particular use might be unfairly prejudicial or be misleading or confusing (section 136).

Section 165 allows a judge to warn a jury of the inherent dangers of certain types of evidence, such as hearsay evidence. It relevantly provides -

(2) If there is a jury and a party so requests, the judge is to:

(a) warn the jury that the evidence may be unreliable, and
(b) inform the jury of matters that may cause it to be unreliable; and
(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

(5) This section does not affect any other power of the judge to give a warning to, or to inform, the jury.

Deliberations

Option

The Taskforce released the following option for discussion -

To legislate an exception to the rule against hearsay.

In raising this option, the Taskforce suggested that the following matters would need to be considered:

- Which witnesses should be covered (for example, is it limited to the deceased in a homicide trial or should it extend to witnesses who are unavailable for other reasons)?
- What kinds of "representations" would be covered - oral statements, written notes, tape recordings etc?
- Does there need to be a nexus in time between the making of the statement by the "missing witness" and the fact asserted?
- Should there be a requirement that the circumstances in which the representation was made make it likely that it is reliable and not a fabrication?
- Are there special warnings that the judge should be required to give to a jury?
- Should there be different rules in circumstances where the accused denies any involvement, as opposed to when the homicide is admitted but a defence is raised?

Results of consultation

The issue of hearsay evidence was discussed at the Taskforce legal forum. The major concern expressed by participants was its reliability. It was felt that careful guidelines would be needed, such as a warning to the jury about the fact that it couldn't be tested and a direction about the weight that might apply to it.

Heather Douglas (QUT) supported the idea of developing an exception to the hearsay rule. She submitted that it should be limited initially to the deceased in a homicide case or to a person injured to such an extent that they can not give evidence. Special warnings should not be given. The evidence is important regardless of whether involvement in the killing is denied or admitted. WLA made a similar submission.

ATSIWLAS proposed that -

Where there has been a relationship involving violence between the parties and there is no other admissible evidence of this violence then evidence of statements made by the victim about the violent relationship may be admissible in certain circumstances.

Factors to consider include-

- the probative value of the evidence (eg equivocal statements should not be allowed)
- the nature and extent of the statement made by the victim
- the person or the people to whom the statements were made
- relationship between those persons and the accused
- the reliability of the evidence.

Detective Inspector D J Alcorn also supported a legislative exception to the hearsay rule.

The QPS commented -

Allowing hearsay to prove the nature of the domestic relationship is a vexing issue, and without sufficient evidence that a change of the current laws of evidence would create a fairer system…the law should remain unchanged on this point.

Discussion

The Taskforce overwhelmingly supports legislating an exception to the hearsay rule, taking into account the issues raised, and the provisions of the New South Wales Evidence Act 1995.

Recommendation 53

That legislation provide an exception to the hearsay rule, where there are factors making it highly probable that the hearsay statement is reliable, and with directions to juries warning of the need for caution before the evidence is accepted or relied on.

Expert testimony

Homicide cases

The use of expert testimony called by the prosecution is discussed in the USA Report to Congress on Battering Testimony. This Report advises of two cases in which "expert testimony was admitted to corroborate the out-of-court statements of battered women who had been killed, and were therefore unavailable to testify".

There are two potential types of evidence that experts might give in these cases:

1. Where the woman had contact with the "expert" prior to the offence being committed (for example, refuge workers, counsellors, doctors).
2. Where there has been no contact but the witness uses her or his expertise to elucidate statements made by the woman, decisions she has taken and circumstances of her life. It could include explaining the relevance of "hearsay" statements made by the woman which could be admitted in homicide trials under the proposals discussed above.

In the second situation the expert plays a similar role to that of the expert in the cases where women kill or injure their violent partner. The label "battered woman syndrome" is probably not particularly useful, and it is social framework evidence that will most assist the judge and jury to understand the homicide and to assess the credibility of any defence being offered by the accused.

Non-fatal cases

There may also be a role for expert testimony to explain the conduct of the victim/survivor subsequent to the offence (in non-fatal offences). This is likely to be a controversial suggestion as this is not the kind of evidence generally presented in our courts, especially as the witness herself would be expected to give evidence. It is analogous to presenting evidence of "rape trauma syndrome" at a rape trial.

In the USA expert testimony is sometimes used by the prosecution to explain the conduct of a complainant who has been sexually assaulted by her batterer. It can be used to explain delayed reporting, not leaving the relationship or lack of consent to sex.

In a 1997 New Zealand case of Guthrie the accused was convicted of raping, sexually violating and threatening to kill his former partner over a period of time during their relationship. The prosecution called a clinical psychologist to give evidence "describing the symptoms and effects of battered woman syndrome (BWS)".

The trial judge ruled the evidence admissible, but in a general way, and did not allow the expert to "give evidence as to her opinion that the complainant suffers from the syndrome". On appeal, the Crown explained that the expert evidence was relevant to explain the behaviour of the complainant, particularly why she may have stayed in the relationship. It also explained why it was appropriate that the evidence led should be of a limited nature:

To allow %5Bthe expert%5D to state her opinion that the complainant's behaviour was consistent with BWS 'would have amounted to a statement that she had indeed suffered physical and verbal abuse at the hands of the appellant; the very issue for the determination of the jury.

The Court of Appeal, however, considered that a more robust attitude should have been taken at the trial:

It would have been better ... for the expert to have expressed a view as to whether the behaviour alleged (or proved) was consistent or inconsistent with BWS.

Ultimately, it would have been a matter for the jury to determine, but the jury would have benefited from an expert opinion on the point.

Writing about this case, Elisabeth McDonald of the New Zealand Law Commission warns of the possibility that the "evidence of abuse can itself become abusive". It is important that evidence about the effects of domestic violence is introduced in cases "in a way that does not question the woman's experience merely because she may not be 'battered enough'". For example, in the OJ Simpson case the defence used an apparent lack of symptoms of BWS to suggest that Nicole Brown Simpson had not been battered by her husband.

It may be that there is a role for expert testimony to be called by the prosecution in certain cases to explain conduct of the victim/survivor that may otherwise be difficult for the jury to understand.

Deliberations

Option

The Taskforce released the following option for discussion -

That legislation clarify that expert testimony can be led by the prosecution to explain the conduct of the victim/survivor.

Results of consultation

WLA supported this option, as did ATSIWLAS, the QPS and Detective Inspector D J Alcorn.

DFYCC submits that:

Using expert evidence in criminal matters involving domestic violence and sexual offences is particularly important and should be encouraged.

The behaviour or actions of victims of these types of offences may not appear to be 'normal' to the general community. For example, a jury may not understand why a woman was unable to leave her violent partner or the victim's version of the facts surrounding the offence given to the police may differ to the version given at trial. Defence counsel may use these differences or inconsistencies to suggest the victim is mistaken or lying about what happened. This can unfairly result in an acquittal of the accused person.

In many cases the victim's actions or behaviour can be explained by the trauma the victim has experienced as a result of the offence. Appropriate expert evidence about the dynamics of domestic violence should be used to explain and enhance the understanding of both the jury and the judge with respect to domestic violence, and why a woman might act in a particular way. An expert witness could be used to assist the court to explain inconsistent or inappropriate behaviour.

Expert witnesses could also provide valuable assistance to the court where the victim suffers from a disability. The expert may be able to inform the court about the effects of the disability, as well as the effect of the offence on the victim's behaviour.

Discussion

The Taskforce generally believes that the present law does allow the prosecution to lead expert evidence, but that there might be some advantage in clarifying the position with legislation.

Recommendation 54

That legislation clarify that expert testimony can be led by the prosecution to explain the conduct of the victim/survivor.

PART 5: LEGISLATIVE GUIDELINES FOR ADMITTING EVIDENCE OF BATTERING AND ITS EFFECTS

Current Queensland law

The Evidence Act 1977 contains a provision specifically intended to ensure that evidence of a history of domestic violence will be admissible in a criminal case where it is relevant. Section 132B states:

Evidence of domestic violence
132B.(1) This section applies to a criminal proceeding against a person for an offence defined in the Criminal Code, chapters 28 to 30.
(2) Relevant evidence of the history of the domestic relationship between the

defendant and the person against whom the offence was committed is admissible in evidence in the proceeding. %5Bemphasis added%5D

Chapters 28 to 30 of the Criminal Code cover homicide, suicide, concealment of birth, offences endangering life or health and assaults.

To some extent this section appears not to greatly advance the ordinary rules of evidence. Legally relevant evidence is always admissible in a court of law. However, part of the purpose of the provision, as understood by the Taskforce, was to encourage trial lawyers and judges to consider the possible relevance of domestic violence in cases with which they were dealing. Further, it may avoid long legal arguments over threshold admissibility even if arguments still occur over the detail of what evidence of the history of the relationship is relevant.

The question for consideration is whether a new statutory rule could be formulated to provide more practical guidance to the courts.

Situations to consider

We have already highlighted some of the situations in which women may have cause to rely on history of violence evidence - as victims and offenders. In the next Chapter, we consider in detail the situations where women may rely on the defences or partial defences under the Criminal Code to excuse their behaviour.

The Taskforce has also noted in this Report that it is not only women who suffer from violence within a familial or intimate context. Similar kinds of violence, with many of the same dynamics, can occur in lesbian and gay relationships, between parents and their children (for example, father towards adult son or step son or abuse of an elderly person by members of their family) and in extended family situations - particularly in Aboriginal and Torres Strait Islander communities and some immigrant communities.

We have also considered the range of people who may be able to provide relevant testimony in these cases - the victim and accused, members of their family, doctors, behavioural scientists, refuge workers and many others.

Problems with formulations

The range of possible offences, defences and "family" or intimate settings highlights the difficulties in formulating any rule that can apply to all appropriate situations. There is always a risk that such rules create unintended exclusions. For example, section 132B of the Evidence Act 1977 could not be the basis of admitting testimony in an attempted robbery trial to support the defence of duress because robbery is not contained in the relevant chapters of the Criminal Code. Apparently, however, this has not, and should not, prevent the evidence from being admitted through the usual principles of evidence.

A number of states in the USA have now legislated to recognise BWS and its relevance to self-defence (and sometimes other defences). Some of the problems that have arisen with these formulations are:

- some states require that a self-defence claim must have been raised before the evidence becomes admissible;
- some limit the range of testimony that can be called; and
- some limit the defences to which the rules apply.

Holly Maguigan warns against rigid formulae and particularly notes the importance of not tying the evidence to BWS or attempting to "codify the elements of a syndrome".

Ideas and models for reform

One of the most flexible and comprehensive statutory formulations is contained in the South Carolina Code of Laws on Criminal Procedures. Title 17 of chapter 23 reads:

Admissibility of evidence concerning battered spouse syndrome; foundation; notice; lay testimony.

(A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
(B) Expert opinion testimony on the battered spouse syndrome shall not be considered a new scientific technique the reliability of which is unproven.
(C) Lay testimony as to the actions of the batterer and how those actions contributed to the facts underlying the basis of the criminal charge shall not be precluded as irrelevant or immaterial if it is used to establish the foundation for evidence on the battered spouse syndrome.
(D) The foundation shall be sufficient for the admission of testimony on the battered spouse syndrome if the proponent of the evidence establishes its relevancy and the proper qualifications of the witness.
(E) A defendant who proposes to offer evidence of the battered spouse syndrome shall file written notice with the court before trial.

Issues

Before formulating a new statutory rule to provide guidance in the use of evidence of violence, a number of issues need to be considered -

1. Should both expert and "lay" testimony on the history of violence be admissible?
2. Should a wide range of experts can be qualified to testify, particularly those who work in the field of domestic violence, violence against women and other forms of violence, but who may not hold tertiary qualifications?
3. Should the rule state that it is accepted that domestic violence, and perhaps some other forms of violence, are matters of scientific, technical or specialised knowledge about which expertise can be held?
4. Should a wide range of relationships be included?
5. Should a particular defence have to be established before the evidence becomes admissible?
6. Should it apply to any offence or defence?
7. Should the evidence be able to be called by the defence or the prosecution (for example, to rebut a defence)?

8. Should the use to which the evidence can be put be unlimited (for example, it may be relevant to both the subjective and objective aspects of certain defences and partial defences - discussed in the next Chapter)?

Deliberations

Option

The Taskforce released the following option for discussion -

That further legislative guidelines for the admission of testimony on the history of the relationship between the accused and the victim (or some other relevant person) be developed.

Results of consultation

The QDVC strongly supported the use of evidence of domestic violence in court proceedings, particularly in support of defences.

Heather Douglas from QUT argued that there is a danger in legislation clarifying the admissibility of evidence in that it can have the effect of narrowing the use of available evidence. The categories of experts and the type of evidence should remain flexible. Care must be taken not to create a "closed pool of potential experts".

WLA supported this option, as did Respondent A, a lawyer who wished to remain anonymous, and Detective Inspector D J Alcorn. In particular WLA wanted domestic violence workers to be recognised as experts.

DFYCC submitted that judicial officers should be encouraged to consider a broad range of people as experts, including social workers and domestic violence workers. However, care should be taken with using workers who have worked with the complainant as there may be a conflict of interest and the impression of partiality. Counsellors who are also called as witnesses may be required to produce their notes.

ATSIWLAS was also supportive of this option, particularly if it will encourage the acceptance of refuge and domestic violence workers as experts.

Discussion

The Taskforce acknowledges that section 132B of the Evidence Act 1977 allows relevant evidence of the history of domestic violence to be admitted in a criminal proceeding, but the vast majority of Taskforce members are of the view that further legislative guidance on its use is appropriate. Such guidance would include the use of expert and lay testimony, the use to which the evidence can be put, and to which offences or defences it might apply.

Recommendation 55

That section 132B of the Evidence Act 1977 be repealed and replaced with a new scheme detailing the admissibility of evidence of the domestic relationship between the accused and the complainant/victim, and including the use of expert and lay testimony, the use to which the evidence can be put, and to which offences or defences it applies.

Jury instructions

As an alternative or supplement to the use of expert evidence one option may be to legislate jury directions to counter domestic violence myths. The concept of jury instructions has been introduced in some places to counteract similar problems in rape trials. For example, in Victoria a judge must inform the jury that there may be good reasons why the victim of a sexual assault may hesitate in complaining about it. (These issues are fully explored in Chapter 7) Perhaps a similar concept could be imported into appropriate trials where a history of domestic violence forms the background to the offence.

Deliberations

Option

The Taskforce released the following option for discussion -

Where a history of domestic violence forms the background to the offence a legislated jury direction countering domestic violence myths be given by the judge.

Results of consultation

In her submission, Linda Baccaul-Petrie suggested that most jury instructions did not

carry sufficient weight to as to be able to counteract completely in every juror both/either what the individual has heard or absorbed, or to overcome any existing homophobia or prejudice especially where the myths about transgender and lesbian populace are concerned.
In the jury direction suggested she recommended that the following words be added -

"where relevant, also to convey that the understanding that in most of these regards homosexual/transgender relationships be regarded as much the same as the rest and directing the discounting of any other popular myths surrounding Queer relationships and lifestyles"

The Judges of the Supreme Court of Queensland noted in their submission -

Because of the diversity of factual matrixes in criminal cases, the judges have some misgivings about legislative prescription as to directions to juries.

WLA and Respondent A supported this option, as did ATSIWLAS, the QPS and Detective Inspector D J Alcorn. ATSIWLAS commented that extensive consultation would be required to assist in the wording of the direction.

Discussion

The Taskforce rejects the idea of legislating jury directions to counter domestic violence myths. Instead, we have recommended the development of legislative guidelines to improve the admission of expert testimony. This is considered to be the preferable way to place the relevant information before the jury.