

TASMANIA
LAW REFORM
INSTITUTE

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

ISSUES PAPER NO. 20

NOVEMBER 2014

Contents

Information about the Tasmania Law Reform Institute.....	iv
Background to this Issues Paper	iv
How to Respond.....	v
List of Questions	vi
Part 1: Introduction	1
1.1 The law of self-defence	1
1.2 The need for reform	2
Part 2: Options for Reform	4
2.1 Should the <i>Criminal Code</i> (Tas) s 46 be amended?	4
2.2 Models to insert requirement of reasonableness.....	11
2.3 The relationship between mental illness and the defence of self-defence contained in the <i>Criminal Code</i> (Tas) s 46	13
2.4 The relationship between intoxication and the defence of self-defence contained in the <i>Criminal Code</i> (Tas) s 46	18
2.5 Domestic violence	23
2.6 Partial defences to murder: mistaken or excessive self-defence and diminished responsibility	29
2.7 Consistency between s 46 (self-defence), s 39 (prevention of commission of a crime) and s 40 (defence of dwelling-house).....	33

Information about the Tasmania Law Reform Institute

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

Background to this Issues Paper

In September 2011, the Director of Public Prosecutions wrote to the Attorney-General to raise concerns that the current Tasmanian law on self-defence, as contained in s 46 of the *Criminal Code* (Tas), was too lenient and was out of step with modern standards. In November 2012, the Attorney-General requested that the Tasmania Law Reform Institute conduct a far-reaching examination of the law in Tasmania relating to self-defence and provide advice as to whether the law should be amended.

In relation to self-defence, this Issues Paper considers whether the current law of self-defence in Tasmania should be retained or whether any amendments should be made to the existing law. It considers the circumstances in which a person is lawfully entitled to use force (including lethal force) in defence of themselves or another person. In cases where the accused's perception of the situation corresponds with the actual situation, this may appear a relatively intuitive and straightforward assessment. However, greater difficulties arise when there is a difference between the actual circumstances and the circumstances as the accused saw them. There is scope for considerable debate about the extent to which a person can rely on a mistaken belief for the purposes of self-defence, and whether the reason for the mistake has a role to play in making this assessment. This is the particular concern addressed in this Paper. It considers whether a person should be able to rely on:

- a mistake that results from a delusion arising from a mental illness;
- a mistake that was a result of psychological factors personal to the accused that meant that they were more sensitive to threats of danger than the normal person; or
- a mistake that arises from self-induced intoxication.

The Paper also considers whether it is desirable to ensure consistency between the defence of self-defence and other defences such as prevention of certain crimes and defence of dwelling-house. To this end, it examines issues that arise in relation to defence of property, and the special status the home enjoys as a place of sanctuary. It considers whether the defences of prevention of crime in s 39 and defence of dwelling-house in s 40 of the *Criminal Code* might more appropriately be dealt with in a consolidated defence provision or whether the defences involve unique considerations that warrant a stand-alone provision.

How to Respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper.

There are a number of ways to respond:

- **By filling in the Submission Template**

The Template contains a series of case scenarios and asks you to indicate whether you consider that the defence of self-defence or defence of property should be available in the circumstances of the case. The Template can be filled in electronically and sent by email or printed out and filled in manually and posted. The Submission Template can be accessed at the Institute's webpage <<http://www.utas.edu.au/law-reform/>>.

- **By providing a more detailed response to the Issues Paper**

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible. Submissions may be published on the Institute's website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a final report, containing recommendations, will be published. Responses should be made in writing.

Electronic submissions should be emailed to: law.reform@utas.edu.au

Submissions in paper form should be posted to:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001

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

If you are unable to respond in writing, please contact the Institute to make other arrangements.

Inquiries should be directed to Dr Helen Cockburn on the above contacts, or by telephoning (03) 6226 2069.

CLOSING DATE FOR RESPONSES: 20 February 2015

List of Questions

<p>Question 1 (p 10)</p>	<p>Should the current law of self-defence contained in the <i>Criminal Code</i> (Tas) s 46 be amended to introduce an additional/different requirement of reasonableness or should the current formulation be retained? Please provide reasons.</p>
<p>Question 2 (p 11)</p>	<p>If the current test for self-defence is retained, should the <i>Criminal Code</i> s 46 be amended to reflect the wording of the Model Criminal Code or should the current wording be retained? Please provide reasons.</p>
<p>Question 3 (p 13)</p>	<p>If the <i>Criminal Code</i> (Tas) s 46 is amended to include a requirement that the accused's perception of the circumstances be based on reasonable grounds, which model should be adopted:</p> <ul style="list-style-type: none"> (a) a model based on the common law position; (b) a model based on the Northern Territory (non-Schedule 1 offences) position; (c) a model based on the Western Australian position; (d) a model based on the Queensland and former Tasmanian position; (e) another model?
<p>Question 4 (p 17)</p>	<p>Should all evidence of any abnormality in an accused's mental condition be excluded from consideration in cases of self-defence under the <i>Criminal Code</i> (Tas) s 46?</p>
<p>Question 5 (p 18)</p>	<p>Should the <i>Criminal Code</i> (Tas) be amended to provide that evidence of delusions insufficient to support the insanity cannot be relied on for the purposes of self-defence?</p>
<p>Question 6 (p 18)</p>	<p>Should the <i>Criminal Code</i> (Tas) be amended to provide that evidence of delusions can be relied on for the purposes of self-defence, with a successful argument of self-defence resulting in a qualified acquittal under s 16(3) (that is, not guilty on the grounds of insanity)?</p>
<p>Question 7 (p 18)</p>	<p>Should evidence of mental illness be admissible for the purposes of self-defence and, if successful, result in a complete acquittal? In the case of delusions, should evidence of delusions insufficient to support the insanity defence go the issue of self-defence?</p>
<p>Question 8 (p 22)</p>	<p>Should evidence of intoxication be considered for the purposes of self-defence?</p> <p>In particular should it be considered:</p> <ul style="list-style-type: none"> (a) for the purpose of assessing the accused's belief in the need for self-defence? This would mean that the accused's state of intoxication could be taken into account for the purposes of determining whether the accused had a belief in the need for self-defence. (b) for the purpose of determining the circumstances as the accused believes them to be? This would mean that the accused's use of force would be assessed on the basis of the circumstances as the accused believed them to be, even if the accused's perception of circumstances arose from a drunken or drug-induced mistake.

	<p>(c) as a physical characteristic of the accused in determining whether the response was reasonable?</p> <p>This would mean that the accused could rely on their reduced capacity to respond attributable to intoxication in assessing whether the response was reasonable.</p> <p>(d) if a requirement of reasonableness is inserted in relation to the accused's belief in the need to use defensive force (see Question 1), for the purposes of assessing whether there were reasonable grounds for the accused's belief or for the purposes of assessing if the accused's belief was reasonable in the circumstances?</p> <p>This would mean that the assessment of the reasonableness of the accused's belief in relation to the necessity of using defensive force or the assessment of whether there were reasonable grounds for the accused's belief would be made on the basis of the circumstances of the particular accused, including the accused's state of intoxication.</p>
Question 9 (p 23)	Should intoxication (including drug induced psychosis that does not amount to a mental illness) that is caused by methamphetamine use be treated differently for the purposes of self-defence in the <i>Criminal Code</i> (Tas) s 46 from intoxication arising from other causes?
Question 10 (p 23)	Should drug-induced psychosis that falls within the definition of a mental disease be treated differently for the purposes of self-defence in the <i>Criminal Code</i> (Tas) s 46 from mental illness arising from other causes?
Question 11 (p 23)	If restrictions are placed on reliance by an offender on an intoxicated mistake for the purposes of self-defence, should an exception be made for offenders in the case of intoxication that is not self-induced?
Question 12 (p 29)	Should reforms be made to the criminal law in Tasmania to facilitate the reception of evidence of family violence in relation to the defence of self-defence?
Question 13 (p 29)	Should reforms be made to the criminal law in Tasmania to specify that imminence is not necessary where self-defence is raised in the context of family violence?
Question 14 (p 29)	Should reforms be made to the criminal law in Tasmania to provide for jury direction where self-defence is raised in the context of family violence?
Question 15 (p 31)	Should a partial defence of mistaken self-defence be introduced in Tasmania if the <i>Criminal Code</i> (Tas) s 46 is amended by the insertion of a requirement of reasonableness in relation to the accused's perception of the circumstances? Or is mistaken self-defence a matter that can be appropriately dealt with as part of the sentencing process?
Question 16 (p 31)	Should a partial defence of excessive self-defence be introduced in Tasmania? If so, should it be introduced only if the <i>Criminal Code</i> (Tas) s 46 is amended by the insertion of a requirement of reasonableness in relation to the accused's perception of the circumstances? Or is excessive self-defence a matter that can be appropriately dealt with as part of the sentencing process?
Question 17 (p 32)	Should a partial defence of killing for self-preservation in a domestic relationship be introduced in Tasmania? If so, how should the defence be formulated?

<p>Question 18 (p 33)</p>	<p>Should a partial defence of diminished responsibility be introduced in Tasmania? Or should diminished responsibility be a matter that is taken into account in sentencing?</p>
<p>Question 19 (p 36)</p>	<p>Should the defences of prevention of crime (<i>Criminal Code</i> (Tas) s 39) and/or defence of dwelling-house (<i>Criminal Code</i> (Tas) s 40) be made consistent with the defence of self-defence so as to contain the same mix of subjective and objective requirements?</p>
<p>Question 20 (p 36)</p>	<p>If consistency is desirable, how should this be achieved? Should the defence be consolidated in a single provision or should separate provisions be retained?</p>
<p>Question 21 (p 36)</p>	<p>Should the defence of defence of dwelling house sanction the use of even lethal force?</p>

Part 1

Introduction

1.1 The law of self-defence

1.1.1 In Tasmania, the law of self-defence is contained in s 46 of the *Criminal Code* (Tas) and is formulated in one broad principle:

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

Self-defence is not restricted to homicide. It is a defence of general application applying to crimes such as assault, wounding and causing grievous bodily harm, as well as homicide. Although referred to as a 'defence', the law is clear that the prosecution bears the onus of proof in respect of the defence of self-defence once there is evidence sufficient to raise the issue.¹ A successful claim of self-defence is a complete defence and the defendant is acquitted.

1.1.2 It is well settled in Tasmania that, in assessing self-defence, there are two matters for the consideration of the jury:

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

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

1.1.3 The first component of the test (the assessment of the need to use force) is a purely subjective test. This means that the jury is concerned with the state of mind of the particular defendant. The fact finder must put themselves in the position of the defendant and determine what was the threat or danger that the defendant believed to exist. The question is not what a reasonable person, in the defendant's circumstances, would have thought or whether there were reasonable grounds for the defendant's belief — but whether the defendant really believed there was a situation requiring the use of force in self-defence or in the defence of another.³ The jury needs to consider whether the defendant genuinely and honestly believed that they were acting in self-defence (as opposed to responding for some other reason such as revenge or retaliation).

1.1.4 This means that the defendant can be mistaken about the need to use self-defence. For example, a person may believe that someone approaching them has a gun when in reality there is no gun. Alternatively, a threatening situation may exist (for example, a defendant may be confronted by a person carrying a wooden rake) but the defendant may make a mistake about the nature of the threat faced (for example, they might think that the person is carrying an iron bar rather than a wooden

¹ *Wright v Tasmania* [2005] TASSC 113.

² *Walsh* (1991) 60 A Crim R 419. Although the decision was overturned on appeal, this aspect of the judgment was not criticised (*Walsh* [1993] TASSC 91).

³ This is based on the explanation provided in J Blackwood and K Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Press, 1997) vol 1, 304.

rake).⁴ There is no additional requirement that the mistake is one that a reasonable person would make or a mistake that is based on reasonable grounds.⁵ However, this does not mean that the fact finder (jury or magistrate) must take the defendant at their word. The fact finder may not believe that the defendant made a mistake and/or may not believe that the defendant was acting in self-defence.

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

1.1.5 The second component of the test (the assessment of the amount of force used) is a mixed objective/subjective test. The jury needs to determine the circumstances as the person believed them to be (subjective) and then determine whether a reasonable person in those circumstances would have considered that the force applied by the defendant was reasonably necessary (objective).⁶ The defendant can be mistaken about the circumstances that they faced. Therefore, if the defendant was confronted by a person aggressively approaching with a gun pointed at him or her and who was threatening to shoot and the defendant believed that the gun was loaded (when in fact it was unloaded), the defendant's response is to be assessed on the basis that they were responding to a threat involving a loaded gun.⁷ Using the examples provided earlier, the defendant's conduct is to be assessed on the basis that they were confronted by an iron bar (not a wooden rake) or an armed assailant (not an unarmed assailant). However, this test does not mean that the fact finder is required to accept the defendant's assessment of the amount of force that was necessary — it does not matter that the defendant considered the force used was reasonable. This is because the *defendant's belief* as to the *amount* of force needed is not the issue. The question is whether the force used was reasonable on an objective basis. It is for the jury to decide whether the reaction of the defendant was reasonable and acceptable in the situation as they believed it to be, or whether the defendant went too far and the force used was excessive.

1.2 The need for reform

1.2.1 Concern has been raised that under the current formulation of self-defence, the defence contained in the *Criminal Code* (Tas) s 46 is not precluded even if the accused's perception of the circumstances is entirely irrational. This is said to be inappropriate as it affords an unduly favourable and exorbitant defence to those who quickly resort to violence in the absence of any proper objectively determined circumstance that establishes the need to use defensive force.

1.2.2 In assessing the reasonableness of the force used by the defendant, another difficult question that arises is what circumstances can be taken into account by the fact finder in assessing whether the force used was reasonable in the circumstances as the defendant believed them to be? This is not clear from the words in s 46 of the *Criminal Code* and is open to different interpretations. One interpretation is that 'circumstances' are narrowly confined to the defendant's belief as to the external circumstances that exist at the time (such as an aggressor holding a loaded or unloaded gun). Another interpretation is that the focus on the subjective belief of the defendant mean that the 'circumstances' as the accused believes them to be extends more broadly to include personal characteristics and attributes that affect the defendant's perception of the situation (such as experiences that make the defendant more fearful, or mental illness or intoxication). It can be argued that the subjective component of the test of self-defence has the scope to allow offenders to rely on their mistaken and irrational perception of the circumstances arising from mental illness or intoxication as the basis for

⁴ This example is taken from Blackwood J and Warner K, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Press, 1997) *ibid*, vol 1, 305.

⁵ *Walsh* (1991) 60 A Crim R 419, 423 (Slicer J).

⁶ *Ibid*.

⁷ This example was given in *McCullough v The Queen* [1982] Tas R 43 and cited by Slicer J in *Walsh* (1991) 60 A Crim R 419, 423–24.

their defence. As a consequence, it may be argued that the defence is too lenient and out of step with modern standards and community expectations.

1.2.3 In other Australian jurisdictions, courts have accepted that attributes of the defendant that bear on their perception of the circumstances should be taken into account for the purposes of determining the reasonableness of the defendant's belief in the need to use defensive force and the reasonableness of the response. This has included evidence of the accused's mental condition that affects their appreciation or perception of circumstances, including evidence of shock and concussion,⁸ severe paranoid personality disorder,⁹ the defendant's level of intellectual function,¹⁰ battered woman syndrome,¹¹ paranoid schizophrenia,¹² intoxication¹³ and depression.¹⁴ It is noted that some Australian courts have accepted that delusional beliefs can provide the basis for an assessment of the accused's belief in the need for self-defence and whether reasonable grounds existed for the accused's belief.¹⁵

⁸ *R v Edwards* [2009] SASC 233.

⁹ *R v Grosser* (1999) 73 SASR 584

¹⁰ *R v Schubert* [2000] NSWSC 117; *R v Wheeler* [2005] SADC 116; *Raux v Western Australia* [2012] WACA 1. It is noted that in Queensland and Western Australia a wide range of personal attributes and characteristics of the accused have been accepted as relevant in relation to the defence of mistake contained in s 24 *Criminal Code*. In *R v Mrzljak* [2005] 1 Qd R 308, Holmes and Williams JJ considered that it was appropriate to take into account the accused's intellectual impairment, psychiatric problems and language difficulties in determining whether the accused's mistake was reasonable. This was applied in *R v Dunrobin* [2008] QCA 116 where the accused suffering from a chronic paranoid schizophrenia which impacted on his capacity to comprehend language and communication. It was held that the jury should have been instructed that 'the accused's mental condition was relevant to the appreciation of what, on his part, constituted a reasonable belief': at [45] (Muir JA). In *Aubertin v Western Australia* [2006] 33 WAR 87, McLure J stated (with whom Roberts-Smith and Buss JA agreed) that 'the subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself. However, the ambit of what contributes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disability. This list does not purport to be exhaustive': at [42]–[44]. McLure J considered that this excluded intoxication and a person's values.

¹¹ *R v Osland* (1998) 197 CLR 316; *R v Runjanjic* (1991) 56 SASR 114 (duress); *R v Kontinnen* (Unreported, Supreme Court of South Australia, 30 March 1992).

¹² *R v Kurtic* (1996) 85 A Crim R 57; *R v Imadonmwonyi* [2004] VSCA 176; *R v Bailiff* [2002] ACTSC 79.

¹³ *Conlon* (1993) 69 A Crim R 92.

¹⁴ *R v Morgan* (Unreported, Supreme Court of New South Wales, Hidden JA, 1 August 1997); *R v Hughes* [2102] QCA 208.

¹⁵ *R v Kurtic* (1996) 85 A Crim R 57. This approach was subsequently relied on in *R v Bailiff* [2002] ACTSC 79. It has also been accepted in South Australia that self-defence could be based on delusional beliefs; *Question of Law Reserved (No 1 of 1997)* (1997) 70 SASR 251; *R v Grosser* (1999) 73 SASR 584.

Part 2

Options for Reform

2.1 Should the *Criminal Code* (Tas) s 46 be amended?

2.1.1 The first question to consider is whether or not the *Criminal Code* (Tas) s 46 should be amended by the inclusion of an objective reasonableness requirement in relation to the accused's belief in the need for self-defence. As discussed in Part 1, the law currently focuses on the accused's subjective belief in the need for self-defence, and the insertion of a reasonableness requirement would mean that the accused's assessment of the threat situation would be assessed according to an objective standard of reasonableness. The arguments for and against doing so are set out below. Assuming the answer is in the affirmative, the Issues Paper then (at [2.2]) discusses possible models to achieve this. The Paper goes on to consider the relationship between mental illness and self-defence and the relationship between intoxication and self-defence and examines options for clarification in relation to these issues. It is the Institute's view that these matters require clarification irrespective of whether s 46 is retained in its present form. The Paper then considers other possible changes relevant to the issue of self-defence, namely some specific changes for family violence situations and partial defences to murder.

Should the Criminal Code (Tas) s 46 be amended by inserting a requirement of reasonableness in relation to the accused's belief in the need to use self-defence?

2.1.2 Currently the belief in the need for self-defence in the *Criminal Code* (Tas) s 46 is a purely subjective test. This means that an accused can rely upon an unreasonable mistaken belief in relation to the nature of the threat faced. In contrast, the amount of force used is assessed according to whether it was reasonable (objective) in the circumstances as the accused believed them to be (subjective). This section considers the option of amending the *Criminal Code* (Tas) s 46 by inserting a requirement of reasonableness in relation to the accused's belief in the need to use self-defence. The Institute has identified four models that could be used to change the law to insert a reasonableness requirement in relation to the accused's belief in the need to use force, including the assessment of the accused's belief in relation to the threat that existed and other relevant circumstances. Before these models can be considered the preliminary question is whether such a change is desirable.

2.1.3 Arguments in favour of inserting a requirement of reasonableness

- An argument in favour of inserting a requirement of objective reasonableness in the *Criminal Code* (Tas) s 46 is that an objective test imposes more stringent conditions in relation to the accused's perception of the threat and circumstances and that this is appropriate given that self-defence is a complete defence to offences of violence, including murder.¹⁶
- The current test can be criticised on the basis of its potential to allow undeserving offenders to be acquitted. The absence of any objective criterion of reasonableness in relation to the accused's belief in the need to use defensive force means that a person can rely on self-defence even if they make an unreasonable and entirely irrational mistake. This can be said to be an overly generous concession to people who resort to violence hastily and without

¹⁶ This was one of factors identified in favour of retaining the current provisions in the *Criminal Code* (Qld) in a review conducted by G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences*, Report (2009) [3.31].

reflection. It also has the potential to allow offenders who are intoxicated or mentally ill to rely on a genuine but unreasonable and irrational belief about the need for self-defence.¹⁷

- Further, the subjective approach places no restriction on an offender who is excessively fearful or apprehensive or prejudiced, as their conduct is assessed in light of the circumstances that they believed to exist.¹⁸ On this basis, it can be argued that a standard of reasonableness is necessary to prevent reliance on self-defence by people who act on ‘unreasonable, inaccurate and even racist perceptions of threats from others’.¹⁹ It may also be necessary to prevent reliance on homophobic prejudice as the basis for self-defence.
- An objective standard in relation to the necessity to use force discourages violent self-help. A criticism of the entirely subjective assessment of an accused’s perception of the threat is that it is said to encourage rashness and un-reflective responses and ‘unnecessary resorts to violent self-help’.²⁰ It can be argued that the subjective approach does not reflect the value placed by the law on the sanctity of human life and bodily integrity, and the need for compelling reasons to justify the use of force, particularly lethal force. In contrast, a requirement of reasonableness is said to:

discourage a rush to use force. The desire is to defend the public against people with paranoid tendencies, who make unreasonable mistakes with regard to the existence of a factual situation that justifies private defence, and instead to encourage thought and restraint.²¹

A requirement of reasonable grounds for an accused’s belief ‘support[s] and reinforce[s] a code of social behaviour which deprecates failing to take due care to verify one’s belief in the need to injure others’.²² This means that requiring an accused to have reasonable grounds for their belief in the need to use force can be said to have an important declaratory role in affirming and supporting the values of society.

- The insertion of the requirement for reasonable grounds may exclude the self-defence claims of offenders whose perception of the circumstances are based on a delusional belief where there is no factual basis for their subjective belief. In the New South Wales Court of Criminal Appeal decision in *R v Kurtic*,²³ Hunt CJ considered the application of the principles set out in *Conlon* (the relevance of intoxication to the existence of reasonable grounds in self-defence) to an offender who suffered from persecutory delusions. His Honour (with whom other members of the court agreed) expressed the view that:

[t]here may well be some problem in seeking to stretch the principle which *Conlon* ... states to apply to the present case, as the issue of whether there were no reasonable grounds for a belief that it was necessary in self-defence to do what was done — although not wholly objective — must nevertheless be at least partly objective. Whatever the effect a characteristic personal to the accused may have upon his

¹⁷ See [2.3].

¹⁸ This criticism was made by McSherry in response to the recommendation of the Victorian Law Reform Commission (VLRC) to introduce a completely subjective test for self-defence, see B McSherry, ‘Self-defence and Provocation’ (1992) 66 *Law Institute Journal* 151, 151. See also S Yeo, *Compulsion in the Criminal Law* (Lawbook, 1990) 215–16; Law Reform Commission of Western Australia (WALRC), *A Review of the Law of Homicide*, Final Report No 97 (2007) 170–71; K Roach, ‘A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions’ (2012) 16 *Canadian Criminal Law Review* 275, 277–78, 285.

¹⁹ Roach, above n 18, 277–85.

²⁰ Ibid 278.

²¹ B Sangero, *Self-Defence in Criminal Law* (Hart Publishing, 2006) 287.

²² Yeo, above n 18, 215.

²³ (1996) 85 A Crim R 57.

perception of some particular action as a threat which he faced or upon the reasonableness of his response to what he perceived to be a danger, there must, in my view, be a reasonable possibility that at least some action *in fact* took place which could have been mistaken as a threat or danger to the accused before any decision can be made concerning the possibility that his perceptions of that action were affected by that personal characteristic.²⁴

This decision indicates that ‘the subjective belief, however misguided or mistaken, of an accused acting in self-defence, needed to be referable at least to some actual fact within the matrix of surrounding circumstances prevailing at the time of the alleged offending’.²⁵ If this was the interpretation applied to a belief on reasonable grounds, this approach would prevent offenders suffering a psychotic episode as a result of mental illness and/or drug use from relying on their mistaken perception as a justification to use force against an innocent bystander.

- In some jurisdictions, concerns have been raised that the application of a purely subjective standard to the accused’s perception of the threat and circumstances is inconsistent with human rights obligations.²⁶ This issue has been raised by English commentators who have asserted that the subjective approach in the law is incompatible with the *European Human Rights Act 1998*, art 2.²⁷ In the Tasmanian context, human rights considerations do not affect the validity of the law of self-defence in the *Criminal Code* (Tas) s 46.²⁸ However, it could be argued that allowing self-defence where an accused has made an unreasonable mistake does not adequately protect the right to life. In this way, the subjective focus of the current law can be criticised on the basis that it fails to adequately protect the interests of the victim.
- The imposition of a ‘reasonableness’ standard in relation to the accused’s perception of the threat still allows the court to take into account the circumstances of the accused, as it is not a wholly objective test.²⁹ Self-defence is still assessed on the basis of the circumstances as the accused perceived them to be. It is just that an objective gloss is included to prevent an accused relying on irrational and unreasonable perceptions. The ability to take into account the personal characteristics and circumstances of the accused in assessing whether reasonable grounds existed, influenced the decision of the Law Reform Commission of Western Australia to recommend that a standard of reasonableness be imposed.³⁰ This means that it is possible to accommodate within the test of ‘reasonable grounds’ the experiences of an accused whose perception of the threat differs from the threat that might be perceived by a hypothetical reasonable person, such as those who kill in response to prolonged domestic violence.

²⁴ Ibid 64 (emphasis in original).

²⁵ D Howard and B Westmore, *Crime and Mental Health Law in New South Wales: A Practical Guide for Lawyers and Health Care Professionals* (Lexis Nexis Butterworths, 2nd ed, 2010).

²⁶ See A Simester, J Spencer, G Sullivan and G Virgo, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 5th ed, 2013) 795–97.

²⁷ See D Ormerod, *Smith and Hogan’s Criminal Law* (Oxford University Press, 13th ed, 2011) [12.6.1.4] fn 337. See also A Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 124–25. However, others have suggested that the situation in relation to the English law is not clear cut; Ormerod 384–85.

²⁸ In Tasmania, there is no state or federal human rights legislation that enshrines the right to life (as protected by the *International Covenant on Civil and Political Rights*, art 6 to which Australia is a signatory) and accordingly the international obligation does not affect Australian law until it is incorporated by Parliament into Australian law; *Kioa v West* (1985) 159 CLR 550, 570.

²⁹ Yeo, above n 18, 217. See Richard Singer, ‘The Resurgence of Mens Rea: II – Honest but Unreasonable Mistake of Fact in Self Defense’ (1987) 28 *Boston College Law Review* 459.

³⁰ WALRC, above n 18, 172.

2.1.4 Arguments against inserting a requirement of reasonableness

- The current formulation of the legal test of self-defence contained in the *Criminal Code* (Tas) s 46 contains a mixed subjective and objective test that allows the necessity of force to be assessed from the accused's point of view while still allowing community standards to be introduced in assessing the appropriateness of the accused's response.³¹ It has operated for over 25 years and there is no clear indication that the defence is not working well.
- The approach in the *Criminal Code* (Tas) s 46 has the advantage that it is consistent with the approach to self-defence contained in the Model Criminal Code,³² as enacted in Commonwealth legislation, in New South Wales, the Australian Capital Territory and the Northern Territory (for Schedule 1 offences).³³ The Model Criminal Code approach reflects a view that if there are no partial defences to murder (that is, a defence that would reduce murder to manslaughter), then it is necessary to have a broad test for self-defence.³⁴ This means that self-defence needs to focus on the accused's belief in the necessity for self-defence and the accused's perception of the circumstances. This model for self-defence has been recently adopted in Victoria.³⁵ It is also the approach in South Australia, New Zealand and the United Kingdom.³⁶
- The current formulation has the advantage of simplicity. The simplification of the law was one of the reasons that underpinned the changes to the Tasmanian law in 1987. In Victoria, the model was adopted, in part, as it allows for greater clarity and simplicity in directing the jury than the previous test (based on the common law) that the accused's belief be based on reasonable grounds.³⁷
- The retention of a subjective test demonstrates confidence in the ability of the jury to scrutinise an offender's claim that they were acting in self-defence.³⁸ The subjective test requires the jury to be satisfied that there was not a reasonable possibility that the accused was acting in self-defence (that is that there was not a reasonable possibility that the accused, in view of the danger that they believed that they faced, had a genuine and honest belief in the need to act in self-defence). The jury considers all the circumstances that existed (including the accused's perception of the circumstances) in determining whether the accused actually held a belief in a threat that required the use of force (rather than acting for some other reason).³⁹ If an accused uses violence in circumstances where there was not in fact any clear

³¹ See VLRC, *Defences to Homicide: Final Report*, (2004) [3.73].

³² See Model Criminal Code Officers' Committee, *Model Criminal Code – Chapter 2, General Principles of Criminal Responsibility*, Report (1992), 70 contained in cl 313.

³³ See *Criminal Code* (Cth) s 10.4; *Criminal Code* (ACT) s 42; *Crimes Act 1900* (NSW) s 418; *Criminal Code* (NT) s 43BD. 'Schedule 1 offences' in the Northern Territory Code include homicide.

³⁴ I Leader-Elliott, 'Reforming and Codifying the Criminal Law (of Homicide): Reflections on the Victorian Experience', (Paper presented at Homicide Law Reform in Victoria: Prospects and Retrospect, Melbourne, 15th and 16th August 2014).

³⁵ *Crimes Act 1958* (Vic) s 322K inserted by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 4. Section 322K also requires the person has a belief that the force was necessary to defend the person from the infliction of death or really serious injury if self-defence is relied on in relation to murder: s 322K(3).

³⁶ See *Criminal Law Consolidation Act 1935* (SA) s 15(1); *Crimes Act 1961* (NZ) s 48; *Criminal Justice and Immigration Act 2008* (UK) s 76; *Gladstone Williams* [1987] 3 All ER 411 (CA); *Beckford v R* [1988] AC 130.

³⁷ *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic), Explanatory Memorandum, 6.

³⁸ A criticism of the subjective test is that jurors 'are prone to being gullible in accepting an accused's assertion that he held an honest belief': S Yeo, 'The Element of Belief in Self-Defence' (1989) *Sydney Law Review* 132, 137.

³⁹ Although difficulties arise for the prosecution if the *Criminal Code* (Tas) s 16(3) is interpreted as applying to self-defence. If the jury accepts the delusion, then s 16(3) directs that criminal responsibility is to be assessed as if those facts were true. This means that the jury has to accept the deluded belief as true and that the prosecution has only two avenues

imminent threat of harm, a jury may be reluctant to believe that the accused was acting in self-defence. This reluctance is certainly evident in the difficulties experienced by battered women in relying on self-defence in circumstances where they have killed their violent partner in a non-confrontational situation or in response to a seemingly minor incident.⁴⁰

- Further, even if the jury accepts the accused's account, it is still able to apply community standards of acceptable conduct in its determination of whether the force used was reasonable in the circumstances as the accused believed them to be. This means that the accused's response is objectively assessed.⁴¹ And this assessment allows the jury to take into account the necessity of using force (the imminence of the threat that the accused believed that they faced and other options that may have been available) and the proportionality of the force used. If a threat is merely anticipated, then it may be reasonable for an accused to seek outside assistance or to leave rather than resorting to force.⁴² Although neither retreat nor imminence are formally necessary for self-defence to be successful, in cases where an actual threat does not exist (other than in the mind of the intoxicated or mentally ill offender) these considerations may provide grounds for the judge to withhold the defence from the jury, so that it is not considered by the jury,⁴³ or, if left for the consideration of the jury, the flexibility of the standard of reasonable force allows the jury to reject the defence. Accordingly, the retention of the current legal test can be supported on the basis that it has the capacity to allow spurious claims of self-defence to be rejected.
- Support for a model of self-defence that is based on the accused's subjective perceptions of the threat (rather than an objectively assessed model) can be found in concerns raised about the failure of self-defence to adequately accommodate the experience of people (typically women) who kill in response to prolonged domestic violence. There is extensive literature that has critiqued the traditional formulation of the defence on the basis that beneath its apparent neutrality and objectivity, the defence has operated in a gender biased way.⁴⁴ Traditionally, the interpretation and application of the defence has largely precluded the self-defence claims of those whose actions do not conform to the paradigm case of self-defence —

to raise a reasonable doubt: (1) to argue that the delusion was not one of immediate/imminent harm or (2) to argue that the force used was excessive.

⁴⁰ K Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 266.

⁴¹ See above [1.1.5].

⁴² See *Adams on Criminal Law Student Edition*, (Thomson Reuters, 2013) [CA48.11] for New Zealand cases where self-defence has not been successful in the context of a pre-emptive strike where there were alternative courses of action open instead of the use of force (*Wang* [1990] 2 NZLR 529; *R v Ranger* (1988) 4 CRNZ 6; *R v Terewi* (1985) 1 CRNZ 623).

⁴³ For example, in *Burgess; Saunders* [2005] NSWCCA 52 where the court considered that it is appropriate for the court to remove self-defence from the jury's consideration if the facts are not capable of giving rise to the objective requirement of the defence, despite the accused's belief that their actions were justified.

⁴⁴ There is extensive literature that has examined the operation of self-defence in the context of battered women who kill. Some of these critiques include the following: VLRC, above n 31; WALRC, above n 18, 164–169; Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence – A National Legal Response*, ALRC Final Report 114, NSWLRC Final Report 128 (2010) [14.5]–[14.38]; Northern Territory Law Reform Committee (NTLRC), *Self-defence and Provocation* (2000); New Zealand Law Commission (NZLC), *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001); Law Commission of England and Wales, *Partial Defences to Murder*, Final Report no 290 (2004); L Roth and L Blayden, *Provocation and Self-defence in Intimate Partner and Sexual Advance Homicides*, NSW Parliamentary Research Service, Briefing Paper 5/12 (2012) [10.1]; S Bronitt and B McSherry, *Principles of Criminal Law*, (Lawbook Co, 3rd ed, 2010) [6.70]; E Sheehy, J Stubbs and J Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) *Sydney Law Review* 467; I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) *Sydney Law Review* 403; J Stubbs and J Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to the Gender Bias in the Law?' in J Stubbs (ed), *Women, Male Violence* (Institute of Criminology, 1994); J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709; A Hopkins and P Easteal, 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010) 35 *Alternative Law Review* 132.

the spontaneous once-off encounter between two males of equal strength. Consequently, the defence has been poorly equipped to deal with the self-defence claims of women who killed in a non-confrontational situation or in response to a seemingly innocuous threat, or who used a weapon against an unarmed victim. There is widespread agreement that the ‘nature and dynamics of domestic violence should be recognised in homicide defences’.⁴⁵ The Tasmanian Government has demonstrated its commitment to support victims of domestic violence through the introduction of Safe at Home — a whole of government approach to domestic violence which is a key social policy initiative.⁴⁶ As recognised by the Australian Law Reform Commission (ALRC), an integrated approach to family violence is not just concerned with the introduction of measures to improve the safety of victims but also to ensure that the criminal law recognises the experiences of family violence victims who kill. For that reason, any change to the law of self-defence would need to be carefully assessed to ensure that it did not restrict access to the defence by those who kill in the context of ongoing domestic violence.

- A subjective approach to an accused’s perception of the threat has also been supported on the basis that it is contrary to principles of criminal responsibility to deny self-defence to a person who makes an unreasonable mistake.⁴⁷ The argument is that ‘to insist on reasonableness of an accused’s belief is to make her or him criminally responsible for a crime of violence when the accused’s only fault was negligence, that is, a failure to take sufficient care to ascertain whether there was an actual threat occasion’.⁴⁸ The defendant’s culpability is said to be lacking (or very low) because there was no intention to break the law — rather the person was motivated by a desire to protect themselves and to rely on the law for that purpose.⁴⁹ If the subjective component of the test of self-defence is amended in Tasmania to include a reasonableness requirement, a person who kills in circumstances where they unreasonably believe that a threat exists will be convicted of murder. While it may be accepted that the offender is blameworthy to some extent, it could be argued that a murder conviction is not appropriate if the person genuinely believes that they were acting in self-defence.⁵⁰ It can be argued that there is a significant moral distinction between murder and a killing in mistaken self-defence.⁵¹ It can also be argued that the actions of a person who makes an unreasonable mistake in relation to the need for self-defence or the appropriate response are ‘conceptually much closer to manslaughter (by criminal negligence) than murder’.⁵²
- Support for the retention of a subjective test of belief in the need for self-defence rests on the likely circumstances that a person faces when they are compelled to act in self-defence (a

⁴⁵ ALRC and NSWLRC, above n 44, [14.76].

⁴⁶ Safe at Home < http://www.safeathome.tas.gov.au/about_us>.

⁴⁷ See F Wright, ‘The Circumstances as She Believed Them To Be: A Reappraisal of Section 48 of the *Crimes Act 1961*’ (1998) 6 *Waikato Law Review* 109, 117, 119; Yeo, above n 18, 206; Dennis Baker, *Glanville Williams: Textbook of Criminal Law* (Sweet & Maxwell, 3rd ed, 2012) [21-020]. A related argument to support the subjective approach relates to the logical classification of elements of offences and defences: see Yeo, above n 18, 204; Baker, above n 47, [21-020].

⁴⁸ Yeo, above n 18, 206. See also *Williams (Gladstone)* (1983) 78 Cr App R 276, 281 (Lord Lane CJ), approved in *Beckford* [1987] 3 WLR 611, 619.

⁴⁹ Baker, above n 47, [21-020]; Sangero, above n 21, 288–89.

⁵⁰ Yeo, above n 18, 219.

⁵¹ P Fairall and S Yeo, *Criminal Defences* (Lexis Nexis, 4th ed, 2005) [10.39]: the authors observed in relation to excessive self-defence that there is a pervasive view that ‘exists [of] a significant moral distinction between murder and unlawful killing in excessive self-defence’. Excessive self-defence arises where the force used is excessive, ‘either in the sense that the occasion did not call for the use of force at all, or in the sense that more force was used than was required to make effective defence’: at [10.38]. In relation to excessive self-defence, see also P Fairall, ‘Excessive Self-defence in Australia: Change for the Worse?’ in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 178; S Yeo, ‘Revisiting Excessive Self-Defence’ (2000) 12 *Current Issues in Criminal Justice* 39.

⁵² WALRC, above n 18, 181 referring to Fairall, above n 51, 178, 184; S Yeo, ‘Applying Excuse Theory to Excessive Self-defence: Change for the Worse?’ in Yeo S (ed), *Partial Excuses to Murder* (Federation Press, 1991) 158, 163.

fearful situation that prompts instant action) and it can be argued that to impose a requirement of reasonableness on their belief does not have a utilitarian purpose.⁵³ Where a person acts in self-defence, they are usually confronted with a situation where they must act quickly and there is little time for reflection or to check the validity of a belief that self-defence is necessary.⁵⁴ In this situation of fear and urgency, it is argued that ‘a future threat of punishment is most unlikely to deter’ and that it would be ‘unjust to punish him for failing to take steps to verify his views’.⁵⁵ As Heath observes:

people faced with a potential self-defence situation [are unlikely to] make their decisions about what to do on the basis of the legislation for the time being in force ... As the case law recognises, people who believe they are facing a situation in which they are threatened with death or serious injury are not in a position to make calm, rational decisions. They are certainly not in a position to obtain legal advice or read [the relevant law].⁵⁶

- A further reason not to amend the legal test contained in the *Criminal Code* (Tas) s 46 through the insertion of a requirement of reasonableness is that this may not resolve the problem identified by the Director of Public Prosecutions — that unmeritorious defendants may benefit from the subjective focus of the current defence. A belief on reasonable grounds has been interpreted by courts in comparable jurisdictions to include characteristics of the accused including intoxication and mental illness that has the effect of altering the accused’s perception of the circumstances.⁵⁷ This means that ‘what is being evaluated is not the reasonableness of the conclusions or actions *per se*, but rather the reasonableness of *this accused* drawing that conclusion or acting in that way given the situation she was in’.⁵⁸ There is a close connection between the subjectivised ‘objective’ test and the assessment of the accused’s response on the basis of their perception of the threat faced. This was recognised by the Victorian Law Reform Commission (VLRC) which considered that the adoption of the Model Criminal Code approach (which is the same as the Tasmanian approach), ‘makes some small modifications to the current [common] law’ but that ‘it does not differ greatly’.⁵⁹ Accordingly, it is unclear the extent to which the introduction of a requirement of reasonableness in relation to the accused’s perception of the threat and circumstances will actually serve as a constraint on the defence of self-defence. Although, as noted at [2.1.3], the requirement for reasonable grounds may prevent an offender from relying on a mistaken belief that has no factual basis in the actual circumstances.

Question 1:

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

2.1.5 If the current approach to the law of self-defence is retained in Tasmania, consideration could be given to aligning the wording of the Tasmanian provision with the Model Criminal Code approach. The wording in the Model Criminal Code forms the basis for the self-defence provisions in the

⁵³ Yeo, above n 18, 207–8; Baker, above n 47, [21-020].

⁵⁴ Baker, above n 47, [21-020].

⁵⁵ Yeo, above n 18, 208.

⁵⁶ M Heath, ‘Self Defence’ in D Caruso, R Buth, M Heath, I Leader-Elliott, P Leader-Elliott, N Naffine, D Plater and K Toole (eds), *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) [10.48].

⁵⁷ See [1.2.3].

⁵⁸ David Paciocco, ‘Applying the Law of Self-defence’ (2007) 12 *Canadian Criminal Law Review* 25, 37. See also Judicial College of Victoria, *Criminal Charge Book* (13 October 2010) [8.9.2.1] <<http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19107.htm>>.

⁵⁹ VLRC, *Defences to Homicide, Options Paper* (2003) [4.111].

Australian Capital Territory, the Northern Territory (Schedule 1 offences), New South Wales and Victoria.⁶⁰ A useful model is found in the changes to the *Crimes Act 1958* (Vic) effected by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic), which creates a new test for self-defence in Victoria:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct consisting the offence in self-defence.
- (2) A person carries out conduct in self-defence if –
 - (a) the person believes that the conduct is necessary in self-defence; and
 - (b) the conduct is a reasonable response in the circumstances as the person believes them to be.⁶¹

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

Question 2:

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

2.2 Models to insert a requirement of reasonableness

2.2.1 If a requirement of reasonableness is inserted in the *Criminal Code* (Tas) s 46, the Institute has identified four models that could be adopted in Tasmania.

2.2.2 **Model One (the common law):** the test can be simply stated relying on the words of the High Court in *Zecevic v DPP (Vic)* — an accused is entitled to use such force as they believed upon reasonable grounds that it was necessary to use in self-defence.⁶² This is hybrid subjective/objective but unlike the current Tasmanian position, both components of the law of self-defence contain an objective element: the decision to use force and the decision concerning the amount of force used. This means that both the belief of the accused in the existence of the threat and the belief in the necessity of using the amount of force employed must be based on reasonable grounds.

2.2.3 **Model Two (Northern Territory model – non-Schedule 1 offences):**⁶³ the *Criminal Code* (NT) s 29 is based on the Model Criminal Code provision with the addition of a requirement that the accused’s perception of the circumstances must be reasonable. The accused’s belief in the need to use

⁶⁰ See [2.1.4].

⁶¹ It is noted that the Victorian provision limits self-defence in the case of murder to cases where ‘the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury’: *Crimes Act 1958* (Vic) s 322K. The Victorian provision also specifies that self-defence does not apply to a response to lawful conduct if the person knew that the conduct was lawful. This is contrary to the position in New South Wales where these restrictions do not exist.

⁶² See *Zecevic v DPP* (Vic) (1987) 162 CLR 645, 661 (Wilson, Dawson and Toohey JJ), 654 (Mason CJ), 666 (Brennan J).

⁶³ This applies to force causing serious harm. It does not apply to murder and manslaughter or endangerment offences in Part VI, Division 3A. See Stephen Gray and Jenny Blokland, *Criminal Laws: Northern Territory* (Federation Press, 2nd ed, 2012).

force is (as with Tasmania) entirely subjective. However, the accused's use of force is assessed on the basis of whether the force used was a 'reasonable response in the circumstances as the person reasonably perceived them'.⁶⁴ This is different from the Tasmanian position which does not require that the accused have a reasonable perception of the circumstances. This model has the advantage that it reflects the current Tasmanian position with the adoption of a 'reasonableness' gloss in relation to the accused's perception of the circumstances that may exclude consideration of the accused's deluded beliefs.

2.2.4 Model Three (the Western Australian model): the *Criminal Code* (WA) s 248 contains another version of the hybrid subjective/objective test for self-defence. It requires that the accused's belief in the need to use self-defence be based on reasonable grounds and that the response is reasonable in the circumstances as the accused reasonably believes them to be. It contains four elements: (1) the accused (subjectively) believes that the act is necessary to defend themselves or another; (2) the accused's act is a reasonable response (objective) by the accused in the circumstances as the accused (subjectively) believes them to be; (3) there are reasonable grounds (objective) for the accused's (subjective) belief that the harmful act is necessary to defend the accused or another person; (4) there are reasonable grounds (objective) for the accused's (subjective) belief as to circumstances.⁶⁵ It is arguable that this is a more stringent test than Model One as the assessment of the force used is viewed objectively in the circumstances as the accused believed to exist rather than on the basis of whether the accused had reasonable grounds for the belief.⁶⁶ However, it is a more complicated provision for the jury to understand and can be criticised on this basis.

2.2.5 Model Four (the Queensland and former Tasmanian position): these provisions make a distinction between cases where there is an intention or likelihood of causing death or grievous bodily harm and other cases. There is also a distinction between circumstances where the accused has provoked an assault and circumstances where the assault is unprovoked. The provision concerning self-defence against an unprovoked assault where death and grievous bodily harm is intended or likely contains a version of the hybrid subjective/objective test: (1) the accused must have a reasonable apprehension of death or grievous bodily harm from the deceased's assault and (2) the accused must believe on reasonable grounds that death or grievous bodily harm cannot be otherwise avoided.⁶⁷ In other cases of self-defence against an unprovoked assault, a person is entitled to use such force as is reasonably necessary to make an effectual defence.⁶⁸ Provisions that contain complex distinctions between provoked/unprovoked and intention or likelihood of death have been criticised for being too complex and most jurisdictions have moved away from this approach (for example, Tasmania, Western Australia, Canada, New Zealand). However, the need for the accused to have a reasonable apprehension of a threat and a belief on reasonable grounds that the harm cannot be otherwise avoided could be incorporated into the Tasmanian test.

⁶⁴ *Criminal Code* (NT) s 29(2)(b).

⁶⁵ See *O'Neill v Western Australia* [2013] WASCA 158, [94] (Buss JA); *Goodwyn v Western Australia* [2013] WASCA 141, [95] (Buss JA).

⁶⁶ However, as noted at [2.1.4], there is doubt as to whether there is any practical difference between the two tests.

⁶⁷ See discussion in J Devereux and M Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 8th ed, 2013) [13.81]–[13.98]. See also G Mackenzie and E Colvin, *Victims Who Kill Their Abusers: A Discussion Paper on Defences*, Discussion Paper (2009) [3.24].

⁶⁸ *Criminal Code* (Qld) s 271(1). A person can rely on the mistake of fact defence contained in s 24, in conjunction with s 271(1) if the accused makes an honest and reasonable mistake about the amount of force required, see Devereux and Blake, above n 67, [13.103].

Question 3:

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

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

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

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

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

Section 16(3) is contained within the provisions of the *Criminal Code* that create the defence of insanity.

2.3.2 Currently, it is unclear whether:

- there are circumstances where evidence of a mental disease and its effects could be used for self-defence if the defence of insanity is rejected;
- the High Court decision in *Hawkins v The Queen*⁶⁹ undermines the authority of the Court of Criminal Appeal in *Walsh*;⁷⁰
- reliance on s 16(3) provides the accused with a complete or a qualified acquittal; and
- s 16(3) is limited to insane delusions or whether it applies to delusions more generally.

These are matters that require legal clarification — regardless of whether or not the substantive defence is amended to insert the requirement of reasonableness. In making this clarification, it is necessary (as a matter of policy) to decide whether self-defence should be available to offenders whose mistaken belief in the need to use violence in self-defence is attributable to a mental illness. This involves making a decision as to whether:

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

⁶⁹ (1994) 179 CLR 500.

⁷⁰ [1993] TASSC 91.

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

2.3.3 The Institute has identified four broad approaches to the interaction of mental illness and self-defence:

2.3.4 **Model One (not allow any evidence of the accused’s mental condition for the purposes of self-defence):** Exclude all evidence of any abnormality in an accused’s mental condition from consideration in cases of self-defence under the *Criminal Code* (Tas) s 46 — this would include evidence of delusions arising from a psychosis as well as those offenders who (due to a psychiatric condition) are more sensitive to threats.

2.3.5 This option would directly address the concerns of those who consider that it is inappropriate that self-defence may be relied upon by offenders with mental illness who may incorrectly perceive a threat (due to their illness) and use violence against an innocent bystander. Self-defence could be excluded for this category of offender on the basis that the availability of a complete defence in these circumstances is out of step with community standards and expectations. It can also be supported on the basis that the law of self-defence should not take into account an accused’s level of maturity, intelligence and mental health because ‘[d]oing so subverts the very logic in conducting an objective evaluation into reasonableness, [and] opens the door for the consideration of every personality or culturally based trait that can influence standards of behaviour’.⁷¹ This would leave any issue in relation to any reduction in the accused’s culpability, arising from a psychological condition, to be dealt with under the insanity defence in the *Criminal Code* (Tas) s16 or at the sentencing stage.

2.3.6 However, this approach does not accord with the approach to self-defence in any of the other comparable jurisdictions considered in this Paper. It could also be argued that it unnecessarily restricts the use of evidence of the accused’s particular circumstances that is relevant to the jury’s assessment of the accused’s conduct. In cases where the accused has a heightened perception of the threat or an otherwise mistaken view of the circumstances as a result of a psychiatric condition, the jury does not need to accept that the accused’s conduct was reasonable on the basis of that medical condition — the jury objectively considers the response in light of the circumstances and may determine that the accused’s response was excessive.⁷² Objection can also be made in relation to the exclusion of all evidence of an accused’s psychological abnormality on the basis that this would exclude consideration of evidence of battered woman syndrome from the jury’s assessment of self-defence which (although criticised) has proved useful in individual cases to educate the jury about the perceptions of women in situations of prolonged domestic violence.⁷³

2.3.7 **Model Two (Exclude evidence of delusions from self-defence – the Commonwealth and ACT approach):** Repeal the *Criminal Code* (Tas) s 16(3) and insert a provision that specifies that evidence of delusions insufficient to support the defence of insanity cannot be relied on for the purposes of self-defence. This is the approach adopted in the *Criminal Code* (Cth) s 7.3(7) and the *Criminal Code* (ACT) s 29(2). The *Criminal Code* (ACT) s 29 provides:

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

⁷¹ Paciocco, above n 58, 38.

⁷² An illustration of the operation of the hybrid subjective/objective test can be seen in the case of *Tasmania v Denness*, 1 April 2010, COPS, (Porter J), where the accused pleaded guilty to one count of wounding. The accused suffered complex psychiatric conditions, including post-traumatic stress disorder and a background of underlying personality damage. In sentencing, it was accepted that, as a product of deluded mind, the accused believed that the complainant was armed with a hammer and was going to hit him, but that in those circumstances, hitting the complainant with a machete was an excessive response.

⁷³ See [2.1.4], [2.5].

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

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

These provisions reflect the view of the Model Criminal Code Officers Committee that ‘delusions are symptoms of underlying pathology and that such defendants should be confined to the mental impairment defences’.⁷⁴ While this approach precludes reliance on a delusion for self-defence, it does not prevent a person who suffers from an insane delusion from relying on self-defence in circumstances where the person is actually under threat (rather than relying solely on an imagined threat that is a product of psychosis).⁷⁵

2.3.8 This model accords with the approach of the Court of Criminal Appeal in *Walsh*, where it was held that expert evidence of an insane delusion was not admissible in relation to the defence of self-defence in the *Criminal Code* (Tas) s 46. In the circumstances, evidence of the accused’s delusions was confined to the insanity defence contained in the *Criminal Code* (Tas) s 16. Model Two also prevents people who are suffering psychotic illnesses from relying on their deluded beliefs to obtain a complete acquittal and this is supported on policy grounds, as recognised by Davis LJ in *So v The Crown*.⁷⁶ His Honour considered that if the position were otherwise, it would mean that:

the more insanely deluded a person may be in using violence in purported self-defence the more likely that an entire acquittal may result. It could mean that such an individual who for his own benefit and protection may require hospital treatment or supervision gets none. It could mean that the public is exposed to possible further violence from an individual with a propensity for suffering insane delusions, without any intervening preventative remedies being available to the courts in the form of hospital or supervision orders.⁷⁷

It can also be said to accord with community sentiments that a person who inflicts violence as a result of a deluded belief of danger ‘should be confined to a place of safety but not be punished’.⁷⁸

2.3.9 Further, by repealing the *Criminal Code* (Tas) s 16(3), it can be argued that this approach has the advantage of promoting clarity and the modernisation of the law through the removal of a redundant provision. The scope and operation of the rule in relation to delusions has remained obscure with some commentators, courts and law reform bodies expressing the view that the provision is redundant and out of step with modern psychiatry.⁷⁹ In Canada, these concerns led to the repeal of the equivalent provision in 1991.⁸⁰ The utility of s 16(3) is particularly questionable in circumstances

⁷⁴ MCCOC, *Chapters 1 and 2: General Principles of Criminal Responsibility*, Report (1992) [43].

⁷⁵ See *R v Resnik* [2003] ATCSC 96.

⁷⁶ [2013] EWCA Crim 1725.

⁷⁷ [2013] EWCA Crim 1725, [45].

⁷⁸ Simester et al, above n 26, 817.

⁷⁹ S Bronitt and B McSherry, *Principles of Criminal Law* (Law Book Co, 1st ed, 2001) 213–18; Fairall and Yeo, above n 51, [13.30]; W Brookbanks, ‘Insanity’, in W Brookbanks and A Simpson (eds), *Psychiatry and the Law* (Lexis Nexis, 2007) 123, 142; G Williams, *Criminal Law: The General Part* (Stevens & Sons 2nd ed, 1961) [160]; Law Reform Commission of Canada, *Criminal Law, The General Part: Liability and Defences*, Working Paper 29 (Ottawa: Minister of Supply and Services Canada, 1982) 48 cited in Bronitt and McSherry, above n 79, 218; *R v Chaulk* (1990) 62 CCC (3d) 193. See also E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2011) 17.20; Devereux and Blake, above n 67, 8.115; D Klinck, ‘“Specific Delusions” in the Insanity Defence’ (1982-1983) 25 *Criminal Law Quarterly* 458, P Fairall, ‘The Exculpatory Force of Delusions – A Note on the Insanity Defence’ (1994) 6 *Bond Law Review* 57, 59. In this regard, D Ormerod writes that the function of the *M’Naghten* rule on delusions ‘seems merely to emphasize that delusions which do not prevent D from having *mens rea* will afford no defence. As Lord Hewart CJ rather crudely put it, “the mere fact that a man thinks he is John the Baptist does not entitle him to shoot his mother”’: *Smith and Hogan’s Criminal Law* (Oxford University Press, 13th ed, 2011) 304.

⁸⁰ It should be noted that the former Canadian provision, s 16(3) of the *Criminal Code*, made it clear that such an accused would receive an acquittal on the grounds of insanity (not a complete acquittal). Its repeal followed the report of the Law

where a person has a deluded belief in the need for self-defence arising from a mental illness. In these circumstances, it is difficult to envisage a scenario where the actions do not fall within the *Criminal Code* (Tas) s 16(1)(ii), which has been interpreted to mean that the defendant did not know that what they were doing was wrong according to the ‘everyday standards of reasonable people’.⁸¹ The possibility of the jury rejecting the defence of insanity while still considering it possible that the accused was acting in self-defence under a delusion associated with a mental disorder seems problematic, as was recognised in the Canadian decision of *R v Chaulk*:

An accused will be able to bring his claim within the scope of the second branch of the test set out in s 16(2) [the equivalent of *Criminal Code* (Tas) s 16(1)(ii)] if he proves that he was incapable of knowing that his conduct was morally wrong in the particular circumstances, for example, if he believes that the act was necessary to protect his life. If he is not able to establish this fact, it must be concluded that he either knew or was capable of knowing that the act was wrong in the circumstances. He cannot then possibly succeed in claiming that the act would have been justified or excused had the perceived facts been true.⁸²

If the jury accepts the expert opinion evidence concerning the accused’s delusional belief in the need to use self-defence, then a qualified acquittal on the grounds of insanity is available on the basis that the accused did not know that the act was wrong. On the other hand, if the jury rejects the defence of insanity, it seems difficult (if not impossible) to argue that the accused can rely on evidence of their delusion for the purposes of self-defence on the basis that they are ‘criminally responsible for the act or omission to the same extent as if the fact which ... [they were] induced by such delusion to believe to exist really existed’.⁸³ There is no evidentiary foundation to support the contention that the accused had a genuine belief in the need to act in self-defence.

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

2.3.11 **Model Three (Specify that delusions result in a qualified acquittal – Western Australian Law Reform Commission):** Retain the *Criminal Code* (Tas) s 16(3) and provide that evidence of delusions can be relied on for the purposes of self-defence, with a successful argument of self-defence resulting in a qualified acquittal under s 16(3) (that is, not guilty on the grounds of insanity). This would mean that a person who held a deluded belief in the need for self-defence but did not meet the test for insanity contained in the *Criminal Code* (Tas) ss 16(1) and (2) could rely on s 16(3) if their response was reasonable in the circumstances as they believed them to be. The onus of proof would be on the defendant (as with the other provisions of the insanity defence) to establish this on the balance of probabilities.

2.3.12 Models Two and Three are similar in that they achieve the same end — limiting the use of evidence of delusions arising from a mental illness to the insanity defence. However, Model Three potentially creates a broader defence of insanity for offenders who use violence under the influence of a deluded belief in the need for self-defence than does Model Two. This addresses the concerns of some commentators who have expressed the view that arguments that s 16(3) is an anachronism fail to take account of the difference between the medical and legal definition of insanity and the role of

Reform Commission of Canada that stated that ‘[m]edical opinion rejects the idea of partial insanity and legal scholarship stresses the injustice and illogicality of applying to the mentally abnormal a rule requiring normal reactions within their abnormality; a paranoid killing his [or her] persecutor will be acquitted only if the imagined persecution would have justified the killing by way of self-defence — the law requires him [or her] to be sane in his [or her] insanity. For this reason it is suggested that the rule on insane delusions be abandoned’, Law Reform Commission of Canada, cited in Bronitt and McSherry above n 79, 218.

⁸¹ *R v Porter* (1933) 55 CLR 182, 189–90 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

⁸² (1990) 62 CCC (3d) 193, 236 (Lamer J). Note that Slicer J distinguished this case in *Walsh* (1991) 60 A Crim R 419, 426–27.

⁸³ *Criminal Code* (Tas) s 16(3).

the jury in applying the insanity defence.⁸⁴ The argument advanced in support of there being an independent role for s 16(3) is that:

[t]here will be cases where the dysfunctional mental state, while not satisfying the jury of the defence of mental illness, may nevertheless be relevant to other issues that the jury must determine, such as whether ... the accused's state of mind was relevant to defences such as ... self-defence.⁸⁵

Retaining the *Criminal Code* (Tas) s 16(3) acknowledges the possibility that there may be cases where evidence concerning a mental disease and its effects may be regarded by a jury when considering the *Criminal Code* (Tas) s 46 in circumstances where the defence of insanity has been rejected. This question of whether any circumstances exist in which this may be possible was left open by the Court of Criminal Appeal in *Walsh*.⁸⁶

2.3.13 This approach reflects the English law on insanity (the *M'Naghten* rule on delusions) and arguably reflects the intended operation of the *Criminal Code* (Tas) s 16(3).⁸⁷ It also reflects the approach of the Western Australian Law Reform Commission (WALRC) which recommended that the equivalent Western Australian provision be retained and that it be made clear that successful reliance would result in a special verdict of not guilty by reason of mental impairment rather than a complete acquittal.⁸⁸ The WALRC supported this approach on the basis that it was in the public interest and that it allowed for the appropriate treatment of a deluded offender.⁸⁹ It ensures that a person with a deluded belief in the need for self-defence receives a qualified acquittal and this can be argued to reflect community expectations.

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

2.3.15 **Model Four (allow all evidence):** Allows evidence of mental illness (delusions and heightened sensitivity) to be relied on for the purpose of self-defence with the result that a successful argument of self-defence results in a complete acquittal. This model reflects the case law that has allowed expert evidence of mental illness to be admitted in relation to the issue of whether the accused's belief in the necessity of their actions was based on reasonable grounds.⁹⁰ It also reflects the approach of Slicer J in *Walsh*,⁹¹ that evidence of delusions insufficient to support the insanity defence could go to the issue of self-defence.

Question 4:

Should all evidence of any abnormality in an accused's mental condition be excluded from consideration in cases of self-defence under the *Criminal Code* (Tas) s 46? (Model One)

⁸⁴ This was the view of Slicer J in *Walsh* (1991) 60 A Crim R 419, 427. See also Howard and Westmore, above n 25, [6.47–6.50].

⁸⁵ Howard and Westmore, above n 25, [6.48].

⁸⁶ [1993] TASSC 91, [26] (Crawford J).

⁸⁷ The *Criminal Code* (Tas) s 16(3) substantially reproduces the statement of the House of Lords in *M'Naghten's* case about the effect of insane delusions on criminal responsibility, where the accused is not otherwise legally insane — in this case 'the defendant's responsibility is judged by reference to the facts as he supposed them to be and not the actual facts', Blackwood and Warner, above n 3, 230. See also Baker above n 47, [27-017]; Law Commission (UK), *Insanity and Automatism: Supplementary Material to the Scoping Paper* (11 July 2012) 4.59 fn 62; *So v The Crown* [2013] EWCA Crim 1725, [36] (Davis LJ).

⁸⁸ WALRC above n 18, 233.

⁸⁹ *Ibid.* However, the WALRC relied on the first instance judgment of Slicer J in *Walsh* (1991) 60 A Crim R 419 as justification for a continued need for the provision and did not refer to the subsequent Court of Criminal Appeal judgment.

⁹⁰ See [1.2.3].

⁹¹ See (1991) 60 A Crim R 400.

Question 5:

Should the *Criminal Code* (Tas) be amended to provide that evidence of delusions insufficient to support the insanity cannot be relied on for the purposes of self-defence? (Model Two)

Question 6:

Should the *Criminal Code* (Tas) be amended to provide that evidence of delusions can be relied on for the purposes of self-defence, with a successful argument of self-defence resulting in a qualified acquittal under s 16(3) (that is, not guilty on the grounds of insanity)? (Model Three)

Question 7:

Should evidence of mental illness be admissible for the purposes of self-defence and, if successful, result in a complete acquittal? In the case of delusions, should evidence of delusions insufficient to support the insanity defence go the issue of self-defence? (Model Four)

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

2.4.1 The Tasmania Law Reform Institute has previously made recommendations in relation to the need to clarify the existing law in relation to the relevance of intoxication to the *Criminal Code* s 46. This could be done if the existing law is retained or if a requirement of reasonableness is inserted. In the previous work of the Institute, two main alternatives for reform were identified:

- (a) to provide that an intoxicated mistake is irrelevant for the purposes of assessing an accused's perception of the circumstances and the response.⁹² This was to follow the United Kingdom and Victorian position in relation to the relationship between self-induced intoxication and self-defence;⁹³ or
- (b) to provide that evidence of intoxication is relevant to an assessment of the circumstances as the accused believes them to be. This is the position in New Zealand, the Commonwealth, the Australian Capital Territory, the Northern Territory (Schedule 1 offences) and New South Wales.⁹⁴

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

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

⁹² See TLRI, *Intoxication and Criminal Responsibility*, Final Report No 7 (2006) [6.9.5].

⁹³ See *O'Grady* [1987] QB 995; *Criminal Justice and Immigration Act 2008* (UK) s 76(5); *Crimes Act 1958* (Vic) s 9AJ(2). Note that the statutory provision that sets out the relevance of intoxication to criminal defences will apply to all offences (not just homicide offences), see *Crimes Act 1958* (Vic) s 322T; *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic) Explanatory Memorandum, 11–12.

⁹⁴ See A P Simester and W J Brookbanks, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2012) 511, n 71, citing *R v Ranger* (1998) CRNZ 6; *R v Thomas* [1991] 3 NZLR 141; *R v Terewi* (1985) 1 CRNZ 623; *Tuialli v Police* HC Auckland AP310/86, 19 March 1987; *Deans v Police* HC Christchurch AP7/87, 5 March 1987; *King v Police* HC Dunedin AP11/87, 5 August 1987 (New Zealand); *R v Katarynski* [2002] NSWSC 613.

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

- (a) for the purposes of assessing the accused's belief in the need for self-defence;
- (b) for the purpose of determining the circumstances as the accused believes them to be; and
- (c) as a physical characteristic of the accused in determining whether the response was reasonable.⁹⁵

2.4.4 The Institute expressed the view that it was difficult to find any argument, other than those based entirely on policy, why intoxication should not be relevant to the subjective tests in the *Criminal Code* (Tas) s 46.⁹⁶ In relation to whether the force used was reasonable, the Institute considered that the standard of reasonableness was not altered by an accused's distorted perceptions or judgment caused by intoxication. However, the Institute considered that it was appropriate for the effect on a person's physical capabilities/capacities (coordination and motor skills) to be taken into account in determining whether the force used was reasonable.⁹⁷

2.4.5 In considering the issue of intoxication and criminal responsibility, the Institute proposed a model of reform that would govern the relationship between intoxication and all criminal defences (not just self-defence). In determining whether evidence of intoxication could be relied on by an accused as an exculpatory factor, the Institute's view was that a distinction should be made between purely objective tests and tests which were not wholly objective. The general principle supported by the Institute was that intoxication was relevant as an exculpatory factor to any subjective test, to any partially subjective test but not to any wholly objective test.⁹⁸ Thus, the recommendations that were made in relation to self-defence contained in the *Criminal Code* (Tas) s 46 were based on principle and consistency. These are sound reasons to continue to support the earlier recommendations of the Institute.

2.4.6 However, in view of any concerns raised in response to this Issues Paper about the reliance by intoxicated offenders on self-defence, it may be that it is appropriate to revisit these recommendations. It may be that broader policy concerns about the criminal responsibility of intoxicated offenders mean that the view is taken that evidence of intoxication should be excluded from a consideration of the circumstances as the accused believed them to be for the purposes of self-defence.

2.4.7 In addition, the Institute is aware of concerns about reliance on self-defence by offenders affected by methamphetamine. Methamphetamine (also known as ice or crystal meth) is a potent form of amphetamine that acts as a central nervous system stimulant.⁹⁹ There is increased community concern about the consequences of methamphetamine use and its association with criminal behaviour.¹⁰⁰ There is also research evidence that demonstrates a link between methamphetamine use

⁹⁵ TLRI, above n 92, [6.9.27].

⁹⁶ Ibid [6.9.7].

⁹⁷ There is agreement with this approach in Canada, see Paciocco, above n 58, who writes that 'when it comes to evaluating the vulnerability of the accused and his reasonable need for violence (as opposed to the quality of his subjective judgment) intoxication will be a relevant consideration. For this purpose alone it can be considered during the objective evaluation (*R v Dorion* (1972) 18 CRNS 127 (NBCA)) In essence, a lack of sobriety is a relevant physical characteristic, but its impact on the functioning of the mind of the accused is not to be taken into account': at 40.

⁹⁸ TLRI, above n 92, [6.9.28].

⁹⁹ Australian Drug Foundation, <*Amphetamines*, <http://www.druginfo.adf.org.au/drug-facts/amphetamines>>.

¹⁰⁰ E Hope, 'Police call for help on drugs', *The Mercury*, Sunday, April 27, 2014; K Moor, "'Ice' use hits pandemic proportions', *The Mercury* (Hobart) 29 April 2014; D Dingwall, 'Ice begets burglary boom', *The Advocate* (Launceston) 5 May 2014.

and violent behaviour.¹⁰¹ Methamphetamine use potentially interacts with self-defence in a number of ways:

- (1) the offender may experience a heightened perception of or sensitivity to threat as a result of the toxic effects of the drug; or
- (2) the offender may experience a drug induced psychotic episode that is part of an intoxication syndrome or is relatively short-lived due to the direct psychological effects of an ingested substance; or
- (3) the use of methamphetamine may be associated with the development of a psychotic illness that then has an independent long-term existence;
- (4) the offender's drug induced psychosis may be a result of substance use interacting with a pre-existing mental illness.¹⁰²

Drug use then also potentially raises the issue of insanity (and the interaction of intoxication, insanity and self-defence). It raises questions in regard to whether an offender is able to rely on a mistaken belief in the need for self-defence that arises from intoxication and/or a delusion associated with a mental illness.

2.4.8 Although there is a concern about increased methamphetamine use, it is the Institute's preliminary view that it is not necessary for the purpose of defining the relationship between self-defence and intoxication to make separate provision for methamphetamine use. There does not seem to be any principled basis for distinguishing between potential causes of an accused's intoxication. In any event, as a practical matter, if an offender has consumed other drugs such as alcohol, or cannabis (in addition to methamphetamine) it would be very difficult to unpick the effect on the psychological state of an offender that could be attributed to a particular drug and to assert that the accused's mistaken perception or psychotic state was attributable to methamphetamine alone as opposed to the combined effect of the offender's overall drug use. It follows that it is the Institute's preliminary view that the approach taken to intoxication should apply to all types of self-induced intoxication.

2.4.9 In relation to insanity, similarly, there does not appear to be any basis for making a distinction between the approach to drug-induced psychosis attributable to methamphetamine and drug-induced psychosis attributable to other drug use. Currently, the *Criminal Code* (Tas) s 17(1) recognises that intoxication may bring an offender within the insanity rules contained in the *Criminal Code* (Tas) s 16 if the accused's intoxication has caused a disease of the mind.¹⁰³ In assessing whether the accused is suffering a disease of the mind, 'the distinction is between a defect of reason resulting from an underlying condition and a defect of reason caused by something external'.¹⁰⁴ Psychosis that is a direct result of the ingestion of the drug would not fall within the scope of a mental disease ((2) above) but it is likely that psychosis that results in mental disturbance (even if initially occasioned by drug use) would fall within the law of insanity ((3) and (4) above).¹⁰⁵ If the accused's psychosis falls within the

¹⁰¹ R McKetin, D Lubman, J Najman, S Dawe, P Butterworth and A Baker, 'Does Methamphetamine Use Increase Violent Behavior? Evidence from a Prospective Longitudinal Study' (2014) 109 *Addiction* 798.

¹⁰² See A Carroll, B McSherry, D Wood and S Yannoulidis, 'Drug-induced Psychoses and Criminal Responsibility' (2008) 26 *Behavioural Sciences and the Law* 633, 634.

¹⁰³ See Blackwood and Warner, above n 3, 294. See for example, *Reilly*, unreported Serial No 62/1979, where it was accepted that alcoholic paranoid psychosis fell within the definition of disease of the mind.

¹⁰⁴ Carroll et al, above n 102, 635 referring to *R v Radford* (1985) 42 SASR 226. See also *Jeffrey* [1982] Tas R 199, 227 (Nettlefold J).

¹⁰⁵ *Ibid* 648–49.

definition of a mental disease, the relationship between insanity and self-defence will be governed by the approach taken to that issue.¹⁰⁶

2.4.10 It is also the view of the Institute that it is desirable to clarify the interaction of self-defence and intoxication, even in the event that the current law is amended and a requirement of reasonableness inserted. This is because it is unclear whether the insertion of a requirement that the accused's belief be based on reasonableness grounds will mean that evidence of intoxication is necessarily excluded from the issue of self-defence. At common law, it has been accepted that intoxication is relevant to the requirement that there be reasonable grounds for the accused's belief.¹⁰⁷ However in other jurisdictions, self-induced intoxication is not taken into account as a relevant factor supporting the existence of reasonable grounds for the accused's belief.¹⁰⁸ This was also the approach of the Tasmanian Court of Criminal Appeal in *McCullough v The Queen*¹⁰⁹ decided under the old self-defence provision that required reasonable apprehension and beliefs based on reasonable grounds. It is also made clear in Victoria, in relation to homicide offences, where legislation provides that self-induced intoxication is not relevant to questions of whether there are reasonable grounds for the belief of the accused.¹¹⁰ This reflects the recommendations of the VLRC:

To allow self-induced intoxication to be taken into account in determining the reasonableness of the accused's actions would be to risk absolving a person of criminal responsibility simply on the basis that he or she was drunk, or under the influence of drugs, at the time of the offence. Self-defence ... [is] a complete defence to murder. In the Commission's view, this justifies a requirement that where an accused kills while intoxicated and that intoxication is self-induced, the reasonableness of his or her action should be considered against that of a person who is not intoxicated.¹¹¹

The Tasmania Law Reform Institute also previously expressed the view that intoxication should not be relevant to a test based on reasonableness or reasonable grounds.¹¹²

2.4.11 If legislation is introduced that limits the ability of an offender to rely on evidence of intoxication in relation to self-defence, it will be necessary to consider the position of involuntary intoxication, as it may be thought inappropriate to extend the restriction to offenders who do not voluntarily consume alcohol or drugs. Involuntary intoxication, although uncommon, 'embraces a wide number of cases, such as intoxication produced by trickery or fraud; duress or coercion; the unforeseen side-effects of a drug; or by unwitting inhalation of fumes or gas'.¹¹³ In Victoria, a distinction is made between voluntary and involuntary intoxication for the purposes of self-defence — with an offender who is involuntarily intoxicated having their actions judged for the purposes of self-defence according to the standard of the reasonable person intoxicated to the same extent as the offender. In contrast, if intoxication is voluntary it is not relevant for self-defence. The *Crimes Act 1958* (Vic) provides:

¹⁰⁶ See [2.3].

¹⁰⁷ *R v Conlon* (1993) 69 A Crim R 92.

¹⁰⁸ See *R v Mrzljak* (2004) 152 A Crim R 315, [84] (Holmes J) referring to *McCullough v The Queen* [1982] Tas R 41; *R v Graham* [1995] QCA 190 (Queensland); *Aubertin v Western Australia* (2006) 33 WAR 87, [43]–[44], E Colvin, 'Abusive Relationships and Violent Responses' (2009) 42 *Texas Tech Law Review* 339, 350 (Western Australia).

¹⁰⁹ [1982] TAS R 43.

¹¹⁰ *Crimes Act 1958* (Vic) s 322T.

¹¹¹ Final Report [3.174]. See also Recommendation 20 that provides that '[i]f an accused was intoxicated at the time of the homicide, and that intoxication was self-induced, in determining whether any part of a defence based on reasonable belief exists, or whether the accused's response in the circumstances was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated'.

¹¹² See TLRI, above n 92, [6.9.33].

¹¹³ Fairall and Yeo, above n 51, [12.28].

322T Intoxication

...

- (4) If a person's intoxication is not self-induced, in determining whether any part of a defence to an offence relying on reasonable belief or reasonable response exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.
- (5) For the purposes of this section, intoxication is self-induced unless it came about—
 - (a) involuntarily; or
 - (b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or
 - (c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
 - (d) from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.
- (6) Despite subsection (5), intoxication is self-induced in the circumstances referred to in subsection (5)(c) or (d) if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control.¹¹⁴

This approach is consistent with the approach taken in the *Criminal Code* (Tas) to intoxicated mistakes in relation to sexual offences, where an offender is precluded from relying on a mistake caused by self-induced intoxication (but not involuntary intoxication).¹¹⁵

Question 8:

Should evidence of intoxication be considered for the purposes of self-defence?

In particular should it be considered:

- (a) for the purpose of assessing the accused's belief in the need for self-defence?

This would mean that the accused's state of intoxication could be taken into account for the purposes of determining whether the accused had a belief in the need for self-defence.

- (b) for the purpose of determining the circumstances as the accused believes them to be?

This would mean that the accused's use of force would be assessed on the basis of the circumstances as the accused believed them to be, even if the accused's perception of circumstances arose from a drunken or drug-induced mistake.

- (c) as a physical characteristic of the accused in determining whether the response was reasonable?

This would mean that the accused could rely on their reduced capacity to respond attributable to intoxication in assessing whether the response was reasonable.

¹¹⁴ Section 322T replaces the previous s 9AJ of the *Crimes Act*. See *Crimes Amendment (Abolition of Defensive Homicide) Bill 2014* (Vic) Explanatory Memorandum, 11–12.

¹¹⁵ *Criminal Code* (Tas) s 14A.

- (d) if a requirement of reasonableness is inserted in relation to the accused's belief in the need to use defensive force (see Question 1), for the purposes of assessing whether there were reasonable grounds for the accused's belief or for the purposes of assessing if the accused's belief was reasonable in the circumstances?

This would mean that the assessment of the reasonableness of the accused's belief in relation to the necessity of using defensive force or the assessment of whether there were reasonable grounds for the accused's belief would be made on the basis of the circumstances of the particular accused, including the accused's state of intoxication.

Question 9:

Should intoxication (including drug induced psychosis that does not amount to a mental illness) that is caused by methamphetamine use be treated differently for the purposes of self-defence in the *Criminal Code* (Tas) s 46 from intoxication arising from other causes?

Question 10:

Should drug-induced psychosis that falls within the definition of a mental disease be treated differently for the purposes of self-defence in the *Criminal Code* (Tas) s 46 from mental illness arising from other causes?

Question 11:

If restrictions are placed on reliance by an offender on an intoxicated mistake for the purposes of self-defence, should an exception be made for offenders in the case of intoxication that is not self-induced?

2.5 Domestic violence

2.5.1 Over many years, concerns have been raised about the failure of self-defence to adequately accommodate the experience of people (typically women) who kill in response to prolonged domestic violence. This is discussed at [2.1.4]. This issue is an important consideration in any proposed reform of self-defence. As acknowledged by McMahon, '[a] potent force — perhaps the *most* potent — underpinning both the evolution at common law and recent statutory reforms of the law of self-defence in Australia has been concern for the position of what have come to be called “battered women” defendants in homicide trials’.¹¹⁶

2.5.2 A possible solution to address the difficulties experienced by family violence victims could be to make legislative changes to allow self-defence to better accommodate the claims of those who use violence in response to domestic violence. This involves addressing wider considerations than the substantive law of self-defence, such as the evidentiary provisions and provisions in relation to jury directions. Several possible options have been identified that are based on reforms in other jurisdictions. These include making legislative change to:

- (1) facilitate the reception of evidence of family violence by the court where a family violence victim kills their abuser;
- (2) specify that imminence is not necessary where self-defence is raised in the context of family violence;
- (3) provide for jury directions where self-defence is raised in the context of family violence.

¹¹⁶ M McMahon, 'Homicide, Self-defence and the (Inchoate) Criminology of Battered Women' 9 (2013) 37 *Criminal Law Journal* 79, 79.

2.5.3 (1) **Legislative change to facilitate reception of evidence of family violence.** It is widely acknowledged that a crucial factor in accommodating the self-defence claims of victims of domestic violence is the ability to communicate to the jury the dynamics of domestic violence and to allow the jury to understand the lived experiences of those subjected to ongoing domestic abuse.¹¹⁷ To this end, both the Western Australian and Victorian Law Reform Commissions made recommendations that sought to provide guidance on the application of self-defence in the context of family violence, particularly in relation to the admission of evidence of family violence.¹¹⁸ In Victoria, legislative reforms (contained in the *Crimes Act 1958* (Vic) ss 322J and 322M) specify the range of evidence that can be adduced about the history of the relationship and the nature of violence in the relationship to prove both the subjective (a belief in the necessity of using force) and the objective (the existence of reasonable grounds for the belief) elements of the test.¹¹⁹ These provisions also allow for the introduction of ‘social framework evidence’ that permits evidence of the nature and dynamics of domestic violence to be introduced with a view to dispelling myths about domestic violence that exist in the community.¹²⁰

322J Evidence of family violence

(1) Evidence of family violence, in relation to a person, includes evidence of any of the following—

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

(2) In this section—

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

family member, in relation to a person, includes—

- (a) a person who is or has been married to the person; or
- (b) a person who has or has had an intimate personal relationship with the person; or
- (c) a person who is or has been the father, mother, step-father or step-mother of the person; or

¹¹⁷ See WALRC above n 18, 271–276, 290–293; VLRC, above n 31, [4.96]–[4.138].

¹¹⁸ See WALRC, above n 18, Chapter 6; VLRC, above n 31, Chapter 4.

¹¹⁹ Hopkins and Eastal, above n 44, 134. The new provisions, ss 322J and 322M were inserted by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) and replaced *Crimes Act 1958* (Vic) s 9AH which was to the same effect. See Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic), Explanatory Memorandum, 7–8.

¹²⁰ VLRC, above n 31, [4.96].

- (d) a child who normally or regularly resides with the person; or
- (e) a guardian of the person; or
- (f) another person who is or has been ordinarily a member of the household of the person;

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

violence means—

- (a) physical abuse;
- (b) sexual abuse;
- (c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—
 - (i) intimidation;
 - (ii) harassment;
 - (iii) damage to property;
 - (iv) threats of physical abuse, sexual abuse or psychological abuse;
 - (v) in relation to a child—
 - (A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or
 - (B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.
- (3) Without limiting the definition of *violence* in subsection (2)—
 - (a) a single act may amount to abuse for the purposes of that definition;
 - (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

322M Family violence and self-defence

- (1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—
 - (a) the person is responding to a harm that is not immediate; or
 - (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.
- (2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—
 - (a) a person has carried out conduct while believing it to be necessary in self-defence; or

- (b) the conduct is a reasonable response in the circumstances as a person perceives them.

2.5.4 This model has been supported in the recent review of family violence and defences to homicide conducted by the ALRC and the New South Wales Law Reform Commission (NSWLRC)¹²¹ and could usefully provide a model for reform in Tasmania. It is noted that Queensland is the only other Australian jurisdiction that has a provision that addresses the admissibility of evidence of domestic violence. This is contained in the *Evidence Act 1977* (Qld) s 132B and is less detailed than the Victorian provision. It makes admissible ‘relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed’.¹²²

2.5.5 (2) **Legislative change to specify that imminence is not necessary where self-defence is raised in the context of family violence.** Imminence is one of the factors relevant to the assessment of whether the accused’s use of force was reasonable in the circumstances as the accused believed them to be.¹²³ Although imminence is not a legal requirement for the defence of self-defence, the focus of self-defence continues to be on the attack or threat that is in close temporal proximity to the use of force. This focus has been identified as a barrier to reliance on self-defence by women who kill in response to domestic violence.¹²⁴ It is argued that a focus on imminence does not acknowledge the reality that the experience of domestic violence is not a list of discrete and disconnected acts of violence that have a defined beginning and end — instead it is a cumulative and complex experience with the threat of violence ever present. The nature of domestic violence does not fit well with the focus of the legal inquiry where the most important assault or threat is that identified immediately before the use of force.¹²⁵ This has the effect that the previous violence perpetrated against the accused is relegated to ‘background’ thereby minimising the prior violence in the relationship and distorting the threat faced by the accused.¹²⁶

2.5.6 As a result of these concerns, the VLRC’s view was that legislative intervention was necessary to make it clear that ‘actions may be carried out in self-defence, where the threat is not

¹²¹ The ALRC and NSWLRC’s examination of the relationship between homicide defences and evidence of family violence reported that ‘[s]takeholders unanimously supported the Commissions’ proposal for the enactment of legislative guidance about the potential admissibility of family-violence related evidence in the context of homicide defences’ and that ‘[t]he majority of submissions supported provisions along the lines of the *Crimes Act 1958* (Vic) s 9AH without elaboration’: above n 44, [14.87]. Recommendation 14-5 provided: ‘State and territory criminal legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard’: at 654.

¹²² See discussion in Taskforce on Women and the Criminal Code, *Report of the Task Force on Domestic Violence to the Queensland Government*, Report (2000), 140–44 where deficiencies of the provision are discussed and the Taskforce recommends its repeal and replacement with a new provision. See also VLRC, above n 59, 134–35. In their 2008 report, Mackenzie and Colvin recommended that a provision based on the Victorian provision be introduced in Queensland: above n 16, 58–9.

¹²³ Traditionally, imminence, as well as a duty to retreat and proportionality of response, were formal requirements for self-defence. This is no longer the case but these factors continue to be relevant to whether the force used was reasonable, see Fairall and Yeo, above n 51, [10.23]–[10.30], [10.40]–[10.48]. For example in *Wright v Tasmania* [2005] TASSC 113, Blow J referred to factors that limited the defendant’s option such as having no telephone, having misplaced his keys and being unable to leave his house, and his status as a newcomer to town: at [28]. In *Rudman v R* [1997] TASSC 16 the trial judge directed the jury to consider ‘the possibility that he could have done something else to avoid the attack if he felt threatened with an attack. Could he have done something less violent to deflect the attack. Could he have retreated. Could he have sidestepped. Could he have taken any form of evasive action to avoid the attack rather than using force to provide himself with a defence. ... Now again, I stress that his failure to have recourse to any one of those alternatives is plainly not decisive but they are matters that obviously would have to be considered. What could he have done other than what he did’: at [21]. The Court of Criminal Appeal ruled that there was no error in the trial judge’s direction.

¹²⁴ See VLRC, above n 31, [3.52]–[3.64]; WALRC, above n 18, 166–67, 274.

¹²⁵ S Tarrant, ‘Something is Pushing Them To the Side of Their Own Lives: A Feminist Critique of the Law and Laws (1990) 20 *University of Western Australia Law Review* 573, 599.

¹²⁶ J Tolmie, ‘Provocation or Self-defence for Battered Women Who Kill’ in S Yeo (ed), *Partial Excuses to Murder* (Federation Press, 1991) 69.

immediate, but ... more remote in time'.¹²⁷ The Commission recommended that a provision be included in the self-defence provision that was based on a belief in the inevitability of the harm (rather than its immediacy).¹²⁸ In implementing the recommendations of the VLRC, the *Crimes Act 1958* (Vic) s 9AH expressly provided that in circumstances where family violence is alleged, a person may be acting in self-defence:

... even if –

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

This provision allowed for an accused to rely on self-defence, even if the threat was not immediate and even if the response was disproportionate to the harm. In doing so, it placed emphasis on the necessity of the accused using violence rather than on the imminence of the threat in assessing the accused's conduct.¹²⁹

2.5.7 Changes to the Victorian law of self-defence were introduced to Parliament following a review into the operation of the defensive homicide provisions conducted by the Department of Justice.¹³⁰ While significant deficiencies were identified, the review stated that it was important that any changes made to the defensive homicide provision and the law of self-defence 'did not affect the operation of other important changes introduced'.¹³¹ These important changes included the expanded operation of self-defence in cases of family violence. This has been adopted by the Victorian Government and the legislative reforms passed by Parliament have retained an equivalent provision to the former s 9AH of the *Crimes Act 1958* (Vic) in sections 322J and 322M.¹³²

2.5.8 Similarly, Western Australia has also made legislative reform to the defence of self-defence contained in the *Criminal Code* (WA) s 248 to expressly provide that a person acts in self-defence if they believe that their act is necessary to defend himself or herself or another person 'from a harmful act, including a harmful act that is not imminent'.¹³³ This means that imminence is no longer a decisive factor in self-defence. It is noted that, unlike the Victorian provision, this provision applies generally and is not restricted to circumstances of family violence.¹³⁴

2.5.9 (3) **Legislative change to provide for jury directions where self-defence is raised in the context of family violence.** Community misconceptions exist about family violence and it has been acknowledged that the trial judge has a crucial role to play in addressing these misconceptions by 'assisting juries to recognise the significance of prior violence and to make the necessary connections between expert evidence [about domestic violence] and the issues at trial'.¹³⁵ Even if expert evidence is not adduced, an important function for the trial judge is to 'address possible juror misconceptions about family violence' and to explain the relevance of family violence to the elements of self-

¹²⁷ VLRC, above n 31, [3.61].

¹²⁸ VLRC, above n 31, Recommendation 4.

¹²⁹ A Guz and M McMahon, 'Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-defence in Australia' (2011) *Flinders Law Journal* 79, 111–12.

¹³⁰ Department of Justice (Victoria), *Defensive Homicide: Proposals for Legislative Reform*, Consultation Paper (2013).

¹³¹ *Ibid.*

¹³² See Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) Explanatory Memorandum, 7–8.

¹³³ *Criminal Code* (WA) s 284(4)(a). It is noted that the WALRC concluded that it was not desirable to specifically refer to imminence within the self-defence test (as the Victorian provision does). Instead, it was considered that the concepts of imminence and proportionality should be dealt with by jury directions: WALRC, above n 18, 290–91. See also Recommendation 22.

¹³⁴ Guz and McMahon, above n 129, 112–13.

¹³⁵ VLRC, above n 31, [4.4].

defence.¹³⁶ In Victoria, changes to the *Jury Directions Act 2013* (Vic) were introduced by the *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic). The amendments created a new jury direction that may be given where self-defence or duress are raised in the context of family violence:

32 Direction on family violence

- (1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with subsection (6) and all or specified parts of subsection (7).
- (2) The trial judge must give the jury a requested direction on family violence unless there are good reasons for not doing so.
- (3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this section if the trial judge considers that it is in the interests of justice to do so.
- (4) The trial judge—
 - (a) must give the direction as soon as practicable after the request is made; and
 - (b) may give the direction before any evidence is adduced in the trial.
- (5) The trial judge may repeat a direction under this section at any time in the trial.
- (6) In giving a direction under this section, the trial judge must inform the jury that—
 - (a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and
 - (b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and
 - (c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending;...
- (7) If defence counsel requests that the direction include any of the following matters, the trial judge, subject to subsection (2), must include those requested matters in the direction—
 - (a) that family violence—
 - (i) is not limited to physical abuse and may include sexual abuse and psychological abuse;
 - (ii) may involve intimidation, harassment and threats of abuse;
 - (iii) may consist of a single act;
 - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
 - (b) if relevant, that experience shows that—

¹³⁶ Ibid [4.140].

- (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
 - (ii) it is not uncommon for a person who has been subjected to family violence—
 - (A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
 - (B) not to report family violence to police or seek assistance to stop family violence;
 - (iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—
 - (A) family violence itself;
 - (B) cultural, social, economic and personal factors;
 - (c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.
- (8) If the accused is unrepresented, the trial judge may include in the direction any of the matters referred to in subsection (7)(a), (b) or (c).
- (9) This section does not limit any direction that the trial judge may give the jury in relation to evidence given by an expert witness.

The directions are aimed to counter community misunderstandings about ‘how the dynamics of family violence may impact on the behaviour of family violence victims, such as why victims of family violence remain in abusive relationships’.¹³⁷

Question 12:

Should reforms be made to the criminal law in Tasmania to facilitate the reception of evidence of family violence in relation to the defence of self-defence?

Question 13:

Should reforms be made to the criminal law in Tasmania to specify that imminence is not necessary where self-defence is raised in the context of family violence?

Question 14:

Should reforms be made to the criminal law in Tasmania to provide for jury direction where self-defence is raised in the context of family violence?

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

2.6.1 Unlike other Australian jurisdictions, Tasmania does not have a partial defence that reduces murder to manslaughter in cases of mistaken or excessive self-defence. Neither does Tasmania have a partial defence akin to the Queensland defence of self-preservation in a domestic relationship. There

¹³⁷ *Jury Directions Act 2013* (Vic) s 32. See also Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) Explanatory Memorandum, 21–23.

is also no defence of diminished responsibility in Tasmania that would operate as a partial defence to murder where the accused suffers from an abnormality of mind and where the abnormality substantially impairs the accused's mental responsibility for their conduct.

2.6.2 The Institute is seeking feedback on whether any of these partial defences should be introduced. It can be argued that these defences are unnecessary whilst Tasmania has a broad self-defence provision but the introduction of partial defences may need reconsideration if the scope of self-defence is narrowed by the introduction of a reasonableness requirement.

Mistaken self-defence

2.6.3 If the *Criminal Code* (Tas) s 46 is amended to require that the accused's belief in the need to use defensive force be reasonable or based on reasonable grounds, it may be thought that it is desirable to introduce a partial defence to murder in cases where the accused genuinely (but mistakenly and unreasonably) believes that defensive force is necessary. Currently, under the *Criminal Code* (Tas) s 46 such an accused would have a complete defence, provided the force used was reasonable in the circumstances as the accused believed them to be. If the law is changed, it may be considered unduly harsh for such a person to be convicted of murder. Alternatively, it may be thought that this is a matter that is best dealt with at the sentencing stage.

2.6.4 In Victoria, the issue of mistaken self-defence was initially addressed through the creation of an offence of defensive homicide (rather than the creation of a partial defence) in the reforms to the law of self-defence. However, the operation of the law was criticised and the defence has been repealed. While it existed, the offence of defensive homicide was contained in the *Crimes Act 1958* (Vic) s 9AD, which provided:

A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder [that is, carries out the conduct while believing the conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury] is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief ...

This meant that a person who had a 'genuine belief in the need for lethal violence, but no reasonable basis for the belief, will be acquitted of murder but convicted of defensive homicide'.¹³⁸

2.6.5 Although the offence was of general application, an intention of creating the offence (as part of the larger reforms to homicide) was 'to improve the legal position of women who kill abusive partners and uphold contemporary community standards regarding culpability for murder'.¹³⁹ Since its implementation, the operation of the offence was criticised on the basis that it had been ineffective to achieve its intended purpose. It was criticised for not providing adequate protection to women who kill their abusive partner,¹⁴⁰ while at the same time allowing unmeritorious defendants to avoid a conviction for murder. It was also criticised as resulting in the reintroduction of the controversial partial defence of provocation under another guise and legitimising lethal male violence.¹⁴¹ In response to these criticisms, the Victorian Department of Justice published a Discussion Paper in

¹³⁸ Toole, above n 40, 265.

¹³⁹ Ibid 286.

¹⁴⁰ See *ibid*; K Fitz-Gibbon, 'The Victorian Operation of Defensive Homicide: Examining the Delegitimisation of Victims in the Criminal Court System' (2012) *Griffith Law Review* 555.

¹⁴¹ Fitz-Gibbon, above n 140; D Tyson, 'Victoria's New Homicide Laws: Provocation Reforms or More Stories of Women 'Asking for it?'' (2011) 23 *Current Issues in Criminal Justice* 203; K Fitz-Gibbon and S Pickering, 'Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 159.

2010¹⁴² and then a Consultation Paper in 2013 setting out proposals for reform, including the abolition of the offence of defensive homicide.¹⁴³ As a result of this review, the offence of defensive homicide has been repealed.¹⁴⁴ In addition, the reforms changed the law of self-defence by removing the objective assessment of the accused's belief in the need for self-defence. This means that the law now contains the same hybrid objective/subjective test as the current Tasmanian position. It requires that the accused believed that the conduct was necessary and that the conduct was a reasonable response in the circumstances as the accused perceived them to be.¹⁴⁵

2.6.6 Although the Victorian experience has been problematic, it may be that a partial defence (rather than a separate offence) could be introduced in Tasmania if a requirement of reasonableness is inserted into the *Criminal Code* (Tas) s 46 in relation to the accused's belief in the need for self-defence. This would arguably make the defence more closely aligned to self-defence (in the same way that excessive self-defence operates) and this may restrict the scope of the defence and assist in excluding spurious and undeserving cases.

Question 15:

Should a partial defence of mistaken self-defence be introduced in Tasmania if the *Criminal Code* (Tas) s 46 is amended by the insertion of a requirement of reasonableness in relation to the accused's perception of the circumstances? Or is mistaken self-defence a matter that can be appropriately dealt with as part of the sentencing process?

Excessive self-defence

2.6.7 In Western Australia, the *Criminal Code* (WA) s 248(3) reduces murder to manslaughter where the force used would be an act done in self-defence but for the fact that it was not a reasonable response in the circumstances as the person believed them to be. This is concerned with the issue of whether excessive force was used in the circumstances, as the accused believed them to be, rather than the situation where a person makes an unreasonable mistake about the circumstances that exist. There is also a partial defence of excessive self-defence in New South Wales and South Australia.¹⁴⁶

Question 16:

Should a partial defence of excessive self-defence be introduced in Tasmania? If so, should it be introduced only if the *Criminal Code* (Tas) s 46 is amended by the insertion of a requirement of reasonableness in relation to the accused's perception of the circumstances? Or is excessive self-defence a matter that can be appropriately dealt with as part of the sentencing process?

'Defence of preservation in an abusive domestic relationship'

2.6.8 In Queensland, a partial defence (contained in the *Criminal Code* (Qld) s 304B) applies to reduce murder to manslaughter if the killing is for preservation in an abusive domestic relationship. This provision was introduced as a result of a review of the application of the criminal law to women who kill violent partners.¹⁴⁷ It provides that a person is guilty of manslaughter only if:

¹⁴² Department of Justice (Victoria), *Review of the Offence of Defensive Homicide*, Discussion Paper (2010).

¹⁴³ Ibid Proposal 1.

¹⁴⁴ *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 3.

¹⁴⁵ *Crimes Act 1958* (Vic) s 322K.

¹⁴⁶ *Crimes Act 1900* (NSW) s 421; *Criminal Law Consolidation Act 1935* (SA) s 15(2).

¹⁴⁷ Mackenzie and Colvin, above n 67; Mackenzie and Colvin, above n 16.

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

2.6.9 The provision has been criticised on the basis that the only difference between reliance on the complete defence of self-defence and the partial defence of the abusive domestic relationship defence is the absence of the requirement for a triggering incident — in the self-defence provision under the *Criminal Code* (Qld) s 271(2) it is necessary for there to be a triggering assault.¹⁴⁸ The similarity between the partial defence in Queensland and the complete defence of self-defence in other jurisdictions has also been observed.¹⁴⁹ However, some commentators have supported the defence in the context of the mandatory sentencing regime for murder that exists in Queensland. The existence of a 'safety net' partial defence has allowed some women to run concurrent self-defence and self-preservation defences at trial (rather than negotiating a plea).¹⁵⁰

Question 17:

Should a partial defence of killing for self-preservation in a domestic relationship be introduced in Tasmania? If so, how should the defence be formulated?

Diminished responsibility

2.6.10 Diminished responsibility is a partial defence that reduces murder to manslaughter. In Australia, diminished responsibility is available as a defence in the Australian Capital Territory, New South Wales, the Northern Territory and Queensland.¹⁵¹ Although the provisions are not uniform, three common elements can be identified:

- the accused must have been suffering from an abnormality of mind;
- the abnormality of mind must have arisen from a specific cause; and
- the abnormality of mind must have substantially impaired the accused's capacity to understand their actions or to know that they ought not to do the act or to control their actions.¹⁵²

Diminished responsibility is also a defence in the United Kingdom.¹⁵³ As with insanity, the burden of proof in relation to diminished responsibility is on the accused to establish the defence on the balance of probabilities. Conditions that have been held to amount to an abnormality of the mind include psychosis, organic brain disorder, schizophrenia, epilepsy, hypoglycaemia, depression, post-traumatic stress disorder, and anxiety.¹⁵⁴ Personality disorders have also been held to come within the term.¹⁵⁵

¹⁴⁸ M Edgely and E Marchetti, 'Women who Kill their Abusers: How Queensland's New Abusive Domestic Relationship Defence Continues to Ignore Reality' (2011) 13 *Flinders Law Journal* 125, 140. For criticism of the Queensland approach, see also: Sheehy, Stubbs and Tolmie, above n 44, 480; Eastal and Hopkins, above n 44, 135–6.

¹⁴⁹ Hopkins and Eastal, above n 44, 135.

¹⁵⁰ H Douglas, Panel Discussion (Homicide Law Reform in Victoria: Prospects and Retrospect, Melbourne, 15th and 16th August 2014).

¹⁵¹ *Crimes Act 1900* (ACT) s 14; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (NT) s 159; *Criminal Code* (Qld) s 304A.

¹⁵² Bronitt and McSherry, above n 44, [5.85].

¹⁵³ *Coroners and Justice Act 2009* (UK) s 52. See discussion in Simester, et al, above n 26, 727-35.

¹⁵⁴ VLRC, above n 59, [5.104].

Diminished responsibility has been a controversial defence with divergent views expressed by law reform bodies that have examined the appropriateness of the defence.¹⁵⁶

Question 18:

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

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

2.7.1 An issue raised in the Tasmania Law Reform Institute's project plan for the review of the law relating to self-defence was the consistency between the provisions of the *Criminal Code* (Tas) that apply to self-defence (contained in s 46) and the defences of prevention of commission of a crime (contained in s 39) and defence of dwelling-house (contained in s 40). The *Criminal Code* (Tas) s 39 provides:

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

2.7.2 This contains both subjective and objective requirements. The person must believe that the force used is necessary in order to prevent the commission of a crime (or an act being done that would amount to a crime), which would be likely to cause immediate and serious injury to any person or property (subjective). In addition, the belief must be based on reasonable grounds (objective).¹⁵⁷

2.7.3 Section 39 may be raised as an additional or alternative defence to self-defence contained in s 46 of the *Code* in some cases — fending off an imminent assault for example. In these circumstances, there is a clear overlap between self-defence and the prevention of commission of a crime because if a person is acting in self-defence, then they are usually preventing a crime being committed. However, there are differences in the scope and operation of self-defence and the defence of prevention of a crime. Section 39 only makes lawful, force that is used to *prevent a crime* and so does not operate if a person defends themselves against conduct which is not criminal (such as if the person likely to cause serious injury to property or person is not committing a crime on account of their infancy or mental disease).¹⁵⁸ This restriction does not apply to self-defence. There is also a statutory requirement that the belief relates to a crime that is likely to cause both immediate and serious injury (whereas there is no requirement of law that there is a threat of immediate harm for self-defence and neither is there a requirement as to the seriousness of the perceived threat). In addition, unlike s 46, s 39 includes a requirement of a belief on reasonable grounds that the use of such force was necessary.

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

¹⁵⁵ Bronitt and McSherry, above n 44, [5.90].

¹⁵⁶ See NSWLRC, *Partial Defences to Murder: Diminished Responsibility*, Report No 82 (1997); Law Commission for England and Wales, *Partial Defences to Murder*, Final Report, Law Com No 290, (2004); VLRC, above n 31; WALRC, above n 18; Model Criminal Code Officers Committee, *Fatal Offences against the Person*, Discussion Paper (1998); NZLC, above n 44, [140]; NZLC, *The Partial Defence of Provocation*, Report 98 (2007) [12].

¹⁵⁷ See *Goss v Nicholas* [1960] Tas SR 133, 135 (Crawford J).

¹⁵⁸ Simester et al, above n 26, 782.

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

2.7.5 Whilst claims of self-defence and defence of property share some similarities in that they both arise in circumstances where the conduct of the accused occurs in response to an actual or perceived attack, justifications for the use of force are perhaps less convincing when the threat is to one's property rather than one's person. This is because it is generally agreed that an intruder's right to life prevails over a homeowner's rights in relation to property. This hierarchy of rights is reflected in the legislation. Whereas s 46 entails a subjective inquiry into the accused's belief in the need for self-defence, the sections of the *Code* dealing with defence of property require that the belief in the need for the use of force is based on reasonable grounds.

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

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

As is the case with s 39, s 40 contains both subjective and objective requirements. Firstly, the person must believe that the force used was necessary to prevent forcible entry or eject an intruder (subjective) and that belief must be based on reasonable grounds (objective). Secondly, the person must believe that the intruder intended to commit a crime (subjective) and that belief must be based on reasonable grounds (objective).

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

2.7.8 A number of arguments have been advanced to justify the use of even lethal force in protection of the home.¹⁵⁹ These include that people are more vulnerable in the home and that 'an intrusion into one's premises involves a threat to one's privacy, dignity, and honor, analogous to the threat present in crimes such as rape and kidnapping against which deadly force is considered justified.'¹⁶⁰ It may also be the case that a homeowner, confronted by an intruder in the middle of the night, is not in a position to know their intentions and may respond with an apparently disproportionate degree of force fearing that the intruder intends physical harm to them or the other occupants of the dwelling.

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

¹⁵⁹ Stuart P Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' (1999) *University of Illinois Law Review* 1.

¹⁶⁰ *Ibid* 3–5.

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

2.7.11 If consistency across these defences is considered desirable, there are two ways this could be achieved — either by consolidation in a single provision or by the retention of separate provisions. The Model Criminal Code adopts a single provision approach. The provision (in part) reads:

2.3.17 Self-defence

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

The equivalent NSW provision differs only in one respect. Whereas the MCC provision sanctions the use of force to prevent damage to property or trespass to land where such force does not involve the intentional infliction of death or serious injury (s 2.3.17(3)) lawful force in the NSW provision is limited to force which does not involve the intentional or reckless infliction of death (*Crimes Act 1900* (NSW) s 420).

2.7.12 In the UK recent amendments effected by the *Crime and Courts Act 2013* have reshaped the law of self-defence as it relates to home owners acting against intruders. Whereas the availability of both self-defence and defence of property is conditioned on the use of force which is not *disproportionate* in the circumstances as the accused believed them to be¹⁶¹ the amendments create a separate category of self-defence cases, namely ‘householder cases’, where the availability of the defence depends instead on the use of force which is not *grossly disproportionate* in the

¹⁶¹ *Criminal Justice and Immigration Act 2008* (UK) s 76(6).

circumstances as the accused believed them to be.¹⁶² A ‘householder case’ refers to circumstances in which the accused uses force in self-defence against an intruder in their own residence.¹⁶³ Whilst the new test will have no application in circumstances where the accused relies solely on a claim of defence of property, in householder cases it would seem to sanction the use of even lethal force.

2.7.13 The *Crime and Courts Act 2013* was enacted against the backdrop of continuing public debate about the rights of householders to protect themselves against burglars.¹⁶⁴ Similar concerns can be discerned in the amendments to the self-defence provisions of the South Australian *Criminal Law Consolidation Act 1935*, enacted in 2003. Section 15C now provides that the requirement of reasonable proportionality which applies otherwise to self-defence and defence of property does not apply where D uses force in the circumstances of a home invasion.¹⁶⁵ Accordingly, as long as the accused neither intended to cause death nor was reckless in that regard (as to which see s 15A(1)(b)), defence of property may be a complete defence even where lethal force is applied.

Question 19:

Should the defences of prevention of crime (*Criminal Code* (Tas) s 39) and/or defence of dwelling-house (*Criminal Code* (Tas) s 40) be made consistent with the defence of self-defence so as to contain the same mix of subjective and objective requirements?

Question 20:

If consistency is desirable, how should this be achieved? Should the defence be consolidated in a single provision or should separate provisions be retained?

Question 21:

Should the defence of defence of dwelling house sanction the use of even lethal force?

¹⁶² Ibid s 76(5A) as amended by *Crime and Courts Act 2013* (UK) s 43(2).

¹⁶³ *Criminal Justice and Immigration Act 2008* (UK) s 76(8A). The definition of ‘householder case’ in (8A) is as follows:
For the purposes of this section “a householder case” is a case where—
(a) the defence concerned is the common law defence of self-defence,
(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),
(c) D is not a trespasser at the time the force is used, and
(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

¹⁶⁴ The debate was largely sparked by the case of *R v Martin* [2001] EWCA Crim 2245 and the accompanying media campaign which accompanied Martin’s conviction. After being the victim of a number of burglaries at his isolated farmhouse, Martin had shot at two intruders, killing one and wounding the other. At trial, his claim of self-defence failed.

¹⁶⁵ *Criminal Law Consolidation Act 1935* (SA) s 15C as inserted by *Criminal Law Consolidation (Self Defence) Amendment Act 2003* (SA) s 6.