DEFENDING PRIMARY VICTIMS WHO FACE CRIMINAL CHARGES FOR THE USE OF DEFENSIVE FORCE AGAINST THEIR ABUSIVE PARTNERS: ATTEMPTING TO CHANGE 'LAWS' PRACTICES'

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Australian lawyers, scholars and policy makers have grappled for decades with the barriers faced by victim-survivors in successfully raising self-defence in response to criminal charges for the use of force against their abusive partners. In this article we discuss a recent legal innovation developed to address similar barriers in the New Zealand context. The defence in R v Ruddelle was ground-breaking in Australasia in that expert evidence on 'intimate partner violence entrapment' was admitted at trial from an expert who was not a psychologist or psychiatrist. The aim was to assist the jury in more accurately understanding the facts for the purposes of determining whether the Indigenous defendant's defensive force was 'reasonable' in self-defence. Similar evidence was provided at sentencing. In this article we assess the gains that were made in taking such an approach at sentencing, as well as the limitations of this strategy at trial in this particular case.

I INTRODUCTION

For decades now Australian scholars and defence counsel have grappled with how best to defend women[1] who are charged with criminal offences committed in response to intimate partner violence ('IPV') victimisation.[2] Most of the academic

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1 Whilst not all victim-survivors of intimate partner violence who offend will be women, our languaging reflects the fact that the majority will be: Australian Domestic and Family Violence Death Review Network, *Data Report 2018* (Report, May 2018) 10–11, 19 <https://coroners.nsw.gov.au/documents/reports/ADFVDRN_Data_Report_2018%20(2).pdf>.

2 See, eg, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38(2) *Melbourne University Law Review* 666 ('Securing Fair Outcomes'). Policy-makers and reform bodies have grappled with how to make the application of the defences fairer: see, eg, Victorian Law Reform Commission, *Defences to Homicide* (Final Report, October 2004) <https://www.lawreform.vic.gov.au/wp-content/uploads/2021/07/VLRC_Defences_to_Homicide_Final_Report-1.pdf>.

legal scholarship has focused on the law on self-defence in response to homicide charges. Here, despite the volume of academic work, advocacy and law reform, few women responding with lethal defensive force to attacks by abusive partners are acquitted on the basis that they were acting in reasonable self-defence.[3] Similar challenges have been experienced in the comparable jurisdictions of Canada and New Zealand.[4] Whilst there are likely to be complex and multi-factorial reasons why victim-survivors are not generally successful in raising self-defence, misconceptions as to how IPV operates factually may have played some role and is the issue explored here.[5]

As we have pointed out elsewhere, traditionally 'IPV was understood and responded to as a series of assault crimes, in between which adult victim-survivors were considered free' to leave their abusive partner or access services in order to achieve safety.[6] This has been described as the 'violence model'[7] or the 'bad relationship with incidents of violence'[8] model of IPV. Lawyers 'have looked to mental health professionals, such as psychologists and psychiatrists, to explain [the] victim-survivor's decision-making processes' and, in particular, why she 'failed to make rational safety decisions' and therefore found herself in a situation that had escalated to the point of homicide.[9] Battered woman syndrome[10] was 'an early attempt to provide such an explanation … [but] has been extensively critiqued in the academic literature' both as a scientific concept and as a defence strategy.[11]

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3 Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2282–3 <https://doi.org/10.1177/10778012231156154>; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34(3) *Sydney Law Review* 467, 486 ('Defences to Homicide for Battered Women'); Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 383, 387 <https://doi.org/10.1177/0004865812456855>.

4 Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (University of British Columbia Press, 2014); Law Commission (NZ), *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (Report No 139, May 2016) <https://www.lawcom.govt.nz/assets/Publications/Reports/NZLC-R139.pdf>. For the United States context, see Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000).

5 See Stella Tarrant, Julia Tolmie and George Guidice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 3, Australia's National Research Organisation for Women's Safety, June 2019) 4 <https://anrowsdev.wpenginepowered.com/wp-content/uploads/2019/06/RP.17.10_Tarrant_RR_Transforming-Legal-Understandings-of-IPV.pdf>; Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 36(1) *Melbourne University Law Review* 250, 252.

6 Julia Tolmie, Rachel Smith and Denise Wilson, 'Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework' (2024) 30(1) *Violence Against Women* 54, 56 <https://doi.org/10.1177/10778012231205585>.

7 Evan Stark, 'Coercive Control' in Nancy Lombard and Lesley McMillan (eds), *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, 2013) 17.

8 Julia Tolmie, 'Thinking Differently in Order to See Accurately: Explaining Why We Are Convicting Women We Might Be Burying' [2020] (4) *New Zealand Women's Law Journal* 8, 9.

9 Tolmie, Smith and Wilson (n 6) 56.

10 See Lenore E Walker, 'Battered Women and Learned Helplessness' (1977) 2(3–4) *Victimology* 525.

11 Tolmie, Smith and Wilson (n 6) 56. For a critique, see David L Faigman and Amy J Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Arizona Law Review* 67, 78–9; Marilyn McMahon,

It has been suggested, for example, that evidence the defendant was suffering from a 'syndrome' pre-packages her decisions as the product of her mental health issues and therefore necessarily as unreasonable.[12] Because her defensive force must be 'reasonable' in order to meet the legal requirements for self-defence, this effectively undermines that defence on the facts.[13] Despite such criticism, battered woman syndrome is still used by trial experts, judges and lawyers.[14] A more recent manifestation of the focus on explaining the defendant's perceptions and reactions is expert testimony on the effects of 'trauma' on the defendant's decision making. This consists of evidence that explains how 'current events can trigger past experiences of trauma when victim-survivors [suffer from] conditions like post-traumatic stress disorder' ('PTSD'), along with 'physiological explanations for how people respond to danger – for example, [Walter] Cannon's "fight or flight" theory (with the latter additions of "freeze" and "fawn")'.[15]

A closely related issue is the disciplinary expertise of those permitted or available to give expert testimony at trial. Some courts remain wedded to the notion that the most appropriate experts in these kinds of cases are psychologists and psychiatrists. For example, in *Liyanage v Western Australia*,[16] a case involving a victim-survivor who killed her abusive partner and was arguing self-defence, the Western Australian Court of Appeal rejected expert defence testimony from a social work practitioner with experience working in the family violence sector who was proposing to assess the level of danger that her partner presented to the appellant using IPV risk assessment tools.[17] The court, however, allowed testimony

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'Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome' (1999) 6(1) *Psychiatry, Psychology and Law* 23, 33–4 <https://doi.org/10.1080/13218719909524946>; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations' (1992) 16(6) *Criminal Law Journal* 369, 384–5 ('Defending Battered Women on Trial'); Ian Leader-Elliott, 'Battered but Not Beaten: Women who Kill in Self-Defence' (1993) 15(4) *Sydney Law Review* 403.

12 Sheehy, Stubbs and Tolmie, 'Defending Battered Women on Trial' (n 11) 384; *Osland v The Queen* (1998) 197 CLR 316, 372 [161] (Kirby J).

13 See, eg, *Crimes Act 1961* (NZ) s 48 ('*NZ Crimes Act*'); Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2014) 39(3) *Monash University Law Review* 864, 877–80; *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 657, 661 (Wilson, Dawson and Toohey JJ) ('*Zecevic*').

14 See, eg, *Rowan (a pseudonym) v The King* [2022] VSCA 236 ('*Rowan*').

15 Tolmie, Smith and Wilson (n 6) 57. See Walter B Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage: An Account of Recent Researches into the Function of Emotional Excitement* (D Appleton & Co, 2nd ed, 1929).

16 (2017) 51 WAR 359 ('*Liyanage*'). In the Canadian context, see the discussion in Elizabeth Sheehy, 'Expert Evidence on Coercive Control in Support of Self-Defence: The Trial of Teresa Craig' (2018) 18(1) *Criminology and Criminal Justice* 100. See also Centre for Women's Justice (UK), *Women Who Kill: How the State Criminalises Women We Might Otherwise Be Burying* (Report, February 2021) 8, 49–51 <https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/602a9a87e96acc025de5de67/1613404821139/CWJ_WomenWhoKill_Rpt_WEB-3+small.pdf>.

17 The Court reasoned that this evidence was not relevant to the legal issues presented by self-defence – whether the appellant had a subjective belief at the time that her act was necessary in order to defend herself or reasonable grounds for her belief. The Court also said 'there was nothing in the actuarial assessment, or assessment based on clinical judgment, that could not be undertaken by a person with ordinary knowledge and experience': *Liyanage* (n 16) 361 [148] (Martim CJ, Mazza and Mitchell JJA). This meant that the Court was of the view that the expert was in no better position than the jurors to

from several psychiatrists 'with experience in … [treating] women who had been exposed to abuse and trauma'[18] on 'the psychological impact of prolonged exposure to domestic violence' as relevant to the issue of self-defence and helpful to the jury.[19]

Paige Sweet explains why IPV, and particularly gaslighting, is not best understood and explained by psychologists.[20] This it is because it is a sociological rather than psychological phenomenon. Gaslighting is consequential when perpetrators mobilise gender-based stereotypes and structural and institutional inequalities against victims to manipulate their realities.[21] Paige Sweet notes that '[p]sychological theories suggest that gaslighting takes place in an isolated dyad. In contrast … gaslighting draws upon and exacerbates the gender-based power imbalances present in intimate relationships and in the larger social context'.[22] In other words, abusive behaviours are effective because of the social context they take place within and the power structures in that context that they exploit. It follows that 'the effects of gaslighting are more dramatic for women on the margins, who may experience increased institutional surveillance and lack of institutional credibility'.[23] It also follows that experts from disciplines directed at understanding these larger social power structures might be more appropriate in IPV cases.

There are a small number of Australian cases where evidence from social workers, or in one instance a law professor, about the broader context of domestic violence has been admitted at trial[24] and statements from law reform bodies that support a wide understanding of what constitutes family violence expertise in this context.[25] Furthermore, recent legislative reforms in Western Australia ('WA') have clarified that family violence expertise is to be interpreted broadly.[26] However, it

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assess objective risk. But even if the requirements for admissibility were present, 'if evidence were to be given in court predicting the deceased's future actions and intentions then it should be given by a psychologist or psychiatrist, whose profession is directed to the scientific study of human behaviour': at 396 [158]. Insofar as expert testimony could be allowed as to the social context the appellant found herself in, the Court reasoned that she was able to give that evidence herself 'and the jury were capable of understanding that evidence and assessing its veracity' without expert assistance: at 397 [163].

18 Ibid 374 [49].

19 Ibid 380 [83].

20 Paige L Sweet, 'The Sociology of Gaslighting' (2019) 84(5) *American Sociological Review* 851, 851–2.

21 See ibid 855, noting that

> a central paradox in the sociology of gender is that although women as a group have gained mobility, gender inequality in intimate partnerships persists … romantic relationships are the arena in which traditional gender ideologies are upheld most strongly … intimate relationships are precisely the place to look for the ongoing animation of traditional ideologies that cast women as emotionally untethered.

22 Ibid 856 (emphasis omitted).

23 Ibid 857.

24 *R v Yeoman* [2003] NSWSC 194, [32] (Buddin J); Transcript of Proceedings, *R v Gadd* (Supreme Court of Queensland, 355/1994, Moynihan J, 27 March 1995) 189. See also *DPP (Vic) v Williams* [2014] VSC 304, [33]–[34] (Hollingworth J).

25 See, eg, Victorian Law Reform Commission (n 2) 183.

26 See *Evidence Act 1906* (WA) s 39(4), as inserted by *Family Violence Legislation Reform Act 2020* (WA) item 94 (which provides that 'an expert on the subject of family violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of any matter that may constitute evidence of family violence'). See also *Evidence Act 1995* (NSW) s 79.

remains the case that in the overwhelming majority of Australian cases in which expert testimony is admitted at the trial of IPV victim-survivors charged with homicide, those testifying are psychiatrists or psychologists and in the majority of these cases their testimony involves 'psychological assessments focused on the defendant's pathology'.[27] Of course, even when courts are willing to hear testimony from non-psych experts, there may be practical impediments to introducing such expertise – for example, a dearth of relevant experts available or willing to give testimony in such cases.

Since the publication of Evan Stark's ground-breaking book in 2007, lawyers and policy makers have begun to understand IPV as coercive control.[28] This is an understanding of IPV as a *liberty crime*, rather than an *assault crime*, in which the abusive partner uses a wider range of tactics than simply physical violence in order to close down the victim-survivor's space for action over time. These tactics are directed at isolating her from those around her, undermining her independence, conditioning her to put aside her own opinions and desires to do what her partner wants and using force or threats to ensure compliance and/or punish non-compliance. We have pointed out that the concept of coercive control 'allows us to move beyond understanding IPV as confined to [discrete] incidents of physical abuse, between which the victim-survivor is assumed to be free from abuse'[29] and, instead, to appreciate the abusive partner's behaviours as an unfolding pattern of *strategic and retaliatory* harm that has a compounding and cumulative effect. Making the abusive behaviour the victim-survivor is responding to *fully visible*, potentially renders their perceptions and reactions as reasonable, rather than informed by psychopathology.[30] Moreover, 'we can locate the victim-survivor's perceptions of the abuse and [her] safety options on any one occasion in the context of the overall and ongoing pattern of harmful behaviours that [she is] experiencing, has experienced, and will likely experience'.[31]

Various Australian states have moved towards recognising coercive control in a standalone criminal offence[32] and national principles on coercive control have been developed.[33] The concept of coercive control is, however, difficult to translate into a legal context that is designed to respond to one off incidents and individual psychopathology. The risk remains that it will be heard in the trial of defendants who are IPV victim-survivors simply as another way to understand what has gone into causing the victim-survivor's *mental health issues* and therefore her

27 Nash and Dioso-Villa (n 3) 2287.

28 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) ('*How Men Entrap Women*').

29 Tolmie, Smith and Wilson (n 6) 60.

30 Ibid.

31 Ibid.

32 See, eg, *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW); Criminal Law Consolidation (Coercive Control) Amendment Bill 2023 (SA). For a discussion of the reform process, see Jane Wangmann, 'Law Reform Processes and Criminalising Coercive Control' (2022) 48(1) *Australian Feminist Law Journal* 57 <https://doi.org/10.1080/13200968.2022.2138186>.

33 Standing Council of Attorneys-General, 'National Principles to Address Coercive Control in Family and Domestic Violence' (22 September 2023) <https://www.ag.gov.au/system/files/2023-09/national-principles-to-address-coercive-control-family-and-domestic-violence.PDF>.

perceptions, as opposed to the objective realities of the threat her partner presented in the circumstances.[34]

We have suggested elsewhere that understanding IPV in terms of coercive control still does not go far enough in explaining how victim-survivors experience IPV.[35] That it is necessary to properly investigate two further mutually reinforcing and inseparable dimensions if we are to fully understand the threat that the victim-survivor faced and her lawful options for dealing with it. These two further dimensions are:

- the efficacy and responsiveness of the family violence safety system to the victim-survivor, her (ex) partner and their families, kinship groups, and communities (dimension one);[36] and
- how the infrastructure of colonial violence, the operation of state-sanctioned violence, and structural inequities shape the quality of responses available to particular groups of people and can compound their abusive partners' use of violence (dimension two).

Essentially, understanding IPV as a form of social and systemic entrapment is a complete shift from focusing on the victim-survivor's individual psychological responses to the abuse to attempting to understand the entire social context that she is located within and responding to.[37] An entrapment approach conceives that context not solely in terms of the abuse strategies used by her individual partner, but also the responses of their immediate community and of government agencies and other institutions charged with addressing family violence.

Expert evidence on IPV entrapment should function to challenge the simplistic but widely held assumption that the family violence safety responses are universally available to all victim-survivors regardless of their social positionality and that they match the operation and harm of IPV so, had the victim-survivor

34 In the context of the duress defence, see the analysis in *Rowan* (n 14) [180]–[181] (Kyrou and Niall JJA). The Victorian Court of Appeal reasoned that the history of coercive control the defendant experienced from her partner would have caused a person of ordinary soundness of mind to develop battered woman syndrome, meaning that they would have yielded to her abusive partner's demands rather than seeking to escape the situation. The objective realities of the defendant's circumstances were that she was living on an isolated rural property, was totally dependent on her abusive partner for transport and had no one else to support her and nowhere to go. Her partner was also an extremely dangerous man.

35 Tolmie, Smith and Wilson (n 6). See also Julia Tolmie et al, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' [2018] (2) *New Zealand Law Review* 181; Denise Wilson et al, *Wāhine Māori: Keeping Safe in Unsafe Relationships* (Report, 28 November 2019) ('*Keeping Safe in Unsafe Relationships*'); Heather Douglas, Stella Tarrant and Julia Tolmie, 'Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence' (2021) 44(1) *University of New South Wales Law Journal* 326 <https://doi.org/10.53637/VJII7190>.

36 Dimension three consists of her (ex) partner's tactics of coercive control.

37 Note that the *Crimes Act 1958* (Vic) make it clear that 'evidence of family violence' includes evidence of the 'social, cultural or economic factors that impact on the person or a family member who has been affected by family violence' or 'social or economic factors that impact on people who are or have been in a relationship affected by family violence': at ss 322J(1)(c), (f). This provides legislative clarification that experts can provide evidence about the broader social context, and not simply the behaviours of the abusive partner, when providing expert testimony on family violence.

simply made better choices, she would be safe.[38] In this manner the utilisation of an IPV entrapment framework to understand the facts of the case should hold the prosecution to their criminal burden proof in relation to the defence of self-defence. In other words, it should mean that the Crown cannot simply assert, without providing any supporting evidence, that calling the police or leaving the abusive partner would have provided this specific victim-survivor with safety.[39]

Interestingly, in WA not only has the nature of family violence expertise been broadened in legislative reforms, but the defence is able to formally request jury directions from the trial judge on IPV entrapment in relevant cases. Under sections 39F(1)(iv) and 39F(3)(b)–(d) of the *Evidence Act 1906* (WA), the trial judge can be asked to direct a jury that the defendant's decisions about how they respond to IPV can be influenced by 'social, cultural, economic or personal factors or inequities' they are experiencing, past 'responses by family, community or agencies to the family violence' or to the defendant's help-seeking behaviours, the provision of, or failure to provide ongoing safety options to the defendant, and the defendant's perception of how effective the safety options available to them are likely to be.[40]

Whilst understanding IPV entrapment is important for all victim-survivors, it is particularly significant for those who are dealing with systemic entrapment[41] – for example, social responses that are informed by systemic racism, as well as ongoing intergenerational experiences of colonisation, colonial patriarchy,[42] state violence and oppression.[43] For these victim-survivors, their families and kinship groups, all

38 See Ashlee Gore, *Gender, Homicide, and the Politics of Responsibility: Fatal Relationships* (Routledge, 2022) 8. Note that in the case of *R v Falls* (Supreme Court of Queensland, Applegarth J, 3 June 2010), the defence introduced in court specific factual evidence (as opposed to expert testimony) from police officers as to what they had attempted to do to support the defendant's safety. This suggested that there were limitations as to what the family violence safety system could offer the defendant in that case: see Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes' (n 2) 682, 688–9. See also *Silva v The Queen* [2016] NSWCCA 284, in which the New South Wales Court of Criminal Appeal overturned the defendant's conviction for manslaughter – which had been arrived at on the basis that the defendant was acting unreasonably in self-defence. The Court of Criminal Appeal accepted as 'realistic' the defendant's assessment that calling the police in response to her partner's violence could make it 'worse': at [102] (McCallum J), [126], [137] (RS Hulme AJ).

39 See Tarrant, Tolmie and Guidice (n 5) 51–2.

40 Whether or not defence counsel are aware of and using these provisions is not known. Note that section 60 of the *Jury Directions Act 2015* (Vic) provides for significantly more limited jury directions.

41 See Wilson et al, *Keeping Safe in Unsafe Relationships* (n 35) 65–7.

42 Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' (2014) 47(2) *Australian and New Zealand Journal of Criminology* 276 <https://doi.org/10.1177/0004865813503351>; M A Jaimes Guerrero, '"Patriarchal Colonialism" and Indigenism: Implications for Native Feminist Spirituality and Native Womanism' (2003) 18(2) *Hypatia* 58 <https://doi.org/10.1353/hyp.2003.0030>.

43 Note that in the sentencing context, the Australian courts have generally required evidence of the intergenerational impact of colonisation on the specific individual: see, eg, *Bugmy v The Queen* (2013) 249 CLR 571. There are signs that this may change: see *Inquest into the Death of Tanya Louise Day* (Coroners Court of Victoria, Coroner English, 9 April 2020), in which the coroner was able to recognise the reality of systemic racism (although did not find it was operating in that case). In *Berkland v The King* [2022] NZSC 143 ('*Berkland*'), the New Zealand Supreme Court said that the standard for proving that historical deprivation played a role in the defendant's offending was 'causative contribution': at [109] (Williams J for Winkelmann CJ, William Young and Glazebrook JJ). However, the Court went on to

too often the state agencies charged with providing safety responses are the same agencies that have been and continue to be unsafe for them to engage with. What makes their lives profoundly more dangerous are the 'broader, long-term community patterns of "containment and condemnation" across a range of different government systems and carceral institutions',[44] as well as not being able to rely on the protection and care of mandated first responders (the police, child protection and health services) when they most need it.[45] If they are subsequently charged with a criminal offence because they have defended themselves, the systemic entrapment they experience continues in the courtroom, with the omission of evidence on the inefficacy of the family violence response system and, in fact, the inaccurate assumption that effective safety options were readily available to them.

Ways of thinking about IPV that eradicate these last two dimensions of victim-survivors' experiences sustain structures of white dominance in the courtroom because they render invisible those dimensions of experience that do not show up in middle-class white lives, as well as recasting these experiences in terms of the individual pathologies of those who are affected by them.[46] An entrapment approach is therefore hugely significant in the criminal justice context because Indigenous women in positions of socio-economic precarity are disproportionately represented amongst women who are charged with criminal offending, including homicide, in response to family violence.[47]

In this article, we describe a legal innovation in New Zealand which will be of interest to Australian scholars and practitioners defending victim-survivors on criminal charges. In Part II, we describe the New Zealand case of *R v Ruddelle* ('*Ruddelle*'), in which expert evidence on IPV entrapment from a non-mental health professional was introduced at trial[48] and at sentencing[49] in respect of a victim-survivor who killed her abuser. We explain that, although this strategy was not successful in supporting self-defence at trial, it did result in a substantial improvement in the sentencing analysis and outcome – a shift that has been

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state that sentencing judges should assume 'modern Māori "systemic" poverty is the result of colonial dispossession without the need to prove actual causation every time': at [123].

44 Tolmie, Smith and Wilson (n 6) 12, quoting Marlene Longbottom, 'Systemic Entrapment and First Nations People in Australia' (Speech, Centre for Health Equity Seminar, 22 October 2020).

45 Wilson et al, *Keeping Safe in Unsafe Relationships* (n 35); Heather Douglas et al, 'Facts Seen and Unseen: Improving Justice Responses by using a Social Entrapment Lens for Cases Involving Abused Women (As Offenders or Victims)' (2020) 32(4) *Current Issues in Criminal Justice* 1 <https://doi.org/10.1080/10345329.2020.1829779>; Kyllie Cripps and Hannah McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14(2–3) *Journal of Family Studies* 240 <https://doi.org/10.5172/jfs.327.14.2-3.240>.

46 See Thalia Anthony, Gemma Sentance and Lorana Bartels, 'Transcending Colonial Legacies: From Criminal Justice to Indigenous Women's Healing' in Lily George et al (eds), *Neo-colonial Injustice and the Mass Imprisonment of Indigenous Women* (Palgrave MacMillan, 2020) 103 <https://doi.org/10.1007/978-3-030-44567-6_6>.

47 See, eg, Australian Domestic and Family Violence Death Review Network (n 1) 22; Nash and Dioso-Villa (n 3) 2286; Family Violence Death Review Committee, *Fifth Report Data: January 2009 to December 2015* (Report, June 2017) 54–6 <https://www.hqsc.govt.nz/assets/Our-work/Mortality-review-committee/FVDRC/Publications-resources/FVDRC_2017_10_final_web.pdf> ('*Fifth Report Data*').

48 [2019] NZHC 2973 ('*Ruddelle Trial*').

49 [2021] 3 NZLR 505 ('*Ruddelle Sentencing*').

replicated in subsequent cases. In Part III, we analyse why the introduction of IPV entrapment evidence in *Ruddelle* may have failed to produce a better outcome at trial, raising some of the ongoing challenges presented in this space.

II INTRODUCING IPV ENTRAPMENT EVIDENCE AT TRIAL AND SENTENCING: THE NEW ZEALAND EXPERIENCE

In *Ruddelle,* a wāhine Māori (Indigenous woman from Aotearoa New Zealand) was charged with the murder of her abusive partner. In this article we refer to her as the 'victim-survivor' or the 'defendant' and the deceased as her 'partner' or 'abusive partner'.[50] The victim-survivor had been drinking with her partner when she realised she was 'going to get a hiding'[51] and he was going to hurt her 'bad' or 'kill' her.[52] Her partner, who could be very loving, had inflicted violence on her, his previous partners, her daughter and others, and had informed her that he had killed someone. He could become violent when drinking, and she was terrified of this side of him. That night, the victim-survivor called to her adult son, who was sleeping in the house, to help and instead, her 14-year-old son came. This son pushed her abusive partner, who was much taller and stronger than either he or the victim-survivor. She stated: 'nobody pushes [my partner] like that without him getting angry about it'.[53] Fearing for her son's safety – one punch from her partner could have damaged or killed him[54] – she picked up a sharp knife from the dining table and struck her partner twice in the chest. She said that her intention in doing this was to 'stop him'.[55] She offered to plead guilty to manslaughter prior to trial, but the Crown insisted on charging her with murder.

A *Ruddelle*: Trial

At trial the defence strategy was two pronged. First, it was argued that the defendant was acting in self-defence and was therefore entitled to be acquitted.[56] Secondly, it was suggested that, in any case, she did not satisfy the mens rea requirements for murder because she was neither *intending* to kill her partner[57] or *consciously running the risk* of his death (recklessness) when she stabbed him.[58] It

50 Although we are discussing matters that are on the public record, we wish to provide the defendant, her partner and their families some measure of privacy in the following account.

51 Transcript of Proceedings, *R v Ruddelle* (High Court of New Zealand, CRI-2019-092-001067, Palmer J, 10 February 2020) 328 ('*Ruddelle Transcript*').

52 Ibid 330.

53 Ibid.

54 Ibid 380.

55 Ibid 331.

56 The law on self-defence is set out in the *NZ Crimes Act* (n 13), which provides that '[e]very one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use': at s 48(1).

57 Ibid s 167(a).

58 Ibid ss 167(b), (d).

followed that, even if she was unsuccessful in raising the defence of self-defence, she could only be convicted of the lesser offence of manslaughter.[59]

At trial written and oral expert evidence about IPV entrapment was given by Rachel Smith, who was described by the court as a 'family violence advocate and lecturer'.[60] Smith had been the subject expert for the New Zealand Family Violence Death Review Committee for seven years and, in this capacity, conducted 27 in-depth death reviews (focusing on how the systemic family violence safety system response could be improved), as well as being privy to more than 92 IPV police homicide reviews. Her evidence was accepted by the court[61] in order to 'obtain a full and accurate understanding of what occurred'.[62] In allowing this expert testimony *Ruddelle* represented a significant legal development. This was both in terms of the *expert* permitted to give testimony (a non-mental health professional)[63] and the nature of the *expertise* that they provided (testimony explaining IPV in terms of the social context the victim-survivor was navigating; both the abuse of her partner *and* the inadequacy of the family violence safety system).[64]

Smith described IPV as an 'ongoing cumulative pattern' of multiple forms of violence 'intended to shrink the victim's … ability to be themselves'.[65] She stated that to accurately understand the threat that the defendant faced,

> we need to comprehend her partner's entire pattern of coercive, controlling behaviours over time. And why this is so important is you cannot look at a victim's response in a certain moment because intimate partner violence is a form of abuse that takes effect over time. And what that means is that she is responding not to individual incidents of abuse, she's responding to everything he's ever done … to harm her and threats that [he's] made. And this is what is really, really key. Victims experience their partner's abuse as cumulative and they respond to that cumulative experience.[66]

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59 New Zealand does not have a partial defence to murder that can be run in these kinds of cases. So, to reduce a murder charge to manslaughter, it is necessary to disprove the mens rea for murder.

60 *Ruddelle Trial* (n 48) [4] (Gordon J). Ms Smith described herself as 'an independant family violence consultant': *Ruddelle Transcript* (n 51) 397.

61 The Crown and defence agreed that the evidence was 'supported by a body of knowledge or experience which is sufficiently organised or recognised to be accepted as reliable', as well as relevant and substantially helpful to the jury in understanding other evidence in the trial: *Ruddelle Trial* (n 48) [17]–[18] (Gordon J).

62 Ibid [8].

63 In New Zealand, this was the first time that expert testimony from a non-mental health professional was permitted at trial. We have noted that whilst there have been a small number of instances where such testimony has been accepted in Australia, this is still rare: see above n 24. We are not aware of any Australian cases where expert testimony was introduced by an expert in the functioning of the family violence safety system, acquired through victim-survivor advocacy and family violence death review.

64 The authors are not aware of any case in either Australia or New Zealand in which expert testimony on IPV entrapment has been introduced in a formal and sustained manner at trial, although there have certainly been cases in which mental health experts testifying on battered woman syndrome have also commented on the retaliatory nature of IPV and the limits of the family violence safety response or have described IPV in terms of coercive control: Sheehy, Stubbs and Tolmie, 'Securing Fair Outcomes' (n 2) 698–9; *R v Challen* [2019] EWCA Crim 916.

65 *Ruddelle Transcript* (n 51) 399.

66 Ibid 401.

Smith stated that IPV was 'strategic and retaliatory'.[67] Using the example of non-fatal strangulation, she explained that 'it effectively lets women know that their partners are capable of killing them and their life is in their hands … You do not need to strangle your partner every day to communicate the lethality of that violence and your ability to cause harm'.[68]

Speaking of the first dimension of IPV entrapment,[69] she said that this is about whether 'services and systems and people have either helped or not helped. So did the actions they take make her safer or did they make her less safe?'[70] She noted that the help available affected people's decision making. Commenting on the family violence safety system she said:

> [M]ost women actively resist their partner's violence and they used the current suite of safety options we have in our system. So they took out protection orders, they called the police, and they went into Women's Refuge. And what we found is women were killed when they left, women were no safer having called the police, some people called 40 plus times, and protection orders were breached with fatal consequences. And why this happens is for victims who are living with someone who is capable of killing them, they need two things to occur for lasting safety. They either need their partner to choose to stop using violence against them or they need systems and I mean services such as the police, the Courts, and other people, to be able to intervene in ways that stop him using violence towards her over the long term. And what we currently have are neither of those two options for victims. So we currently have what I would call at best temporary safety options for victims and so they're a little like speed bumps in the road. They might slow the car down, but they're not going to stop the car, so they do not stop his use of violence.[71]

She went through the limitations of the safety options currently available – including the fact that the police 'can only respond to incidents but this person's using a pattern of harm … [W]e've got a mismatch, [because] we've designed a system that responds to incidents, not patterns of harm and … which … puts the onus on victims to take action about someone else's use of violence'.[72] Finally, the second dimension

> of entrapment is really looking at … other forms of violence, like structural violence, that interact with people's personal experience of … violence from their partners. And so we're looking at how racism operates within services. We're looking at how people may be treated if people perceive them to be poor. We're looking at other forms of stigma and marginalisation that affects the way people are responded to from services and who they might also see as helpful.[73]

Smith presented Denise Wilson's research on the systemic entrapment Māori women experience, including often racist and unhelpful responses from services and the threat of removal of their children into state care if they engage/continue to engage with these services.[74] These women have experienced harm

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67 Ibid 404.
68 Ibid.
69 Tolmie, Smith and Wilson (n 6) 63. See above n 36 and accompanying text.
70 *Ruddelle Transcript* (n 51) 400.
71 Ibid 405–6.
72 Ibid 406–7.
73 Ibid 400–1.
74 Wilson et al, *Keeping Safe in Unsafe Relationships* (n 35).

> by multiple systems in their lives, and people, they had a deep sense of aroha and *maanakitanga* … a collective care approach to others. They want the violence to stop but they also want healing for the person using violence … [T]hey might also be very wary about … putting their partners into the criminal justice system where they think they might not be treated equitably.[75]

Aboriginal feminist scholars have, of course, documented similar shocking failures in the responses to Aboriginal IPV victim-survivors.[76]

Smith pointed out that many victim-survivors had been living with abuse for years and had become

> context experts. They know when situations are becoming very, very dangerous. It's this heightened sensitivity that they need to keep themselves and their children safe. And if I can compare it to drivers … if you look at an experienced driver they are scanning for potential hazards. They are able to pick up all mixed signals and so they're able to pick up … the conditions of the roads changing, how are the other drivers on this road, what's their behaviours.[77]

Finally, she drew a distinction between primary victims and predominant aggressors, noting that in the death reviews when primary victims were offenders in the death event:

> most of those women were inside the home, they were trapped in the kitchen, they were responding to an ongoing assault and they may pick up a knife and they used one or two stab wounds and they don't harm children, they don't commit suicide afterwards, it's actively defending themselves.[78]

The pattern for (male) predominant aggressors as offenders in the death event, on the other hand, was very different. Often their partner has tried to separate from them and there is frequently premeditation and overkill – the use of violence 'far beyond what would be necessary to cause death'.[79]

At trial, written and oral evidence was also received from a second expert, who was a clinical psychologist with a long history of involvement in the family violence sector. Because this was general expert testimony the psychologist was able to interview the defendant and relate her opinion on the nature of IPV to the facts of the case. She stated that the victim-survivor 'experienced social entrapment'.[80] But she also went on to point out that she had symptoms 'consistent with post-

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75 *Ruddelle Transcript* (n 51) 409.

76 See, eg, Kylie Cripps, 'Indigenous Women and Intimate Partner Homicide in Australia: Confronting the Impunity of Policing Failures' (2023) 35(3) *Current Issues in Criminal Justice* 293 <https://doi.org/10.1080/10345329.2023.2205625>; Hannah McGlade and Stella Tarrant, '"Say Her Name": Naming Aboriginal Women in the Criminal Justice System' in Suvendrini Perera and Joseph Pugliese (eds), *Mapping Deathscapes: Digital Geographies of Racial and Border Violence* (Routledge, 1st ed, 2021) 106 <https://doi.org/10.4324/9781003200611-10>.

77 *Ruddelle Transcript* (n 51) 402. See Arlene N Weisz, Richard M Tolman and Daniel G Saunders, 'Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions' (2000) 15(1) *Journal of Interpersonal Violence* 75 <https://doi.org/10.1177/088626000015001006>. Evan Stark refers to the 'special reasonableness' of victims of IPV to describe their 'astute sensitivity' to their partner's behavioural clues: Stark, *How Men Entrap Women* (n 28) 353–5.

78 *Ruddelle Transcript* (n 51) 411. Similar findings are contained in Australian Domestic and Family Violence Death Review Network (n 1) 23.

79 *Fifth Report Data* (n 47) 109. For the Australian family violence homicide data, see Australian Domestic and Family Violence Death Review Network (n 1) 12, 15.

80 *Ruddelle Transcript* (n 51) 468.

traumatic stress'[81] and to discuss how the victim-survivor's trauma informed her perceptions and responses to the abuse.

On 20 January 2020, the defendant was acquitted of murder but found guilty of manslaughter. In other words, whilst she was not successful in raising the defence of self-defence the jury was not convinced beyond reasonable doubt that she intended or was consciously risking killing her partner when she stabbed him. The jury verdict was a majority verdict of 11 because one juror would have acquitted her on the basis that she was acting in reasonable self-defence.[82] In Part III we return to explore why self-defence may not have been successfully supported by the introduction of IPV entrapment evidence in this case.

B *Ruddelle*: Sentencing

At sentencing, further evidence was admitted in the form of a written cultural report under section 27 of the *Sentencing Act 2002* (NZ).[83] A cultural report is provided at the discretion of defence counsel and is in addition to the standard pre-sentence report prepared by government agency staff.[84] Unlike the Canadian '*Gladue* reports',[85] reports under section 27 can address cultural issues experienced by non-Indigenous peoples, although in this case the defendant was Indigenous.[86] In *Ruddelle*, the cultural report was prepared by Wilson, who is a Professor in

81 Ibid 469.

82 *Ruddelle Sentencing* (n 48) 505 [1] (Palmer J).

83 Section 27 of the *Sentencing Act 2002* (NZ) ('*NZ Sentencing Act*') provides that an offender can request the court to hear a person speak on: the personal, family, whanau, community, and cultural background of the offender; the way in which that background may have related to the commission of the offence; any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence; how support from the family, whanau, or community, may be available to help prevent further offending by the offender; and how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences. Specific guidance on what should be included in a cultural report was recently provided by the New Zealand Supreme Court in *Berkland* (n 43) [140]–[147] (Williams J for Winkelmann CJ, William Young and Glazebrook JJ).

84 In New Zealand, there may be some overlap between section 27 cultural reports and section 26 pre-sentence reports under the *NZ Sentencing Act* (n 83), in that pre-sentence reports may also address the personal, family, whanau, community, and cultural background of the offender. However, pre-sentence reports are prepared by the probation service rather than a cultural expert or community member nominated by the defence. Pre-sentence reports also cover a wide range of matters not covered by cultural reports, such as the interests of the victim, risks posed by the defendant to the community and the defendant's ability to comply with sentencing possibilities.

85 For further information, see *R v Gladue* [1999] 1 SCR 688; *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

86 For a critique of the limits of pre-sentence reports in Australia in raising relevant cultural and historical background factors to the offending of Aboriginal and Torres Straight Islander offenders, and a recommendation that state and territory governments develop and implement schemes to facilitate the preparation of 'Indigenous Experience Reports' for sentencing in superior courts, see Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Straight Islander Peoples* (Report No 133, December 2017) 214–26 [6.115]–[6.164]. Note that there have been trials in some states of specialised cultural reports at sentencing for Indigenous offenders: for example, 'Aboriginal Community Justice Reports' in Victoria and 'Ngattai Court Reports' in the Australian Capital Territory: at 221 [6.140]–[6.142]. See also Darcy Coulter et al, *Consideration of Culture, Strengths and Risks in Pre-Sentence Reports* (Report, November 2022) 3–7 <https://www.aic.gov.au/sites/default/files/2022-11/crg_0419_20_consideration_of_culture_strengths_and_risk_in_pre-sentence_reports.pdf>.

Māori health and an IPV expert and who interviewed the victim-survivor for the purpose of her report.[87] Unlike expert testimony at trial, cultural reports in New Zealand are generally not produced by psychologists and psychiatrists.

Wilson also used an IPV entrapment framing but was able to extend her discussion of the systemic patterns of harm experienced by the victim-survivor beyond her relationship with her partner because of the very different nature of the sentencing context. At sentencing *all aspects* of a defendant's life experience that go to culpability or mitigation are relevant – not simply those aspects that are relevant to the legal test being applied for a particular offence or defence.[88] Wilson provided an extensive and detailed background to the victim-survivor's offending, using a Māori health framework to set out her description and analysis. Significantly, she noted the victim-survivor had, from a very young age, been the child who was responsible for protecting her younger siblings from potential harm by adults who were intoxicated and violent.[89] The sentencing judge noted that this 'cemented her assumption of responsibility to care for and protect those at risk of harm, including [her partner]'.[90] The social and systemic entrapment framing introduced at trial, and reinforced at sentencing in this manner, informed the decision making framework adopted by the sentencing judge, his analysis of the facts and the outcome. It also acted as a check on the malfunctioning of the criminal justice process at sentencing in this case.

In New Zealand, similarly to Australia, a starting point sentence is first set based on the culpability of the defendant's *criminal actions*. That starting point sentence is then adjusted up or down based on broader personal mitigating or aggravating factors. In *Ruddelle*, instead of basing the starting point sentence on the victim-survivor's *act of stabbing* her partner and then accommodating the history of his violence against her as a personal mitigating factor at the second stage of the process, Palmer J stated that 'the context of family violence is an integral feature of the offending here'.[91] In other words, the violence that the victim-survivor had experienced from her partner during their relationship was understood as directly relevant to the culpability of her criminal action. Palmer J acknowledged the serious nature of the violence the defendant had used, that it had caused death and that she had used a weapon, but he also identified three mitigating features of her offending that were relevant to setting the starting point sentence.[92] First, she acted impulsively and instinctively. She suffered from a 'moderate degree of social entrapment',[93] which explained why she was in the position that she was in on the night in question. Secondly, the deceased was the 'primary aggressor' in the relationship and his conduct directly led to her actions. Thirdly, she was substantially motivated by an urge to protect her son. And whilst

87 Note that Professor Wilson's disciplinary background is nursing.
88 See, eg, *NZ Sentencing Act* (n 83) s 9.
89 *Ruddelle Sentencing* (n 49) 506 [6] (Palmer J).
90 Ibid 509 [18].
91 Ibid 512 [27].
92 Ibid 512 [28].
93 Ibid.

two stab wounds were disproportionate to the threat that she faced, they were not grossly disproportionate.

When drawing on other case law in setting the starting point, the judge said that it was 'important not to replicate any previous misconceptions about family violence and to focus on the offending in the context of the relationship, rather than based only on the latest specific incident'.[94] In other words, he was clear that the precedent value of some of the older caselaw that took an assault orientated approach to IPV was limited.[95] In keeping with this approach, he did not accept the Crown's argument that the last instance of her partner's violence towards the victim-survivor was some time prior to the night in question. This means that he was not prepared to confine himself to a consideration of the physical abuse or to consider that abuse as a series of discrete time specific incidents rather than part of a larger pattern of ongoing harm.

The sentencing judge's analysis of the specific facts was also firmly grounded in an understanding of social and systemic IPV entrapment. The judge, for example, noted that the victim-survivor had been a proactive help seeker in response to the violence she experienced – calling the police 16 times in response to threats from and arguments with her partner,[96] obtaining a protection order and going into refuge.[97] She also obtained a 'secret emergency alarm' which was supposed to bring the police to the address immediately, but no one came when she pressed it.[98] Furthermore, she had 'repeatedly sought help against violence in her life but that had led to a short term response at best and removal of her children at worst, when she was not able to protect them'.[99] Palmer J positioned the victim-survivor as an expert in relation to her partner's violence. The Crown had argued that he had never been deliberately violent towards her son before, but the judge credited the victim-survivor's perspective in reading the situation her son was in as dangerous. He also noted the 'social and cultural disadvantage' that 'many Māori have systemically suffered'.[100] Her exposure to the preconditions of IPV entrapment 'through a life of alcohol and violence, was systemically mandated by the social dynamics of New Zealand society'.[101]

Palmer J set a starting point sentence of 42 months imprisonment, adjusting this down to 23 months, and ultimately imposing a sentence of 11 months and 2 weeks home detention as the 'least restrictive outcome that is appropriate in the circumstances'.[102] This sentence meant that the victim-survivor was able to

94 Ibid 513 [29].
95 Note that concerted efforts have been made in Australia to ensure that judges understand coercive control: see Heather Douglas and Hannah Ehler, *Coercive Control and Judicial Education* (Consultation Report, 2022) <https://aija.org.au/wp-content/uploads/2022/05/2022_Coercive-Control-Consultation_Douglas-Ehler_2022-07-05.pdf>.
96 *Ruddelle Sentencing* (n 49) 507 [11] (Palmer J).
97 Ibid 507 [13].
98 Ibid.
99 Ibid 509 [18].
100 Ibid 515 [41]
101 Ibid 516 [41].
102 Ibid 517 [52], citing *NZ Sentencing Act* (n 83) s 8(g).

continue live at home and parent her teenage son, who would otherwise have been left without parents.[103] Finally, as a direct and practical example of evidence of entrapment being used to challenge the systemic failings of the criminal justice response to Māori, Palmer J was able to use the cultural report by Wilson and the expert testimony at trial to quality check the pre-sentence report that had been prepared for him in the usual course of proceedings. The pre-sentence report recommended the victim-survivor's imprisonment and did not provide the kind of personal background to her offending that should inform a sentencing report and, indeed, sentencing itself. The judge chastised the report writer and insisted on an improved report.[104] At best this was unprofessional and, at worst, an instance of the kind of invisible systemic racism and sexism that has contributed to Indigenous women constituting 66% of those who are incarcerated in women's prisons in Aotearoa New Zealand today.[105]

C Subsequent Sentencing Cases

There have been a small series of New Zealand cases since *Ruddelle* in which IPV entrapment evidence has been introduced at sentencing in respect of offending less than homicide.[106] The evidence in these cases has been introduced after a guilty plea – sometimes after charge negotiation. Most, although not all, of these cases involved Indigenous women. For example, one involved a migrant woman from China. In several cases, this evidence was introduced in the form of a section 27 cultural report produced by a health expert or a family violence advocate from the same linguistic and cultural background as the defendant. These reports were peer-reviewed by a legal academic with expertise in IPV entrapment.[107] In two cases, a sentencing report was produced by a psychologist who did not have relevant cultural expertise and used a 'trauma-informed' framing. We have included these cases here because the psychologist also discussed the manner in which 'social entrapment' contributed to the harm and trauma experienced by the victim-survivor, as did the expert psychologist in *Ruddelle*.

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103 This is a generous sentence in Australian terms: see Nash and Dioso-Villa (n 3) 2283–4.

104 *Ruddelle Sentencing* (n 49) 514 [34] (Palmer J).

105 Department of Corrections (NZ), *Wāhine: E Rere Ana Ki te Pae Hou* (Report, 2021) 7 <https://www.corrections.govt.nz/__data/assets/pdf_file/0004/44644/Corrections_Wahine_-_E_rere_ana_ki_te_pae_hou_2021_-_2025.pdf>.

106 We discuss these cases in generic terms for safety reasons. Of the five cases the authors are aware of, there are only three which we can provide citations for due to legal reasons: *R v S* [2020] NZDC 13968; *R v I* [2021] NZDC 13066; *New Zealand Police v T* [2022] NZDC 25655. Information about these cases is held in a confidential capacity.

107 This is important because health professionals are engaged in the task of diagnosis and treatment, whilst legal professionals are embarked on the process of judging moral culpability using a particular Western theoretical framework for understanding culpability. Information can therefore be selected and presented by health professionals in a manner that lands in the legal context in ways that are not intended and may produce deleterious outcomes for the defendant. We note also that 'battered women syndrome' remains a durable concept within the legal profession and that some lawyers may be unaware of the significant conceptual shift that *Ruddelle Sentencing* (n 49) represents at sentencing or what the implications of that shift are for their client.

The approach taken by the sentencing judges in these cases was consistent with the approach taken in *Ruddelle* in that the IPV the victim-survivor was responding to when they offended went to setting the *starting point sentence*, with similar non-punitive outcomes. For example, in one case the defendant plead guilty to aggravated burglary and demanding with intent to steal (as a secondary party), and was discharged without conviction[108] in respect of the more serious charge, but given a sentence of intensive supervision in relation to the lesser.[109] In three additional cases, defendants who were acting to defend themselves when under threat from their abusive partners, and in a fourth, a defendant who assaulted police attempting to respond to a family violence call-out in which she was the victim, received a discharge without conviction after pleading guilty to offences involving violence short of homicide.[110]

It was pointed out by those experts who were exclusively using an IPV entrapment framing that the criminal justice response *itself* is part of the ongoing pattern of abuse if it does not support the victim-survivor's safety. In one case, for example, the entrapment report written by the family violence advocate and cultural expert clarified that a criminal conviction would make it more difficult for the defendant to navigate safety in her relationship in the future. This is because it would prevent her from obtaining independent employment, undermine her opportunities to build relationships with others who might challenge her partner's abusive behaviours or expand her space for action and would remove any credibility that she had in threatening to separate from her partner (a strategy that had, in the past, temporarily contained his abuse). In other words, this was not about her mental health or personal recovery but about the circumstances created by the sentencing outcome and the safety implications of these. In those cases where the social entrapment evidence was provided by a psychologist as part of a 'trauma-informed' analysis, by way of contrast, the judge framed the sentencing outcome as a matter of supporting the defendant's mental processes. For example, supporting her 'recovery' from trauma, her ability to trust in those in authority and her commitment to leaving her abusive partner, as well as avoiding causing her harm by shaming and invalidating her (including providing the means for her abusive partner to coercively control her).[111]

What this illustrates is that an 'IPV entrapment' framing, and a 'trauma-informed' framing (as supplemented by a discussion of IPV entrapment) have both been successful in supporting non-punitive outcomes at sentencing. However, the framing used by psychologists and derived from Western understandings of trauma, as opposed to the approach exclusively grounded in IPV entrapment, places an individualised and 'damage-centred' narrative over the facts of the case and the defendant.[112] This is problematic for a number of reasons. First, it leaves the

108 Under section 106 of the *NZ Sentencing Act* (n 83).

109 The judge would have given the defendant a discharge without conviction for both offences but felt a sentence of supervision provided her with some ongoing support.

110 Wounding with reckless disregard under section 188(2) of the *NZ Crimes Act* (n 13).

111 See *R v S* (n 106); *R v I* (n 106).

112 Eve Tuck, 'Suspending Damage: A Letter to Communities' (2009) 79(3) *Harvard Educational Review* 409.

victim-survivor without dignity in that she is understood as broken and in need of repair. A deficit discourse causes further harm because it 'has the effect of isolating Indigenous women from, rather than connecting them to, their strengths'.[113] Secondly, it supports myths about IPV – for example, that the safety of victim-survivors depends on them making better choices and that safety can be achieved by separating from her abusive partner or trusting authorities such as the police.[114] Thirdly, such an approach is grounded in compassion for a damaged individual, rather than recognition of the structural inequities many victim-survivors are grappling with in their attempts to achieve safety for themselves and their children. In the words of Thalia Anthony, Gemma Sentence and Lorana Bartels, a 'focus on the pathology of the individual victim … conceals the social experiences of colonisation'.[115] Empathy is 'insufficient when serving clients from marginalized communities' because it does not 'contribute to any sort of greater social change'.[116]

IPV entrapment, by way of contrast, provides a framework that allows the patterns of state neglect and violence to be articulated. This is important in cases where this violence may have been more harmful to the victim-survivor than the abuse from her individual partner and has significantly shaped her safety strategies. It also assists victim-survivors who do not trust state agencies and do not wish to detail their experiences of IPV, and/or their family or kin group experiences, in a document going before a state agency such as the court – although they may be comfortable articulating the violence that has been experienced from state agencies by themselves and their kin group and communities. And it generates better media narratives about the case, which assists in better levels of public understanding and awareness about IPV more generally.[117]

A significant difficulty in providing expert testimony to court is navigating safety issues when victim-survivors remain in extreme danger because their abusive partners are still alive (including when he is a co-defendant and/or has gang associates[118] and social networks which can monitor her in court and prison). Report writers in these cases left out details of the abuse and resorted to including written warnings about how the material should be used – relying on the sentencing judge being circumspect in what they reproduced from the report in their judgment or in court.

113 Anthony, Sentance and Bartels (n 46) 121.

114 See Tarrant, Tolmie and Guidice (n 5) 20–1.

115 Anthony, Sentance and Bartels (n 46) 105.

116 Sun Woo Baik, 'When Empathy's Not Enough' (Spring 2022) *Asparagus Magazine* 9.

117 See, eg, Anna Leask, 'Domestic Violence Expert Urges Murder Trial Jury to View "Panoramic Perspective" Not Single Moment', *New Zealand Herald* (online, 17 February 2020) <https://www.nzherald.co.nz/nz/domestic-violence-expert-urges-murder-trial-jury-to-view-panoramic-perspective-not-single-moment/OB2Z7JENILJTQ6U7EIGC4QNO3A/>.

118 For example, 38% of female primary victims who killed their abusive partner in the New Zealand family violence death review data were gang affiliated: *Fifth Report Data* (n 47) 54. For a discussion in another context of how women are controlled in gang settings, see Tirion Elizabeth Havard et al, 'Street Gangs and Coercive Control: The Gendered Exploitation of Young Woman and Girls in County Lines' (2021) 23(3) *Criminology and Criminal Justice* 313 <https://doi.org/10.1177/17488958211051513>.

III SELF-DEFENCE AND IPV ENTRAPMENT EVIDENCE AT TRIAL: LIMITATIONS AND CHALLENGES

Whilst *Ruddelle* resulted in a significant shift in the approach taken to sentencing, the introduction of evidence on IPV entrapment did not result in an acquittal at trial on the basis of self-defence. Instead, it resulted in the most typical outcome for these types of cases, a conviction for manslaughter.[119] In this, and in subsequent cases, the evidence therefore simply had the effect of making the sentencing process perform more effectively and, arguably, as it always should have.

In this section, we take stock of the kinds of factors which may have contributed to this evidence being unsuccessful at trial in supporting a jury verdict of self-defence. First, we describe two problematic dimensions of how the evidence was introduced in *Ruddelle* that were within the power (to some extent at least) of defence counsel to do differently. These were the introduction of evidence on IPV entrapment as 'counterintuitive' as opposed to general expert evidence, and the co-presentation of such evidence with 'trauma-informed' expertise. Secondly, we discuss challenges that are beyond the control of defence counsel. These include the complexity of IPV entrapment evidence combined with the nature of a criminal trial and, as a related point, the existing family violence 'myths' that can undercut such evidence. They also include the fact that self-defence is still applied in an incident-based manner and therefore remains a legal mismatch for IPV as it is properly understood.

A Factors within the Control of Defence Counsel

1 Introducing IPV Entrapment as Counterintuitive Versus General Expert Evidence

In *Ruddelle*, evidence on IPV entrapment was introduced as 'counterintuitive evidence', instead of ordinary expert evidence.[120] Counterintuitive evidence is admissible in order to counter a doubt that the jury might have about a complainant's credibility based on incorrect understandings of normal human behaviour.[121] In New Zealand, counterintuitive evidence must be general evidence as to social phenomenon – it cannot be related to the facts of the case. As explained by Olive Brown, this meant in *Ruddelle* that, at trial, the IPV entrapment expert

> was confined to a discussion of social entrapment theory in general terms, citing evidence as to 'common patterns' in the circumstances of primary victims of [IPV]

119 Nash and Dioso-Villa (n 3) 2282.

120 *Evidence Act 2006* (NZ) s 25. Note the view that if the expert is not applying their expertise to the facts of the case, they are not providing 'opinion evidence' but rather 'relevant factual material': Douglas, Tarrant and Tolmie (n 35) 345.

121 In other words, it allows the jury to approach its task of assessing credibility untainted by such myths and incorrect assumptions: Fred Seymour et al, 'Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (2013) 21(4) *Psychiatry, Psychology and Law* 517 <https://doi.org/10.1080/13218719.2013.839930>.

> … The expert could not relate the theoretical framework of social entrapment to the explicit facts of the case.[122]

The rules on counterintuitive evidence were evolved in the context of child abuse cases where the concern was that if the expert evidence was specifically related to the facts the jury would assume that the expert, in describing typical behaviours by child victims, was *diagnosing* that child abuse had taken place on the facts.[123] Whether child abuse occurred as alleged is the 'ultimate issue' in the trial and is therefore for the jury, not the expert, to decide.

The problem here is that, unlike battered woman syndrome or theories of trauma which are theories about general human behaviour, IPV entrapment is intensely fact specific. The specific tactics used by the predominant aggressor and how these have developed over time, the reactions of her community to her and her partner, the particular cultural values and constraints that shape what is reasonably expected of her, the experiences the defendant and her community have had with agencies and how particular structural intersectionalities play out in the defendant's life are all unique to the particular case in issue. If the expert cannot relate IPV entrapment to the facts of the specific case, then juries are unlikely to really grasp the significance of their testimony to those facts.

Olive Brown has suggested the risks identified with counterintuitive expert psychological evidence in child sex abuse cases 'do not apply to the admission of expert social entrapment evidence in primary victim self-defence cases'.[124] The ultimate issue in child sex abuse cases is whether the abuse took place – ie, whether the complainant is credible. In self-defence cases, whatever the defendant believed about her circumstances, the ultimate issue is whether her use of defensive force was reasonable in those circumstances, which remains for the jury to decide. And whilst IPV entrapment evidence is relevant in understanding what the defendant believed her circumstances were 'it does not promote a kneejerk reaction as to whether the primary victim was acting in self-defence'.[125] The jury may accept the evidence on IPV entrapment and still find that the defendant's behaviour was unreasonable in self-defence.

2 Co-presenting Entrapment Evidence With 'Trauma-Informed' Expert Testimony

Whilst Western mental health professionals can give testimony on IPV entrapment, they are not experts in the operation of the family violence safety system or social inequality – their disciplinary focus is instead on explaining the defendant's internal individual psychological processes. This arguably risks undercutting evidence on IPV entrapment, but, more importantly, the legal requirements for self-defence on the facts.

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122 Olive Brown, 'It's All in the Detail: Determining the Correct Framing of Expert Social Entrapment Evidence in Primary Victim Self-Defence Cases' (LLB (Hons) Dissertation, Auckland University, 2021) 1.

123 See *DH v The Queen* [2015] NZSC 35; *Kohai v The Queen* [2015] NZSC 36.

124 Brown (n 122) 3. See also Douglas, Tarrant and Tolmie (n 35) 345–6.

125 Brown (n 122) 3.

The psychologist in *Ruddelle*, as well as discussing entrapment, testified to the defendant's trauma from her cumulative experiences of abuse – in childhood and from sequential partners, including the deceased. She stated that the victim-survivor had symptoms that were 'consistent with PTSD',[126] and that trauma affects how people respond to threat: it makes it easier to flip into survival mode.[127] She described this as a fight/flight or freeze mode.[128] On this account, the victim-survivor was in 'freeze mode' when her 14-year-old son was not in the room but went into 'fight mode' when he came into the room.[129] The psychologist described these modes as not being governed by the rational part of the brain but instead 'an instinctive part of the brain' or 'old and primitive parts of the brain'.[130] As summarised by Palmer J during sentencing, the psychologist 'gave her opinion that, due to her lifetime of trauma, [the victim-survivor's] reaction to a threat did not come from "a rational part of the brain"'.[131] She also testified that it was not uncommon for people with trauma to 'use alcohol to cope' and that alcohol can affect judgement.[132]

This was helpful for defence counsel in their closing address because it provides a convincing explanation as to why the victim-survivor did not consciously intend or foresee an obvious risk of death when stabbing her partner twice in the chest. In other words, she did not have the mens rea for murder because she was operating from a primitive and irrational space and with impaired judgment due to intoxication. However, whilst trauma-informed expert testimony was useful in disproving murder, the problem for the concurrent and alternative defence strategy – to suggest that the defendant was acting in reasonable self-defence at the time – is that actions generated by a primitive, instinctive and irrational part of the brain, and under the influence of alcohol, are actions that are presumptively not *reasonable*. It follows that this interpretation of the victim-survivor's perceptions and responses automatically disqualifies such reactions as reasonable self-defence, in a similar manner to testimony on battered woman syndrome.[133]

In 1997, concluding the Canadian Self-Defence Review,[134] Ratushny J recommended changes to the prosecution's charging practices in these kinds of cases. For example, she recommended that the prosecution carefully consider the evidence on self-defence in deciding whether to charge at all and consider 'proceeding on manslaughter rather than murder so that the defence evidence can be heard at trial'.[135] She made these recommendations because charging victim-survivors with murder creates such high stakes at trial that it incentivises

126 *Ruddelle Transcript* (n 51) 469, 495.
127 Ibid 470.
128 Ibid 470–1.
129 Ibid 491–3.
130 Ibid 470–1, 492–4.
131 *Ruddelle Sentencing* (n 49) 509 [17].
132 *Ruddelle Transcript* (n 51) 471.
133 See Stark, *How Men Entrap Women* (n 28) 153, 156.
134 Lynn Ratushny, Department of Justice (Can), *Self-Defence Review: Final Report* (Report, 11 July 1997) 24 <https://www.publicsafety.gc.ca/lbrr/archives/ke%208839%20r3%201997-eng.pdf>.
135 Ibid 24, 180, 199 (Recommendation 3).

defendants to plead guilty to manslaughter even when they have very strong cases for self-defence on the evidence. Ratushny J's recommendations have yet to be actioned in any jurisdiction – most victim-survivors who kill their abusive partners are charged with murder, even in cases where they have a strong self-defence case and/or the prosecution is prepared to accept a manslaughter plea.[136] In *Ruddelle*, the Crown did not accept the defendant's offer to plead guilty to manslaughter and the case went to trial on charges of murder. This placed the defence in the awkward position of trying to run two trial strategies in conjunction that, to some degree, undercut each other.

It is worth noting that the expert testimony provided by psychologists and psychiatrists in these cases draws upon Euro-Western psychological theories of human behaviour rather than indigenous psychologies,[137] liberation psychologies,[138] and/or decolonising psychologies.[139] Analyses of power and oppression, the inalienable right to self-determination and the importance of transformative action are central tenants of these latter psychologies. They also start from the premise that knowledge is culturally and historically contingent. There is a growing critique of the hegemony of Euro-Western psychology in the field of psychology. As Tinashe Dune notes, Euro-Western psychological theories focus on locating problems in the individual's psyche, not in the social landscape. For example, 'the medicalisation and pathologising of social experiences (like racism and discrimination) into mental health problems … which are then relegated to the individual to overcome through … talk-therapy and medication'.[140] In 2021, the American Psychological Association acknowledged and apologised for its role and the discipline of psychology in 'promoting, perpetuating, and failing to challenge racism'.[141] Specifically, it acknowledged that 'traditional diagnostic methods and standards do not always capture the contextual and lived experiences of people of color, which influences mental health outcomes and emotional well-being'.[142]

136 See Nash and Dioso-Villa (n 3) 2282, 2291–2; Sheehy, Stubbs and Tolmie, 'Defences to Homicide for Battered Women' (n 3) 490.

137 See, eg, Eduardo Duran, *Healing the Soul Wound: Trauma-Informed Counselling for Indigenous Communities* (Teachers College Press, 2nd ed, 2019); Waikaremoana Waitoki, Pat Dudgeon and Linda Waimarie Nikora, 'Indigenous Psychology in Aotearoa/New Zealand and Australia' in Suman Fernando and Roy Moodley (eds), *Global Psychologies Mental Health and the Global South* (Palgrave Macmillan, 2018) 163 <https://doi.org/10.1057/978-1-349-95816-0_10>.

138 See, eg, Lillian Comas-Díaz and Edil Torres Rivera (eds), *Liberation Psychology: Theory, Method, Practice, and Social Justice* (American Psychological Association, 2020) <https://doi.org/10.1037/0000198-000>.

139 See, eg, Kate Cullen et al, 'Decolonising Clinical Psychology: National and International Perspectives' (2020) 24(3) *Clinical Psychologist* 211 <https://doi.org/10.1111/cp.12228>.

140 Tinashe Dune et al, 'White and Non-White Australian Mental Health Care Practitioners' Desirable Responding, Cultural Competence, and Racial/Ethnic Attitudes' (2022) 10 *BMC Psychology* 119:1–17, 3 <https://doi.org/10.1186/s40359-022-00818-4>; Anthony, Sentance and Bartels (n 46) 105.

141 'Apology to People of Color for APA's Role in Promoting, Perpetuating, and Failing to Challenge Racism, Racial Discrimination, and Human Hierarchy in US', *American Psychological Association* (Web Page, December 2021) <https://www.apa.org/about/policy/racism-apology>.

142 Ibid.

B Factors Not within the Control of Defence Counsel

1 The Complex Nature of IPV Entrapment Evidence and the Limitations of the Trial Process

We have suggested already that coercive control is a difficult concept to introduce at trial. It necessitates building, in a time limited process and in a manner that is compelling to a group of strangers, a picture of the development of a web of abuse strategies over time, as well as the cumulative and compounding manner in which these have functioned to shut down a defendant's space for action. The abusive behaviours can be micro behaviours repeated over long periods of time, their exact configuration always specific to the particular case.

The first and second dimensions of IPV entrapment present similar challenges. Unless they have had personal experience of or have worked within the family violence response system, jury members are likely to assume that the family violence safety responses currently available are effective if only victim-survivors should choose to use them. Educating the jury to the contrary requires challenging deeply entrenched and unexamined neoliberal ways of sense-making in the context of the time limited and fact based criminal trial.

In Australia, Ashlee Gore set up 10 focus groups to explore how people collectively attribute responsibility for the use of violence.[143] These groups discussed cases involving men's and women's violence, including a scenario in which a woman was charged with homicide for using defensive force against her violent partner. Analysing the response of participants, Gore posits that there was 'a strong preference for individualised explanations where personal effort was the key factor in determining opportunities and outcomes'[144] and this reflects broader cultural forces at work in late modernity. She states that:

> [F]eminist ideas about empowerment and choice for women have been co-opted and fused with palatable elements of neoliberalism that value autonomy and risk management. The result is that, as participants discuss women's responsibility for particular kinds of violence, they consistently reproduce aspects of the 'female entrepreneurial subject' that lies at the heart of neoliberal/postfeminist discourses … [T]his framing was used to construct women's victimisation and vulnerability as an individual problem, and their related offending as simply an exercise of 'poor choices'.[145]

Gore does not go on to point out the additional difficulties that white middle class decision makers may have in acknowledging structural inequities organised around class and race. Jury members who have not had to confront their unearned white privilege may not want to accept the levels of institutional racism – including the toxic colonial combination of racism, sexism and classism experienced by Indigenous women – which are present in the family violence safety system.[146] Supporting juries to engage with the real histories of colonisation is not only

143 Gore (n 38) 71. Each group had four to eight participants (55 participants in total) from a wide range of backgrounds.

144 Ibid 117.

145 Ibid 8.

146 See Wilson et al, *Keeping Safe in Unsafe Relationships* (n 35); Cripps (n 76); McGlade and Tarrant (n 76).

difficult, but it is also work which needs to be undertaken with great care because the person who will most likely suffer the repercussions of failure, including any reactive backlash, is the defendant.

The difficulties in effectively providing social entrapment testimony can be contrasted with the simplicity of diagnosing the defendant with a mental process that works in a one size fits all manner regardless of who the defendant is. Gore notes that pathologising women's violence is not threatening to a 'myth of formal gender equality'.[147] The problem, however, is that such an approach might invite a compassionate sentencing outcome but it does not reflect social realities and nor does it support a self-defence outcome at trial.

2 The Durability of Old Ways of Thinking

Compounding these difficulties are the challenges presented by entrenched, collective and unconscious ways of thinking about IPV.[148] In the adversarial context, these can be used by the prosecution to undercut the defence case (and may also be inadvertently used by defence experts).[149] These include thinking about IPV as a series of incidents, focusing on physical violence and seeing the issue as entrapment in the relationship with the person using violence, rather than entrapment in multiple interpersonal and systemic patterns of harm regardless of whether the victim-survivor is in, or out of, the relationship with her abusive partner.

(a) Template and Incident-Based Analysis

In *Ruddelle*, the prosecution's strategy in cross-examining the experts at trial was to work through the examples that were proffered to establish her partner's abuse of the victim-survivor, suggesting that these were one off or 'normal' and did not warrant being viewed as tactics of coercive control. The prosecution also pointed out that other common forms or features of coercive control were not present on these facts to suggest that the victim-survivor was not experiencing IPV entrapment. For example, in relation to the issue of whether her partner had isolated the victim-survivor, the prosecution suggested that her children not liking him and his not wanting the children to stay with them is 'commonplace'.[150] The prosecution said that the fact that he was happy with her younger son staying there

147 Gore (n 38) 111. On the difficulties women have in making claims to objective rationality: at 14–15.

148 Although these are commonly couched as 'myths', they may be more integrated, unconscious and durable than the word 'myth' really captures. In the context of sexual violence, Julia Quilter has used the concept of 'interpretive schema' to capture the manner in which ancient and unconscious ways of thinking about social phenomenon inform legal responses: Julia Quilter, 'Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23 <https://doi.org/10.1080/13200968.2011.10854458>. As noted already, some jurisdictions have attempted to address common misconceptions via jury directions: see above n 40 and accompanying text.

149 See Charlotte Agnew-Harington and Benjamin Morgan, 'What Are Reasonable Alternatives? Reflections on Ruddelle, Witehira and the Application of the Self-Defence Defence' [2021] (5) *New Zealand Women's Law Journal* 149, 158–61, 162–3, critically discussing how the Crown conducted their case in this and other decisions involving family violence).

150 *Ruddelle Transcript* (n 51) 481.

and 'she had contact with others, her friends, church groups, whatever … count against [her partner] using coercive control to isolate her, do you accept that?'[151]

In relation to her partner punching the victim-survivor's male friend, the prosecution stated 'that's one incident of jealousy with one man that we've heard about. But this evidence doesn't establish a pattern, does it, where she is not in contact with friends, with any family members or other external [people]'.[152] In response to the mention of another occasion where her partner reacted jealously, the prosecution stated that, 'two incidents, again … this is not a pattern of jealousy is it?'[153] When the psychologist protested that coercive control is a pattern of behaviour not individual factors or incidents, the prosecution countered: 'Yes, I understand you are focusing on the broad picture but within that we need to drill down and see what these incidents involve and in particular the coercive control … aspect of the relationship.'[154]

The prosecution similarly attempted to suggest that if economic dependence and isolation were absent then a victim-survivor was less likely to be entrapped when cross-examining Smith.[155] In response, Smith provided examples where a person was economically independent and having contact with a proactively protective family and was still experiencing serious entrapment. She made the point that you have to examine how these aspects operate in an individual person's life. In other words, entrapment is not a one size fits all template experience that can be used to undermine a defendant who is a victim-survivor. She also pointed out that coercive control can be difficult to see from the outside because 'it can masquerade as care and attention'[156] and victim-survivors may not be able to tell people what is happening.

(b) Family Violence Myths: Focusing on Physical Violence

If one understands IPV as a series of discrete physical assaults, then whether physical violence is present or absent is extremely significant. However, if one understands IPV as a form of coercive control within a larger social context of entrapment, then whether physical violence is present or not during a particular passage of time is not hugely relevant. Physical violence may be absent because other forms of abuse are effective in enforcing compliance. As Smith stated in her expert testimony in *Ruddelle*, it can look like abuse is not happening and it is simply that the victim-survivor is constricting their behaviours to try and enact safety for themselves and their children.[157]

Nonetheless the prosecution, when cross-examining the expert psychologist in *Ruddelle*, started by asking, 'one of the factors that you have to consider when assessing whether a woman is socially entrapped is whether there has been an

151 Ibid 481, 486.
152 Ibid 482.
153 Ibid 483.
154 Ibid 483–4.
155 Ibid 417–19.
156 Ibid 419.
157 Ibid 421.

escalation in the severity and frequency of violence is that right?'[158] When the psychologist replied, '[y]es that's correct', the prosecution went on to point out that 'after 2015, '16 and '17, there wasn't an escalation in the severity and frequency of the violence'.[159] When the psychologist noted there were systemic responses to her partner's violence over that period of time that might have curtailed his abuse,[160] the prosecution countered that there was not an 'escalation in the severity and frequency of the violence' in 2017–18, '[s]o that counts against social entrapment, doesn't it?'[161] The prosecution went on to state that 'the reality is that the evidence establishes that the more serious acts of violence were committed in 2015 and '16',[162] and secured the psychologist's agreement to the proposition that for more than a year before 2018, there was no evidence of physical violence, and the more 'serious acts of violence' occurred in 2015–16.[163]

(c) Family Violence Myths: Separation = Safety

The prosecution's cross-examination of the expert psychologist in *Ruddelle* came extremely close to conflating entrapment in the *abuse* with entrapment in the *relationship* with the abusive partner.[164] The prosecution obtained the defendant's agreement in cross-examination to the proposition that she was not 'trapped in the relationship' with her partner – that it was her 'choice to stay in that relationship'.[165] Later the prosecution said to the psychologist, 'we also heard evidence from her that she did not feel she was trapped in a relationship with [her partner], okay? So doesn't that undermine your opinion that she was trapped or socially entrapped within the relationship?'[166] The prosecution noted that in the past the victim-survivor had initiated a divorce from an abusive husband: 'So that's consistent with her being able to choose to bring an end to an abusive relationship?'[167] The prosecution dismissed the psychologist's comments about the need for victim-survivors to have systemic support and the inequities that they experience, on the basis that these 'don't apply here because [the victim-survivor] accepted that she chose to stay within the relationship'.[168]

One of the common 'myths' associated with IPV is that separation from an abusive partner is a means of stopping the abuse and ensuring safety[169] and that women who choose not to separate are choosing to subject themselves to violence and must take responsibility for that. Arguably, this is the myth that informs the

158 Ibid 475.
159 Ibid.
160 The deceased was electronically monitored, under a protection order and in drug and alcohol rehabilitation for some of that time.
161 *Ruddelle Transcript* (n 51) 476.
162 Ibid.
163 Ibid.
164 See *Ruddelle Sentencing* (n 49) 508 [17] (Palmer J).
165 *Ruddelle Transcript* (n 51) 341.
166 Ibid 486.
167 Ibid 487.
168 Ibid 488.
169 See *Fifth Report Data* (n 47) 35–8.

misunderstanding that IPV entrapment is about entrapment in the relationship with the abusive partner rather than entrapment in an ongoing pattern of harm. Smith, by way of contrast, addressed the issue of separation in her testimony in the following manner:

> [W]hen we talk about 'separation' what we're often talking about is some physical distance between people. There's no separation from their ongoing pattern of harm and abuse and often separating actually escalates their partner's use of violence. And so [I] need to be really, really clear; separation does not equal safety. And so when we're taking an entrapment approach, victims are not trapped in a relationship. So it does not matter whether they're in the relationship or out of the relationship. They are trapped in an ongoing pattern of harm with inadequate safety options.[170]

Smith also stated that 'just because someone is living with a partner who abuses them, it doesn't mean they choose to be abused'.[171] She referenced Wilson's research which found wāhine Māori drew upon the cultural concepts of aroha (compassion, empathy, and respect) and *manaakitanga* (hospitality, sharing, and caring for others) in their relationships with their partners, in the context of the lived reality of ongoing colonisation and racism in Aotearoa New Zealand.[172] Therefore, '*[m]anaakitanga* is … practiced with the knowledge that Māori women have of the damage also inflicted upon Māori men' because of the ongoing violence of colonisation and 'their belief that these men have the potential to heal' and be non-violent.[173]

3 Broader Concerns: Self-Defence as a Response to an Incident Rather Than Ongoing Threat

Social and systemic entrapment evidence makes a broader time span evidentially relevant to the defendant's self-defence case. Ideally the jury should be assisted to understand the threat the defendant thought she faced in terms of the entire history of abuse she has experienced from her partner, as well as understanding the safety options she thought were available to her in terms of her and her community's experience of the family violence response system and her expertise as a safety strategist. IPV entrapment evidence should therefore support a victim-survivor's self-defence case against non-imminent harm in the context of ongoing abuse, although Stella Tarrant has suggested that the thinking work required to understand what a self-defence case against non-imminent harm would legitimately look like has yet to be done.[174]

The reality, however, is that many of the cases involving primary victim-survivors who have been charged with homicide should not require evidence on IPV entrapment at trial in order for the defendant to successfully raise self-

170 *Ruddelle Transcript* (n 51) 407–8.

171 Ibid 420.

172 Denise Wilson et al, '*Aroha* and *Manaakitanga*: That's What It Is about: Indigenous Women, "Love", and Interpersonal Violence' (2021) 36(19–20) *Journal of Interpersonal Violence* 9808 <https://doi.org/10.1177/0886260519872298>.

173 Tolmie, Smith and Wilson (n 6) 62.

174 Stella Tarrant, 'Self-Defence against Intimate Partner Violence: Let's Do the Work to See It' (2018) 43(1) *University of Western Australia Law Review* 196; Tarrant, Tolmie and Guidice (n 5) 78–83.

defence.[175] For example, the facts of *Ruddelle* represent a classic self-defence case. This arguably provided the prosecution with the opportunity to undercut the defendant's self-defence case by focusing on the moment in which the victim-survivor acted.[176] Tarrant points out that 'once it is an assault *only* that a person is seen to have been defending themselves against, the entirety of the evidence about the ongoing IPV is rendered incidental and legally meaningless'.[177]

In *Ruddelle*, the victim-survivor was clearly facing a credible threat from her partner. He was in a dangerous and aggressive mood, she knew he was capable of calculated and life-threatening violence, and she was justifiably afraid of this side of him. Her behaviour in spontaneously grabbing a weapon readily at hand and inflicting two stab wounds in the context of an escalating threat is the classic scenario in which women who are primary victims use defensive force that proves lethal.[178] As noted above, the issue for the jury was whether her actions to defend her son were reasonable in the circumstances she believed she was in.[179]

Her initial explanation for why she stabbed her partner was that she just wanted to stop him: 'It happened so fast, I didn't have time to think about who, who I had there. Who I did was my young son. We didn't have time to sit down and think about, "Oh yeah we can protect each other just like that", no it didn't happen that way'.[180] She stated that 'I thought [he] would retaliate and hurt [my son], like there was no way I could think properly to stop him'.[181]

The victim-survivor was subject to sustained cross-examination by the prosecution. She eventually accepted in response to repeated questioning that she and her son could have left the dining room and sought help, that she could have shouted to her son to run, that they could have left via either the kitchen door or the lounge door, that her partner was limping at the time so if they had run there was no prospect of him catching them and that she could have threatened to call the police, asked him to leave the house, or thrown something at him from the table rather than stabbing him.[182] The prosecution stated: 'And I suggest that any one of those options would have immediately defused the situation and taken away any danger or threat to you both. Do you accept that?' The victim-survivor answered, 'yes'.[183] When asked by the prosecution as to why she did not take other actions, she stated that '[i]t was a long night and I was still intoxicated'[184] and later, '[y]eah,

175 Nash and Dioso-Villa (n 3) 2288–9.

176 See Stella Tarrant, 'Making No-Case Submissions in Self-Defence Claims for Primary Victims of Intimate Partner Violence Charged with Criminal Offending' (2023) 35(1) *Current Issues in Criminal Justice* 48, 60 <https://doi.org/10.1080/10345329.2022.2109247> ('Making No-Case Submissions'). In other words, the prosecution was using a theory of violence that undercut the defendant's self-defence case by not considering whether she was defending herself from ongoing violence, as opposed to violence in the immediate time frame.

177 Ibid 60.

178 *Fifth Report Data* (n 47) 54–6.

179 See generally *NZ Crimes Act* (n 13) s 48.

180 *Ruddelle Transcript* (n 51) 331, 381.

181 Ibid 383.

182 Ibid 385–6.

183 Ibid 386.

184 Ibid 385.

could have thought like that'.[185] In response to the question as to whether she could have pushed her partner away and run outside, she stated that she did not accept that 'because it happened so fast and I was a little intoxicated and the morning had gone on the night before'.[186] The defendant also answered 'yes' to the prosecution's question, 'you pulled the knife out of his chest and you stabbed him again, didn't you?'[187] This phrasing suggests an element of deliberation that may not have been present in the urgency of the moment. She also replied 'yes' to the question as to whether, 'one stab wound would have been more than enough to stop him'.[188]

Not mentioned at all in this exchange is the fact that all of the alternative safety strategies suggested by the prosecution were risky – none were guaranteed to provide the defendant's 14-year-old son with safety in the face of the danger presented by her abusive partner in that immediate moment. Some depended on her and her son being able to act wordlessly, simultaneously and quickly, some depended on her partner deciding to desist from using violence even though he was intoxicated and angry, and some were safety strategies that had not been successful in the past or had resulted in negative outcomes. If not successful, as the defendant explained, the consequences for her son could be quick and devastating. And if not successful, she would aggravate her partner further. In making the assessment that she did, as noted by Smith, the defendant was drawing on her years of experiencing and navigating violence from her partner, and her knowledge of what he was capable of doing to her and others.

This cross-examination, however, extracted some damaging concessions and provided a basis for the jury to reject self-defence because the victim-survivor's defensive actions were unreasonably excessive – either because she had other safety alternatives or because stabbing her partner more than once was unreasonable in the crucial moment.[189] Certainly, the comments by Palmer J at sentencing suggest that the victim-survivor failed to meet the test for self-defence on the basis that inflicting two stab wounds was disproportionate to the threat that she faced (although not 'grossly disproportionate').[190]

In the end, the jury decision in *Ruddelle* was ungenerous,[191] particularly because if there was any reasonable doubt that the defendant's defensive force was reasonable the jury were obliged to acquit: the Crown, and not the defence, bore

185 Ibid.
186 Ibid.
187 Ibid 380.
188 Ibid 387.
189 We note that asking the right questions when interviewing a defendant in order to prepare a report for court can be significant in equipping them to understand what is relevant in their experiences and why. Asking the right questions may reveal victim-survivor's resistance strategies (countering pathologizing narratives), agency responses (supporting her to make sense of her safety strategies), and all the forms of harm she was responding to (making visible structural – including intergenerational – violence and oppression). Some victim-survivors have never been asked questions by professionals concerning the second and third dimensions of entrapment and consequently may not think to articulate these aspects of their experience.
190 *Ruddelle Sentencing* (n 49) 511 [25].
191 See the criticism in Agnew-Harington and Morgan (n 149) 168–9.

the burden of disproving self-defence.[192] Furthermore, what is reasonable in self-defence under the test in section 48 of the *Crimes Act 1961* (NZ) is to be judged in the context of the circumstances the defendant honestly thought she was in, even if her perception of those circumstances was affected by her intoxication and exhaustion. Finally, as was pointed out in *Palmer v The Queen*,[193] it is necessary to apply the objective component of the test for self-defence with the consciousness that you are applying it to someone who is in a state of emergency:

> If there has been [an] attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.[194]

IV CONCLUSION

Extensive reforms to the homicide defences have been undertaken in Australia in an attempt to improve access for IPV victim-survivors, with limited effect.[195] Analysing the Australian cases in which victim-survivors have been charged with using lethal violence against their abusive partners between 2010–20, Caitlin Nash and Rachel Dioso-Villa note that '[j]ust having the legislation in place does not mean that the law will be applied as intended'.[196] Rather, the '*practices* of those laws'[197] must be changed. In this article we have critically examined an attempt in New Zealand to shift these practices. The defence in *Ruddelle* was ground-breaking in Australasia for its use of expert testimony on IPV entrapment. Whilst the results at sentencing were positive, and have been replicated in subsequent cases, the results at trial were disappointing – the evidence did not support a jury acquittal on the basis of self-defence.

We note, however, that change is not a linear or simple process when working with complex social problems and complex systems. Change in the complex context is iterative and emerges through a series of interactions and feedback loops between the system's interdependent moving parts. This level of complexity means we need to reconsider what counts as success. In Aotearoa New Zealand, whilst the outcome of *Ruddelle* was disappointing, the case and the concept of social and systemic entrapment has been the focus of subsequent judicial training and continuing education conferences and workshops for legal practitioners. These forums have provided opportunities to engage with many judges and lawyers about social and systemic entrapment and why it is an important framing for our collective aspirations for justice in response to family violence. These dialogic

192 See Tarrant, 'Making No-Case Submissions' (n 176) 61.
193 [1971] AC 814.
194 Ibid 832 (Lord Morris for the Court). See also *Zecevic* (n 13) 662–3 (Wilson, Dawson and Toohey JJ).
195 Nash and Dioso-Villa (n 3) 2278, 2282.
196 Ibid 21.
197 Quilter (n 148) 26 (emphasis in original).

change processes should not be discounted, as they are a critical part of shifting collective understandings of the nature, and harm, of IPV.

Whilst compassionate sentencing outcomes make a significant difference to the lives of individual victim-survivors, their families and kinship groups, such outcomes fail to challenge or change the racist and sexist operation of the criminal justice system when it comes to assigning criminal responsibility. We would suggest that continuing this work remains important despite the challenges that it presents. Doing so requires building a workforce of experts who have the capacity to undertake this work. The complexity of IPV entrapment, and of women's lives, may require different ways of thinking about and using expertise. It may require collaboration between experts from a range of different disciplinary backgrounds, experiences and perspectives – including, relevant cultural and linguistic capacity, front line family violence experience and systems expertise. Better outcomes at trial, of course, also require broader changes, including changes in prosecutorial charging practices and an improvement in general community awareness of the kinds of structural issues discussed in this article. Introducing evidence on IPV entrapment as expert testimony at trial might currently be a necessary strategy for the defence, but social and systemic IPV entrapment needs to be the framework used by the prosecution, judges and juries if we are to have a hope of just outcomes in these kinds of cases.[198]

198 Stella Tarrant has suggested no-case submissions where the state case against the defendant is based on 'a misunderstanding of a defendant's claim about what they were up against when they used force' so that 'there is no way of even beginning the legal assessments required by self-defence': Tarrant, 'Making No-Case Submissions' (n 176) 48.