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Centre for Women's Justice

Self-defence: New Zealand

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About the Centre for Women's Justice
Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work with frontline women's sector organisations to challenge police and prosecution failings around violence against women and girls (VAWG). Our evidence base is built on the experience of frontline women's sector support workers discussed during our training sessions with them, the requests for legal advice they send to us, and our research. In 2021 we responded to a total of 1,081 legal enquiries, including 559 in which we gave legal advice.

About this paper
This paper was commissioned as part of CWJ's work to address the unjust criminalisation of victims of VAWG who are accused of offending. It is specifically intended to help inform debate about potential reforms in law and practice in England and Wales to make self-defence more accessible for victims of domestic abuse who use force against their abuser.

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1. Brief summary of available defences for use of force by primary victims of domestic abuse (including partial defences for homicide)

The primary defence available to victims of intimate partner violence (IPV) in New Zealand who use force against their violent partner is self-defence.[1] This results in a complete acquittal and is potentially available in respect of any relevant offence if the legal requirements of the defence are met on the facts.

The duress defences – duress by circumstances and threats – are defined in law in New Zealand so as to be effectively unavailable to a defendant who uses force against her violent partner. Whilst the defence of duress by emergency circumstances is a full common law defence,[2] including in respect of violence offences short of homicide,[3] the courts have held that the defence is not available if the emergency situation that the defendant is responding to when they offend is a threat from another human being.[4] The defence of duress by threats – in New Zealand, the defence of "compulsion" – is set out in s 24 of the Crimes Act 1961.[5] This is unavailable for a range of offences, including murder, manslaughter and some of the more serious interpersonal violence offences, such as wounding with intent (s 188) and injuring with intent to cause bodily injury (s 189(1)).[6] To successfully raise compulsion in respect of offences where it is available, the accused must have been threatened with immediate death or grievous bodily harm unless they commit the offence and the person making the threat must be physically present throughout the commission of the offence.[7] The defence is therefore not available in the circumstances when a victim uses force against their abuser, other than in the unlikely event that he demands (with threats of immediate death or grievous bodily harm) that the victim use violence against him.

The common law defence of automatism requires that the defendant had lost complete volitional capacity at the time of offending and is rarely successful.[8] The defence of insanity, set out in s 23 of the Crimes Act 1961, requires that the defendant's cognitive capacity be completely overthrown by a disease of the mind at the relevant time.[9]

Intoxication in New Zealand does not operate as a defence – evidence of the defendant's intoxication is relevant to assessing their state of mind for the purposes of establishing liability. For example, it may be evidence to be considered in determining whether the

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[1] Section 48, Crimes Act 1961.
[2] Section 20 of the Crimes Act preserves the common law defences to the extent that they are not altered by or inconsistent with the Crimes Act.
[3] The defence is not available for murder or attempted murder, but is available for such offences as assault: *Police v Kawiti* [2000] 1 NZLR 117, 123; *Hocking v Police* [2012] NZHC 3192; *R v Hutchinson* [2004] NZAR 303, [38] (CA).
[4] *Kapi v Ministry of Transport* (1981) 8 CRNZ 49; *Police v Kawiti* [2000] 1 NZLR 117, *Akulue v R* [2013] NZSC 88. For a critique: Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants (*NZLC R73, 2001); Julia Tolmie and Khylee Quince, "Commentary: Kawiti at the Centre" Elisabeth McDonald, Rhonda Powell, Mamari Stephens and Rosemary Hunter, *Feminist Judgements of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope*, Hart Publishing 2017, 841.
[5] Section 24(1) of the Crimes Act 1961 provides "[a] person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion".
[6] Section 24(2).
[7] *R v Teichelman* [1981] 2 NZLR 64 (CA), 66-67. See Sevan Nouri, "Critiquing the defence of compulsion as it applies to women in abusive relationships" (2015) 21 *Auckland University Law Review* 168.
[8] See *Bannin v Police* [1991] 2 NZLR 237 and discussion in Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince, *Criminal Law in Aotearoa New Zealand*, LexisNexis, Wellington, 2022 at 134-153.
[9] Section 23(2) of the Crimes Act 1961 requires that the defendant be "labouring under a natural imbecility or disease of the mind to such an extent as to render him incapable – (a) Of understanding the nature and quality of [their] act or ommission; or (b) Of knowing that the act or omission was morally wrong, having regard to the commonly accepted standards of right and wrong." The defence results in a finding of not guilty by reason of insanity rather than an acquittal and there are a range of disposition options available to the court, including detention in a secure mental health facility.

defendant had an intentional or reckless state of mind if this is required for a particular offence.[10] Given that a "drunken intent is nevertheless an intent," it would require an exceptional set of facts to find the defendant not guilty because of intoxication.[11]

New Zealand has no partial defences – that is, defences attaching to murder and reducing a conviction for murder to manslaughter. It never had the defences of excessive self-defence or diminished responsibility and abolished the defence of provocation in 2009.[12] Despite this, victims of domestic violence who are charged with murder can receive convictions for manslaughter instead, on the basis that the Crown has not been able to prove the mens rea for murder on the evidence. In fact, there is no evidence that repealing the defence of provocation has made a difference to outcomes in cases where victims use lethal force against their abusive partners,[13] suggesting that the history of violence that the defendant is responding to may often be relevant in disproving mens rea.[14]

In New Zealand both murder and manslaughter share the same actus reus requirements – a culpable homicide, as defined in s 160(2) of the Crimes Act 1961. In cases where victims use lethal force against their abusive partners, a culpable homicide is likely to be established by an unlawful and dangerous act – an assault, for example - that causes death.[15] To be guilty of murder it must be additionally established that the defendant, at the time of committing the unlawful act causing death, had one of the following three mens rea states:[16]

- An intention to kill;
- An intention to cause bodily injury and awareness that death was likely; or
- An intention to pursue an unlawful object and awareness that death was likely.

If none of these mental states can be established, the defendant can be convicted of manslaughter on the basis of a culpable homicide (assuming self-defence is not available as a defence).[17]

A conviction for murder carries a presumption of life imprisonment, which can only be overturned where life would be "manifestly unjust".[18] A history of IPV has been recognised as grounds for overturning the presumption of life imprisonment, however murder convictions still attract high sentences in these cases relative to manslaughter.[19]

2. Summary of self-defence law

Section 48 of the Crimes Act 1961 (NZ) sets out self-defence in the following terms:

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

[10] *R v Kamipeli* [1975] 2 NZLR 610.
[11] *R v Sheehan* [1975] 1 WLR 739, at 744, cited with approval in *Kamipeli*, ibid, at 619-620.
[12] Crimes (Abolition of Provocation) Amendment Act 2009.
[13] New Zealand Law Commission, *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide: Report 139*, Wellington, 2016 at 47, 128-129; Julia Tolmie, "Defending Battered Defendants on Homicide Charges in New Zealand: The Impact of Abolishing the Partial Defences to Murder" (2015) *New Zealand Law Review* 649.
[14] See, for example, *R v Paton* [2013] NZHC 21.
[15] Section 160(2)(a), Crimes Act 1961. Other forms of culpable homicide are an omission causing death (s160(2)(b)); causing the victim by threats, fear of violence or deception to do an act which causes their death (s160(2)(d)) or wilfully frightening a child under 16 years or a sick person (s 160(2)(e)).
[16] Section 167, Crimes Act 1961. Putting aside the more unusual cases involving felony murder under s 168.
[17] Sction 171, Crimes Act 1961: culpable homicide not amounting to murder is manslaughter.
[18] Section 102, Sentencing Act 2002.
[19] See *R v Wihongi* [2011] NZCA 592 (12 years imprisonment for murder); *R v Rihia* [2012] NZHC 2720 (10 years imprisonment). Manslaughter, by way of contrast, has produced sentences of home detention, see: *R v Ruddelle* [2020] NZHC 1983 (dicussed below).

The courts have taken a literal reading of s 48 to determine that self-defence is not available in respect of offences committed without the use of "force".[20] Thus in *Hocking v Police*, the defendant, who was charged with driving offences whilst attempting to escape her partner, was not able to argue that her actions were in self-defence because they did not involve the use of force.[21] Similarly, "possession" does not involve the use of "force", meaning that self-defence is not per se available in respect of the possession of weapons solely for defensive purposes.[22]

The courts have also held that self-defence is only available in respect of the deliberate application of force for defensive purposes.[23] Victims have been denied self-defence, for example, when they have driven off with their abusive partner clinging to the bonnet of their car and he was killed when they accidentally collided with another car,[24] or when they accidentally shot him because they tripped whilst pointing what they thought was an unloaded gun at him in an attempt to intimidate him in order to defend themselves.[25]

Self-defence covers force used to defend oneself *or another*, with no limit on the type of relationship the defendant might have with any person that they seek to defend.[26] Typically, self-defence is distilled into three jury questions[27]:

- What were the circumstances as the accused honestly believed them to be?
- In those circumstances, was the accused acting in defence of themselves or another?
- Was the force used reasonable in those circumstances?

The defendant's honest belief about the circumstances they were in is to be treated as if it were fact for the purposes of assessing the reasonableness of the defensive force they used, no matter how mistaken or unreasonable that belief was.[28] The implicit issues involved in assessing the reasonableness of the defendant's defensive response include:[29]

- The perceived imminence and seriousness of the attack or threatened attack they were responding to;

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[20] *Hocking v Police* [2012] NZHC 3192 at [13].
[21] *Hocking v Police* [2012] NZHC 3192. Note that a verbal threat to kill or to apply physical force is "force" for the purposes of self-defence: *R v Terewi* (1985) 1 CRNZ 623 at 625 (CA). There is some difference of opinion is whether damage to property is "force" for the purposes of self-defence: *Sheehan v Police* [1994] 3 NZLR 592; *R v Hutchinson* [2004] NZAR 303 (CA) at [71]; *Leason v Attorney-General* [2013] NZCA 509 at [53]. Passive actions, such as obstruction, have been held not to constitute "force" for the purposes of raising self-defence*: Bayer v Police* [1994] 2 NZLR 48 (CA).
[22] *R v Ahmed* [2009] NZCA 220. Having said this, whilst self-defence will not be a defence to the *act of possession*, it may function to disprove on the facts a legal requirement that is additional to the fact of possession. For example, an intention to use a weapon only in self-defence may provide a "reasonable excuse" for possession under the relevant legislation: *R v Tuimana* [2007] NZCA 459.
[23] *Te Tomo v R* [2017] NZCA 338 at [29].
[24] *Fairburn v R* [2010] NZCA 44 at [46], [2010] NZSC 159 (conviction overturned on fresh evidence going to lack of mens rea).
[25] *R v Mackenzie* [2000] QCA 324.
[26] *Leason v Attorney-General* [2013] NZCA 509 at [52]. Although the defence is unlikely to extend to animals: *Dion v Police* [2013] NZHC 854 at [5].
[27] *R v Bridger* [2003] 1 NZLR 636 (CA) at [18]; *R v Sila* [2009] NZCA 233 at [18]; *R v Tauariki* [2013] NZCA 366.
[28] *R v Thomas* [1991] 3 NZLR 141, (1991)7 CRNZ 123 (CA); *R v Sila* [2009] NZCA 233 at [22]. Expert evidence about the defendant's cultural background (*R v Mesui* CA471/99, CA485/99, 2 December 1999 at [8]), and experiences of historical victimisation or trauma and/or mental health issues (*R v Oakes* [1995] 2 NZLR 673 (CA); *R v Seu* CA81/05, 8 December 2005, *R v Ghabachi* [2007] NZCA 285; *R v Wang* [1990] 1 NZLR 529 (CA)) has been tendered in relation to the issue as to what the accused's genuine perception of their circumstances was at the time.
[29] New Zealand Law Commission, above n 13 at 70. See also the Court of Appeal in *R v Powell* [2002] 1 NZLR 666 at [43].

- Whether there were alternative course of action reasonably available of which the defendant was aware;
- Whether the defensive action was reasonably proportionate to the threatened danger.

An imminent threat

Section 48 does not require the accused to be facing an attack that is almost or actually in progress before they are justified in using violence in self-defence.[30] However, in *R v Wang*,[31] a case involving a victim who killed her abusive partner whilst he was asleep, the Court of Appeal required that the defendant be responding to "imminent" harm on the basis that self-defence must not exceed what is reasonable in the circumstances. This is because a "threat which does not involve a present danger can normally be answered by retreating or some other method of avoiding the future danger".[32] Furthermore, if a threat is too far in the future the defendant does not know if it is necessary to defend themselves against it because a potential aggressor might always change their mind.

There was initially some hope that the courts would retreat from the requirement that the defendant be responding to an imminent threat.[33] There was also the possibility that the discussion in *R v Wang*[34] might not have been intended to lay down imminent harm as a legal requirement, rather than a factual and normative guide for the application of the legal test for self-defence in cases where this is appropriate.[35] In 2006 the Law Commission noted, however, that more recent Court of Appeal decisions (such as *Afamasaga v R*[36] and *Vincent v R*[37]) have confirmed the requirement for imminence as set out in *Wang*.[38]

In *R v Richardson*,[39] the trial Judge, whom the Court of Appeal cited without criticism, added the gloss that the threat had to be an "anticipated attack" in order to raise self-defence. In other words, a generally threatening set of circumstances was not enough. The accused had argued self-defence in response to charges for possession of firearms. He said that he had been harassed and assaulted by gang members and feared another attack might occur. The Court of Appeal commented that:[40]

> This aspect of the case seems to have been predicated on the quite unsustainable premise that if a person subjectively believed that they were under constant threat, they would be able to carry loaded weapons.

If *Richardson* is right, then one cannot defensively prepare to respond to an omnipresent threat that might crystallise at any point and that the police are unable to defuse. This will be so even if attack is inevitable and, once it is in train, the defendant has no hope of protecting themselves from the aggressor. It is possible that *Richardson* should be understood as an expression of the principle that the law of self-defence should be strictly construed against a

[30] In *R v Ranger* (1988) 4 CRNZ 6 at 9, the defendant was entitled to raise self-defence in respect of pre-emptive force in response to an impending specific threat.
[31] *R v Wang* [1990] 2 NZLR 529 at 539.
[32] *R v Wang* [1990] 2 NZLR 529 at 535, citing *R v Terewi* (1985) 1 CRNZ 623 at 625.
[33] *R v Zhou* HC T7/93, 8 October 1993 and *R v Oakes* [1995] 2 NZLR 673 did not require an imminent attack for self-defence to be put to the jury.
[34] *R v Wang* [1990] 2 NZLR 529.
[35] In *Vincent v R* [2015] NZCA 201 the Court of Appeal said imminence is not a distinct requirement but a question of fact and degree. It goes to, amongst other things, the opportunities available to the defendant to adopt an alternative course of action.
[36] [2015] NZCA 615 at [47].
[37] [2015] NZCA 201.
[38] New Zealand Law Commission, above n 13 at 79.
[39] *R v Richardson* CA450/02, 25 March 2003 at [24].
[40] *R v Richardson* CA450/02, 25 March 2003 at [25].

person unlawfully in charge of a weapon, rather than as laying down a more general legal rule in relation to self-defence.[41]

Alternative courses of action

In *R v Wang*,[42] the Court of Appeal concluded that the defendant honestly believed that she and her family were under serious threat from her violent husband, but it was nonetheless not reasonable defensive force in those circumstances for her to kill him whilst he was unconscious. The Court said:[43]

> … alternative courses were open to her. Her sister and her friend Susan were both in the house. She could have woken them and sought their help and advice. She could have left the house taking her sister with her in the car which was available. She could have gone to acquaintances in Christchurch or to the police.

Fran Wright has criticised the Court for not taking into account the defendant's own perception of what assistance was available and effective to deal with the threat her husband posed.[44] Wright argues that "the circumstances as he believes them to be" in s 48 of the Crimes Act 1961 include not only what kind of threat the defendant believed they were facing, but also what assistance they thought was available. Consequently the Court of Appeal in *Wang*[45] incorrectly interpreted the availability of assistance as an objective matter for the court to decide, as opposed to being an issue that the defendant could be honestly mistaken about.

The New Zealand Law Commission (NZLC)[46] has interpreted subsequent cases, such as *R v McNaughton*[47] *R v Fairburn*[48] and *R v Afamasaga,*[49] as clarifying that the defendant's beliefs as to their circumstances include any beliefs they have as to the options available to them to avoid the threat posed by the person they are defending themselves from. This includes whether they could have sought effective protection from the police.

Proportionality

The principle of proportionality suggests that the defensive force the defendant used should have some relationship to the level of threat they perceived themselves as under.[50] In older cases it is possible to find references to an attack with a weapon presenting greater harm than an attack with fists,[51] raising the possibility that a response with a weapon to an unarmed attack will be considered "disproportionate" and therefore unreasonable defensive force. This would be a problem for women who invariably use a weapon when responding to an attack by a man, and yet can experience an attack with fists as life threatening.[52]

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[41] Andrew Ashworth has suggested that one of the principles that can be distilled from the English case law is that the law of self-defence should be strictly construed against a person unlawfully in possession of a weapon: "Self-Defence and the Right to Life" (1975) 34(2) *CLJ* 282 at 297.
[42] *R v Wang* [1990] 2 NZLR 529.
[43] *R v Wang* [1990] 2 NZLR 529 at 534.
[44] Fran Wright "The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961" [1998] 7 *Waikato Law Review* 109.
[45] *R v Wang* [1990] 2 NZLR 529.
[46] Above n 13 at 82. Note that these cases did not involve victims of IPV acting to defend themselves.
[47] *McNaughton v R* [2013] NZCA 657.
[48] [2010] NZCA 44.
[49] [2015] NZCA 615.
[50] *R v Bridger* [2003] 1 NZLR 636 at [23]-[24]; *Wallace v Abbott* (2002) 19 CRNZ 585 at [101]-[102].
[51] *Petronelli v Serralach* HC Palmerston North AP 60/91 62/91, 17 September 1991 at 5.
[52] Family Violence Death Review Committee *Fourth Annual Report*, Health Quality & Safety Commission, Wellington, 2014 at 47.

Contemporary courts are, however, realistic in taking into account the disproportionate size and strength of assailants in the context of self-defence, and do allow self-defence with a weapon in response to an unarmed attack.[53] The physical mismatch between men and women as a generalisation, and women's general lack of training in the use of physical aggression, has been noted by the courts.[54] In 2014 the Court of Appeal in *Mafi v R*[55] made it clear that it is wrong to require the jury to undertake a comparative assessment between the threat the defendant believed that they faced and the force used to meet it. In other words, there is no requirement for "a reasonable balance" between these two things.

3. How self-defence law has been applied in cases involving a victim of domestic abuse using force against their abuser, including homicide cases

Most reviews of the New Zealand cases involving victims of domestic abuse who use force against their abusive partners involve homicide cases. This data, although based on small numbers, suggests that IPV victims are not generally successful in raising self-defence in respect of their use of defensive force.

The New Zealand Family Violence Death Review Committee (NZFVDRC) reported that from 2009-2015 there were 91 IPV death events, of which 16 involved a female primary victim or suspected primary victim killing her abusive partner.[56] There were strong defensive elements to these death events:[57]

> "most of the offending took place in the victim's home in response to imminent threat of physical harm, and the weapons used were those immediately available at hand, sourced from inside or around the home. There was no evidence of premediation or planning in advance..."

Of the 15 cases resolved at the time of reporting, 3 primary victims were convicted of murder (19%), 8 of manslaughter (50%), 3 were acquitted (19%) and 1 was found unfit to stand trial or insane.[58]

In 2016 the NZLC surveyed media reports and reported cases over a 15 year period, identifying 24 cases in which victims of domestic abuse were prosecuted for killing their abuser.[59] Of these cases, only 4 resulted in an acquittal (3 on the basis of self-defence), whilst 20 resulted in convictions for murder or manslaughter (16 manslaughter, 4 murder). Self-defence was raised in 10 of the 16 cases that went to trial (as opposed to being resolved by guilty pleas), but only 3 defendants were successful on this basis. In all cases where self-defence was successfully raised, the female victim/defendant alleged that the use of force was in response to an actual and ongoing physical assault by her male partner.[60] In

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[53] See *R v Murray* HC Wellington T26-87, 22 October 1987 at 4.
[54] See *R v Styles* CA297/03, 6 November 2003 at [32]; *R v Oakes* [1995] 2 NZLR 673 (CA).
[55] *Mafi v R* [2014] NZCA 408 at [29], cited with approval in *Theobald v R* [2018] NZCA 409 at [82]. See also *R v Howard* (2003) 20 CRNZ 319 (CA) at [26].
[56] NZFVDRC *Fifth Report Data: January 2009 to December 2015* Health Quality and Safety Commission, Wellington, 2017 at 31.
[57] NZFVDRC, ibid at 55 (see also 112-120).
[58] Ibid at 57.
[59] Above n 13 at 45. Of the 24 women 19 were charged with murder and 5 with manslaughter – with 8 cases resolved by guilty pleas (7 to manslaughter and one to murder), whilst 16 progressed to trial. At trial 4 were acquitted (including 3 women charged with murder), 3 were convicted of murder and 8 convicted of manslaughter.
[60] These cases involved Honor Stephens ('Jury accepts battered-wife defence in murder trial' (2012) <https://www.nzherald.co.nz/nz/jury-accepts-battered-wife-defence-in-murder-trial/Y327O7K2FELEPHX7AI7H2NUMOE/> accessed 20 February 2023), Natalie Ford (Herald Online. 'Ford found not guilty of murder' (2011) <https://www.nzherald.co.nz/nz/ford-found-not-guilty-of-murder/WWNSG3JP7AOFGLJXP3P6LIE2A4/> accessed 20 February 2023) and Jessica Keefe (Dominion Post, 'Jessica Keefe not guilty of murder' (2013), <https://www.stuff.co.nz/dominion-post/news/9186589/Jessica-Keefe-not-guilty-of-murder> accessed 20 February 2023).

other words, these were not cases where the defendant was responding to either a threatened attack or a general ongoing threat. In each of these cases, there was evidence of recent domestic abuse and the attack that the defendant was responding to at the time she used lethal force was witnessed by a third party.

Elizabeth Sheehy, Julie Stubbs and Julia Tolmie compared trends in the resolution of homicide cases on the public record involving victim/defendants of domestic abuse from 2000-2010 in Australia, Canada and New Zealand.[61] They found that, despite more liberal and flexible self-defence laws in New Zealand, Australia and Canada appear to have higher acquittal rates, less convictions for murder and a greater reliance on plea bargaining to produce manslaughter verdicts.

The reasons why self-defence is not more commonly successful in New Zealand when raised by victims who use force against their abusers, even when there are strong defensive elements to their actions, are likely to be complex and multifactorial. From a legal perspective, the requirement that the defendant be responding to an imminent threat set out in *Wang*[62] should not generally be a barrier to raising self-defence, given that (as noted) many victims are likely, in fact, responding to such a threat. Nonetheless, the requirement has been criticised by the NZLC as assuming the continued association of self-defence with a one off confrontation, rather than an ongoing and ever present threat of harm as is more typical in cases involving IPV.[63] The requirement also has a tendency to focus the jury's assessment of what is reasonable defensive force onto the immediate circumstances surrounding the defendant's defensive actions, to the exclusion of understanding how the wider cumulative context of violence (including past abuse and future abuse) reasonably influenced her decision making.

Related to this issue, the NZFVDRC has suggested that the barriers that victims face in persuading juries that their actions were reasonable defensive force include outdated and inaccurate understandings of IPV that legal decision-makers use to make sense of the facts when applying the law.[64] This means that juries are not making assessments of reasonableness based on an accurate and complete understanding of the defendant's circumstances – either because those circumstances are not placed before the court or because they are but juries do not understand their significance.

Traditionally IPV was understood and responded to as a series of assault crimes, in between which victim-survivors were understood as free to leave the relationship or access services in order to achieve safety. This has been described as the "violence model"[65] or the "bad relationship with incidents of violence"[66] model of IPV. Whilst lawyers have introduced into court evidence from mental health professionals about "battered women syndrome" to support the defendant's self-defence case, this testimony still understands IPV as consisting of incidents of violence in between which the defendant is assumed to have effective safety options. The main function of the syndrome is therefore to excuse the victim for not exercising her assumed safety options between incidents of abuse, on the basis that she

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[61] See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Battered women charged with homicide in Australia, Canada and New Zealand: how do they fare?" (2014) 45(3) *Australian and New Zealand Journal of Criminology* 383 at 384.
[62] *R v Wang* [1990] 2 NZLR 529.
[63] Above n 13 at 90.
[64] Julia Tolmie, Rachel Smith, Jacqui Short, Denise Wilson and Julie Sach, "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) *NZ Law Review* 181.
[65] Stark "Coercive Control" in L McMillan, L Radford, N Whiting, E Gilchrist, A Gill, N Lombard, C Barter, m McCarry, A Phippps and M Hester (eds) *Violence against women: Current theory and practice in domestic abuse, sexual violence and exploitation* (2013) Jessica Kingsley Publishers, 2013, 17-33.
[66] Above n 64.

had diminished mental functioning because of experiencing trauma.[67] It follows that, with some exceptions, battered woman syndrome testimony has not generally been successful in supporting abused women's claims to have been acting in reasonable self-defence.[68]

Since Evan Stark's ground-breaking book in 2007, lawyers and policy makers have begun to understand IPV as coercive control.[69] This is an understanding of IPV as a *liberty crime,* not 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. Properly employed, the concept of coercive allows us to move beyond understanding IPV as confined to discrete incidents of physical violence and, instead, to appreciate the abusive partner's behaviours overall as an unfolding pattern of *strategic and retaliatory* harm that has a compounding and cumulative effect. The advantage of a coercive control framing is that it makes the abusive behaviour the victim-survivor is responding to *fully visible* and locates 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 in the future. Whilst New Zealand has not enacted a standalone criminal offence of coercive control, it has inserted the concept into the definition of "family violence" in the Family Violence Act 2018.[70]

The NZFVDRC has suggested, however, that understanding IPV in terms of coercive control still does not go far enough.[71] That it is necessary to properly investigate two *further* inseparable dimensions of a victim-survivor's experiences of IPV if we are to fully understand the threat that she faced and her lawful options for dealing with it. These are:

- The efficacy and responsiveness of the family violence safety system to the victim, her family and her community; and
- The manner in which the structural and intersectional inequities of gender, class and racism shape the quality of safety responses available to particular groups of people and can compound their abusive partners' use of violence.

Essentially, understanding IPV as a form of social and systemic entrapment is a shift from focusing on the victim-survivor's individual psychological responses to incidents of abuse to a focus on understanding the entire social context that she is located within and responding to. An entrapment approach conceives that context not solely in terms of the abuse strategies used by her individual partner, but also the broader social context provided by the couple's immediate community, as well as the systemic response of government agencies and other institutions charged with assisting and responding to domestic abuse.

Evidence on IPV entrapment should function to challenge the simplistic but widely held assumption that the current family violence safety responses are available to all victim-survivors regardless of their social positionality, and that these safety responses match the operation and harm of IPV so, had the victim/defendant simply made better choices, she would have been safe. 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 of proof

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[67] Julia Tolmie, "Inaugural Professorial Address: Thinking Differently in Order to See Accurately: Explaining Why We are Convicting Women We Might Otherwise be Burying" (2020) 4 NZWLJ 8 at 32-34.
[68] One exception is *R v Zhou* HC Auckland 4 October 1993, but see Julia Tolmie "Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity" (1997) 19(4) *Sydney L Rev* 472.
[69] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* Oxford University Press 2007.
[70] Section 9, Family Violence Act 2018.
[71] NZFVDRC, *Fifth Report: January 2014 to December 2015*, HQSC, Wellington, 2016 at 39; Tolmie et al above n 64. The FVDRC credited James Ptacek *Battered Women in the Courtroom: The Power of Judicial Responses* Northeastern University Press, Boston, 1999 at 10 for articulating this concept. See also See Heather Douglas, Stella Tarrant and Julia Tolmie "Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence" (2020) 44(1) *University of NSW Law Journal* 324.

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 relationship would have provided this specific victim/defendant with safety.[72]

Whilst an entrapment approach is important for all victims of IPV, it is particularly significant for those defendants who are dealing with systemic entrapment[73] – for example, social responses that are informed by systemic racism, as well as ongoing intergenerational experiences of colonisation, state violence and oppression. For these defendants, their families, and communities all too often the state agencies charged with providing family violence safety responses are the same agencies that have been, and continue to be, unsafe for them to engage with. In New Zealand, for example, the state has uplifted children (particularly Indigenous children) in response to their mothers experiencing IPV victimisation and allowed these children to be systematically abused whilst in its care,[74] the primary health care system is institutionally racist,[75] and researchers have found the same issues with the criminal justice system.[76] What makes these victims circumstances profoundly more dangerous, is 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. Understanding IPV as a form of social and systemic entrapment is significant in this context because Indigenous women in socio-economic precarity are disproportionately represented amongst those victims who are charged with using force against their violent partners.[77]

4. Summary of proposed statutory reforms

In 2001, the NZLC recommended that self-defence, as set out in s 48: "be amended to make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but inevitable".[78] The intention was to allow self-defence in cases where "the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows that further assaults are inevitable, even if help is sought and the immediate danger avoided."[79] This is essentially a recognition that the family violence safety system is designed to respond to incidents and therefore does not match the operation and harm of IPV and/or may not be responsive to all victims of IPV. The NZLC also recommended that expert evidence on the "social context, nature and dynamics of domestic violence"[80] rather than battered woman syndrome, be provided by experts, who should not be limited to "psychologists and psychiatrists" but should include refuge workers and social scientists."[81]

Whilst the NZLC was not in favour of retaining or introducing more partial defences, recommending the abolition of then existing defence of provocation,[82] it did suggest

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[72] Stella Tarrant, Julia Tolmie and George Guidice, *Transforming Legal Understandings of Intimate Partner Violence*, ANROWS 2019, at 51-53.
[73] Denise Wilson, Alayne Mikahere-Hall, Juanita Sherwood, Karina Cootes and Debra Jackson *E Tū Wāhine, E Tū Whānau: Wāhine Māori keeping safe in unsafe relationships* Taupua Waiora Māori Research Centre, Auckland, 2019.
[74] See Caroline Savage, Paora Moyle, Larissa Kus-Harbord, Annabel Ahuriri-Driscoll, Anne Hynds, Kirimatao Paipa, Geord Leonard, Joanne Maraki, John Leonard, *Hāhā-uri, hāhā-tea - Māori Involvement in State Care 1950-1999*, Royal Commission of Inquiry into Abuse in State Care, 2021.
[75] Waitangi Tribunal, *Health Services and Outcomes Inquiry*, WAI 2575 2019.
[76] See Juan Tauri, "Indigenous perspectives and experience: Maori and the criminal justice system" in R Walters and T Bradley (eds) *Introduction to Criminological Thought* Pearson, Australia 2005, chapter 8.
[77] NZFVDRC above n 56 at 54.
[78] NZLC *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper* (NZLC PP41, 2000); *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [32]. See *R v Leuta* [2002] 1 NZLR 213 at [13].
[79] *Some Criminal Defences with Particular Reference to Battered Defendants*, ibid at [30].
[80] Ibid at [43].
[81] Ibid at [14].
[82] See also NZLC, *The Partial Defence of Provocation* NZLC R98, 2007.

replacing the mandatory sentence of life imprisonment for murder with a presumption of life imprisonment.[83] Whilst the NZLC's recommendations on self-defence were not actioned,[84] the recommendations as to sentence,[85] and eventually provocation,[86] were.

In 2016, the NZLC again looked at the issue of self-defence for victims of IPV, recommending that the Crimes Act 1961 be reformed to make it clear; "where a person is responding to family violence, section 48 may apply even if that person is responding to a threat that is not imminent".[87] Recognising that other issues can make it difficult to claim self-defence, such as the jury not hearing evidence on the history of the relationship or not fully understanding all of the circumstances that lead to the alleged offending, the NZLC also recommended modifying the Evidence Act 2006 to allow a broad range of family violence evidence to be admitted in support of self-defence.[88] Finally, the NZLC recommended continued education of judges, lawyers and police in order to improve the understanding within the criminal justice system of the dynamics of IPV.[89] Whilst there has been no statutory reform yet, as we shall see next, the legal profession has taken up these last two recommendations.

5. Summary of non-statutory developments and their impact

The New Zealand Institute of Judicial studies has, since family violence was made a theme of the District Court Judges Triennial Conference in 2015, provided regular judicial trainings on family violence for existing and new judges at every court level. In addition, a New Zealand Bench Book on Family Violence has been developed. These initiatives have coincided with a drive for diversity on the bench[90] and, particularly, the appointment of more Māori and Pasifika judges. Continuing education requirements for lawyers were introduced in 2013[91] and the Ministry of Justice has taken advantage of these by offering multiple training opportunities for lawyers on family violence and on vulnerable witnesses. Perhaps as a result of this work and the recommendations of the NZLC, the courts have recently admitted at trial expert evidence on IPV as a form of social and systemic entrapment, as well developing sentencing processes and outcomes informed by this understanding.

Expert testimony on entrapment at trial

Expert testimony on battered woman syndrome has been long accepted in New Zealand as admissible in criminal proceedings.[92] Despite the fact that it has been criticised by scholars,[93] the Law Commission[94] and some courts,[95] the concept has proven remarkably durable in the thinking of the legal profession.

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[83] *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 78 at [151], [154].
[84] The Ministry of Justice wrongly thought that the courts would overturn the position taken in *R v Wang* [1990] 2 NZLR 529: Ministry of Justice, *Criminal Defences Discussion Paper: Provocation and Other Partial Defences, Self-Defence and the Defences of Duress* unpublished paper, 2003, at [13].
[85] Section 102, Sentencing Act 2002.
[86] Above n 12.
[87] Above n 13 at 17.
[88] Ibid at 110.
[89] Ibid at 37-38.
[90] Helen Winkelmann, Chief Justice of New Zealand, *Annual* Report: For the Period of 1 January 2020 to 31 December 2021, March 2022.
[91] Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013.
[92] *R v Gordon* (1993) 10 CRNZ 430; *R v Oakes* [1995] 2 NZLR 673 (CA); *R v Zhou* HC Auckland T 7/93, 8 October 1993.
[93] See, for example, Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*" (2014) 28 *Melbourne University L Rev* 666.
[94] Above n 13 at 27-28.
[95] *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, per Thomas J.

Nonetheless, in *R v Ruddelle*[96] evidence on IPV as a form of social entrapment was accepted in the murder trial of an abused woman who killed her partner in the New Zealand High Court.[97] *Ruddelle* is a significant legal development both in terms of the nature of the *expert* permitted to give testimony (a non-mental health professional)[98] and the nature of the *expertise* that they provided (testimony explaining IPV in terms of the social context the victim was navigating).

In *R v Ruddelle*[99] written and oral expert evidence was given at trial by an expert on family violence, whose expertise was based on her experience in the family violence sector at a grassroots level as well as in family violence death review.[100] This expert explained the concept of IPV entrapment, including the fact that current family violence safety responses are designed to respond to incidents and are a mismatch for IPV as a pattern of harm; that victims of IPV are responding to cumulative ongoing harm rather than one particular incident; and that victims have often been living with violence for years and are:

> "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."[101]

Despite the introduction of such evidence, the defendant in *Ruddelle* was acquitted of murder but found guilty of manslaughter. This means that she was not successful in raising the defence of self-defence but the jury was also not convinced beyond reasonable doubt that she had the mens rea for murder.[102] The jury verdict was a majority verdict of 11 because one juror would have acquitted on the basis that the defendant was acting in reasonable self-defence.[103]

An approach to sentencing informed by entrapment

In *Ruddelle*[104] further evidence on IPV as a form of social and systemic entrapment was admitted at sentencing in the form of a written cultural report under s 27 of the Sentencing Act 2002 (NZ). This report was prepared by an expert in Māori health and IPV.[105]

The sentencing judge in *Ruddelle*[106] adopted a decision making process for sentencing that was informed by an understanding of IPV entrapment, citing the expert testimony at trial and the cultural report at sentencing in support of taking such an approach. In New Zealand a

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[96] *R v Ruddelle* [2019] NZHC 2973; [2020] NZHC 1983.
[97] *R v Ruddelle* [2019] NZHC 2973 at [4]. The Crown and defence arrived at an agreement that the evidence was "supported by a body of knowledge or experience which is sufficiently organised or recognised to be accepted as reliable" (ibid at [17], citing *R v Makoare* [2001] 1 NZLR 318 (CA), [23]), as well as being relevant and substantially helpful to the jury in understanding other evidence in the trial (ibid, [18]).
[98] The courts approach in this regard can be contrasted with that taken in *The State of Western Australia v Liyanage* [2017] WASCA 112.
[99] *R v Ruddelle* [2019] NZHC 2973; [2020] NZHC 1983.
[100] This expert was the subject expert for the NZFVDRC for many years and had 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.
[101] *R v Ruddelle*, Court transcript at 402.
[102] There are likely to be complex multi-factorial reasons why self-defence did not succeed at trial in this case – including the fact that the evidence on IPV entrapment was undercut by the evidence from a psychologist to the effect that the defendant's actions were informed by trauma and came from a primitive, instinctive and irrational part of the brain; that it was introduced as counter-intuitive evidence; and the focus on the incident that the defendant was responding to in the trial strategy of, and cross examination by, the prosecution.
[103] *R v Ruddelle* [2020] NZHC 1983 at [1] (reporting that the jury verdict was a majority verdict).
[104] *R v Ruddelle* [2020] NZHC 1983.
[105] Note that the expert's disciplinary background was in nursing not psychiatry or psychology.
[106] *R v Ruddelle* [2020] NZHC 1983.

starting point sentence is first set based on the culpability of the offender's criminal actions.[107] That starting point sentence is then adjusted up or down according to broader mitigating or aggravating factors that are personal to the offender. In *Ruddelle*, instead of basing the starting point sentence on Ms Ruddelle'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, Justice Palmer stated that "the context of family violence is an integral feature of the offending here."[108] In other words, the violence that she had experienced from her partner during their relationship was understood as directly relevant to the culpability of her criminal action.[109]

When setting the starting point sentence, the judge in *Ruddelle* was clear that the precedent value of some of the older caselaw taking an incident based or assault orientated approach to IPV was limited.[110] In keeping with this approach, he did not accept the Crown's argument that the last instance of her partner's violence towards Ms Ruddelle was some time prior to the night she stabbed him. In other words, he was not prepared to confine himself to a consideration of her partner's 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.

Justice Palmer set a starting point sentence of three years and six months imprisonment, adjusting this down to 23 months and ultimately imposing a sentence of 11 months and two weeks home detention, as the "least restrictive outcome that is appropriate in the circumstances" under s 8(g) of the Sentencing Act 2006 (NZ). This sentencing outcome meant that Ms Ruddelle was able to live at home and continue to parent her teenage son, who would otherwise have been left without parents.

Justice Palmer's analysis of specific facts was also firmly grounded in an understanding of IPV entrapment. For example, he positioned Ms Ruddelle as an expert on her partner's violence and noted that she had been a proactive help seeker in response to the violence she experienced from her partner.[111] He stated that 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."[112]

And, as a direct and practical example of evidence of IPV entrapment being used to challenge the systemic failings of the criminal justice response to Māori victims of family violence,[113] Justice Palmer was able to use the cultural report 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 Ms Ruddelle'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 for a lack of professionalism and insisted on an improved report.

There have been four cases since *R v Ruddelle* in which evidence of social and systemic IPV entrapment has been introduced at sentencing in respect of offending less than

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[107] See sections 8 and 9, Sentencing Act 2002 and *Moses v R* [2020] NZCA 296 at [46].
[108] *R v Ruddelle* [2020] NZHC 1983 at [27], [30].
[109] Ibid at [28].
[110] Ibid at [29].
[111] Ibid at [13].
[112] Ibid at [18].
[113] Māori constitute 65% of those who are incarcerated in women's prisons in New Zealand today: see New Zealand Department of Corrections, *Wāhine: E Rere Ana Ki Te Pae Hou Women's Strategy 2021 – 2025* at 8.

homicide.[114] The approach taken by the sentencing judges in these cases is directly modelled on, or consistent with, the approach taken in *Ruddelle* in that the IPV the victim/defendant 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 to her abusive partner's offending), and was discharged without conviction under s 106 of the Sentencing Act 2002 in respect of the aggravated burglary charge but given a sentence of intensive supervision in relation to the lesser offence.[115] In three further cases, defendants who used violence against their abusive partners to defend themselves received a s 106 discharge without conviction after pleading guilty to wounding with reckless disregard under s 188(2).[116]

In conclusion, New Zealand has yet to reform the defence of self-defence, even though there have been several recommendations by the NZLC to do so. Despite this, the courts have recently shifted their approach to the introduction of expert testimony at trial in support of victims of domestic abuse seeking to raise self-defence – allowing in evidence of IPV entrapment from experts who are not psychologists or psychiatrists. The courts have also shifted their approach to sentencing in cases where primary victims have used force against their abusive partners and where they have either failed to successfully raise self-defence at trial or have pleaded guilty.

[114] *R v W* [2021] NZDC 16501; *R v C* [2022]; *R v S* [2020] NZDC 13968; *R v I* [2021] NZDC 13066. Please note that the author is unable to provide more fulsome casenames and citations for these cases because of the serious danger that the defendants remain in and because information about these cases is held in a confidential capacity.
[115] *R v W* [2021] NZDC 16501. The judge, who suppressed details of the case because of the serious danger the defendant remained in, would have given her a sentence of discharge without conviction on both charges but felt a sentence of supervision provided the defendant with some measure of ongoing support.
[116] *R v C* [2022]; *R v S* [2020] NZDC 13968; *R v I* [2021] NZDC 13066.

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