



Transforming legal understandings of intimate partner violence

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Acknowledgement of Country

ANROWS acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander elders past, present and emerging, and we value Aboriginal and Torres Strait Islander histories, cultures and knowledge.

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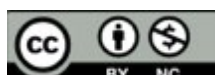
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Transforming legal understandings of intimate partner violence

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ANROWS acknowledges the lives and experiences of the women and children affected by domestic, family, sexual violence and neglect who are represented in this report. We recognise the individual stories of courage, hope and resilience that form the basis of ANROWS research.

Caution: Some people may find parts of this content confronting or distressing.

Recommended support services include: 1800 RESPECT – 1800 737 732 and Lifeline – 13 11 14.

Acknowledgement from Chamari

I acknowledge the unimaginable pain, suffering and ongoing devastation to the lives of women, men, children, their families and communities who experience the effects of family, domestic or intimate partner violence.

It is important to understand the indiscriminate nature of the intimate partner violence, and its ability to present in different forms. Historically we, as a society, have tended to trivialise; and have been largely oblivious to this issue.

I would like to acknowledge and sincerely thank all of those who have contributed to this remarkable report.

CHAMARI LIYANAGE.

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Executive summary

Women who kill their abusive partners have historically faced obstacles in successfully raising self-defence in response to homicide charges (Tasmania Law Reform Institute (TLRI), 2015; Victorian Law Reform Commission (VLRC), 2004). This is so despite the fact that many women who use lethal force in this context are responding defensively to the threat of further victimisation and victims/survivors are significantly more likely to die at the hands of, rather than kill, their abusive partners (Australian Domestic and Family Violence Death Review Network (ADFVDRN), 2018; New Zealand Family Violence Death Review Committee (NZFVDRC), 2017).

Over the past three decades, reform measures have been introduced in many jurisdictions in an attempt to adapt self-defence so that it operates more equitably in these kinds of cases. Despite these measures, cases in which such defendants are able to successfully raise self-defence are still not common in Australia, New Zealand or Canada (Sheehy, Stubbs, & Tolmie, 2012). The most typical outcome is that women plead guilty to manslaughter (not uncommonly, to resolve a charge of murder) or are found guilty of manslaughter rather than murder after trial (ADFVDRN, 2018; Tarrant, 2018).

Julia Quilter (2011) explains, in the context of sexual violence, how “interpretative schema” are used to make sense of facts. Embedded in such schema are assumptions about factual relevance and meaning in relation to different social phenomena that may be inaccurate but are invisible to, and unquestioned by, those using the schema. This explains why law reform can make no difference to the application of the law because the legal rules and principles may have changed, but lawyers, judges and juries are making sense of the social phenomena that the law is being applied to in exactly the same way, arriving at similar outcomes.

In this report, we attempt to further the project of reforming the criminal defences as they are applied to battered women who have been charged with homicide for killing their abusive partners, but we do not limit our analysis to the contemporary legal rules and principles that shape self-defence. We look deeper than this to the practices of those laws. For example, we examine the theories of intimate partner violence (IPV) used by legal professionals and experts in order to determine which

facts are selected and presented as relevant to understanding what happened in these cases, the language used to frame those facts and the conclusions drawn from them. Then we look at the old common law of self-defence and marriage to examine how its framing of forms of violence and defensive force are implicit in the application of the law today.

Examining theories of IPV (in Part One) and old common law principles (in Part Two) we make close analyses of a number of court documents produced in the case of *The State of Western Australia v. Liyanage* (SCWA, No. 27 of 2015) (“*Western Australia v. Liyanage*”). We analyse this case as an exemplar of the self-defence trials we are concerned with. We chose this approach, an in-depth consideration of one case, so that we could examine the processes of justice beyond the operation of explicit legal rules.

Western Australia v. Liyanage is typical of the cases in which women’s claims to have acted in self-defence against their abusive partner have been rejected. It is typical in terms of the nature and seriousness of the IPV the defendant was responding to when she used lethal force, the conceptual understandings of IPV as used by legal professionals and experts in the case, and the legal outcome (see Sheehy, 2013; Sheehy et al., 2012).

Dr Liyanage (referred to in this report by her first name, Chamari, with her permission) struck her husband (referred to in this report by his first name, Dinendra) at least two times on the head with a heavy metal mallet as he lay in their bed in June 2014. Afterwards, Chamari had no memory of having done so. She was charged with his murder in 2014 and convicted of his manslaughter in 2016 after a trial by judge and jury, meaning that the jury rejected her self-defence case. Her appeal against her conviction of manslaughter was rejected by the Western Australian Court of Appeal in 2017 (*Liyanage v. The State of Western Australia* [2017] WASCA 112). An appeal was lodged in the High Court of Australia but withdrawn because the pressure on the defendant resulting from another court process would have been unacceptably high.

The documents that were analysed were:

- the trial transcript;
- the trial judge's judgment on the admissibility of expert evidence (*Western Australia v. Liyanage* [2016] WASC 12);
- the sentencing judge's sentencing remarks (*Western Australia v. Liyanage* [2016] WASCSR 31); and
- the transcript of the Court of Appeal hearing; and
- the judgement of the Court of Appeal (*Liyanage v. Western Australia* [2017] WASCA 112).

Part One of this report asks what theories of IPV were used by the prosecutor, expert witnesses and judges at the trial and appellate court levels to make sense of the facts in *Western Australian v. Liyanage*, and whether those theories were consistent with current social science knowledge about IPV.

Part One commences by explaining the two theories of violence that are most commonly used in the legal context when primary victims/survivors of IPV are charged with homicide in respect of the killing of their predominant aggressor: the battered woman syndrome, and a model that conceptualises IPV as incidents of violence that take place in a bad relationship. These are contrasted with a social entrapment model; a framework for understanding IPV that is derived from the contemporary social science literature. This model takes a broader view of the abuse strategies involved in IPV, as well as taking account of IPV within its social context. Such a framework requires documentation of the full suite of coercive and controlling behaviours by the predominant aggressor, including the strategic and retaliatory dimensions of this behaviour and its temporal development. It also requires an examination of the responses of family, community and agencies to the abuse, and the manner in which any structural inequities experienced by the primary victim/survivor support the aggressor's use of violence and compound her experience of entrapment. This approach requires that the safety options of the victim/survivor be realistically explored in her particular circumstances and not simply assumed. The social entrapment model is consistent with reforms such as those in Victoria (*Crimes Act 1958* (Vic), ss. 322J, 322K) which were aimed at ensuring that women's use of force in response to IPV is assessed within its social

context, including the particular circumstances of each defendant (Kirkwood, McKenzie, Tyson, & Domestic Violence Resource Centre Victoria (DVRCV), 2013; VLRC, 2004).

In Part One, having first introduced these three "theories" of IPV in general terms, we go on to use a narrative approach to illustrate how the theory of violence that is used affects the manner in which facts are constructed and understood in a particular case. We first tell the story of the facts in *Western Australian v. Liyanage* using a social entrapment framing. Then we summarise the story about the facts as told by two of the expert witnesses in the case using a battered woman syndrome framing and show how this story differed from that using an entrapment framing. Thirdly, we describe the narrative of the facts as recounted by the prosecutor using a bad relationship with incidents of violence model and demonstrate the differences between this story and the one that we have told using social entrapment as a conceptual paradigm. Finally, we interrogate the judgements of the trial judge and the Court of Appeal to suggest that the theory of violence used by the judges was a combination of the two outmoded theories as used by the expert witnesses and the prosecution.

We suggest that when legal professionals use dated theories of violence, they automatically undercut women's self-defence cases by the manner in which they construct the facts. In other words, the theory used predetermines, to some degree, that self-defence is likely to be unsuccessful, at least in those cases where a defendant is not facing an imminent attack at the time that they use defensive force.

Part Two of the report asks *why* social entrapment as a conceptual framework is difficult to understand and use in the legal context. Whereas in Part One we look at how interpretative schema drawing on particular theories of violence influence or determine how the law is applied, in Part Two we examine the interpretative schema associated with the old common laws of self-defence and marriage. We ask to what extent these older legal paradigms are still influencing the application of the current law.

First, we set out the old common laws of homicide, self-defence and “husband and wife”, as described by pre-eminent eighteenth century jurist Blackstone and other treatise writers, and provide an analysis of those laws which centralises the legal position of wives during that time. Blackstone’s legacy is known to all students of the common law. The analysis shows that it was difficult, if not impossible, for wives to rely on the laws of self-defence. This was most apparently so because those laws had the social contexts in mind that were applicable to men rather than women. However, an examination of the laws of self-defence alongside those of marriage reveals that the old common law provided no *concept* of lethal self-defence by a wife against her husband. The requirement that force was only to be used where the need to defend oneself arose *suddenly*, and that “retreat” from immediate physical conflict was assumed to resolve the need for defence, made self-defence only applicable to a fight between two men. The marital rape immunity rule and the rule that a husband could “chastise” his wife “within reason” arose from the concept of marital unity, which was the understanding of marriage as a status hierarchy in which a wife submitted to the authority of her husband. These rules and underlying legal concepts made certain forms of violence against wives not registrable as violence.

In the second section of Part Two, we show how the rules of marriage and self-defence have been reformed, tracing briefly the legal changes that have occurred in three key rules:

- the “chastisement rule”;
- a husband’s immunity from prosecution for rape; and
- what we refer to as the “fight” rule in the law of self-defence; that is, the requirement that a person be responding to an immediate physical attack in order to rely on the law of self-defence.

In the final section of Part 2 we analyse the court documents in *Western Australia v. Liyanage* again to demonstrate that, although the key rules about marriage and self-defence have changed, the State’s case in *Western Australia v. Liyanage* rested on some of the same assumptions as those in the older common law. The structure of the State’s argument and the evidence it called is explicable in relation to a “fight” paradigm

of self-defence. The construction of Dinendra’s sexual conduct repeated the old common law’s “invisibilising” of sexual violence against wives. The State failed to perceive the status hierarchy in Chamari’s and Dinendra’s marriage as part of the violence against which Chamari was defending herself and on which her claim of self-defence was based. We suggest that, as a result, the State failed to disprove Chamari’s claim of self-defence against the non-imminent harm in Dinendra’s IPV; rather, it left that claim unanswered.

We intend for this report to function as an educational resource for:

- law students;
- police;
- prosecution and defence lawyers;
- expert witnesses; and
- judges.

It is intended that the report be read by individuals and used in teaching and training materials to render visible and question the conceptual models of IPV that are currently used by decision-makers in the criminal justice process in those cases where an accurate understanding of IPV is essential to the application of the law. We also model the use of a more appropriate conceptual framework (social entrapment) to investigate, present and respond to the facts of a particular case. We suggest this model is more appropriate because it allows a person who raises self-defence against IPV to have their legal claim heard; the form and seriousness of the violence that is the basis of their claim can be revealed and their circumstances realistically assessed.

In the conclusion to this report, we make recommendations to support the collective conceptual shifts that are required if the criminal defences are to be equitably available to primary victims/survivors who use force in response to their experiences of IPV. These are shifts in thinking which make visible and challenge the models of violence that are currently being applied when trying to understand violence in the context of intimate relationships, in favour of the use of a model that better reflects contemporary social science

knowledge of IPV. Such paradigm shifts require intellectual/ analytical *and* empathetic engagement on the part of all participants in the criminal justice process. Some of the recommendations we make address directly the collective shifts in thinking that we believe are required, and others describe some of the practical measures that would support (and result from) those shifts.

Introduction

Outline of the project and the report

Women who kill their abusive partners have historically faced obstacles in successfully raising self-defence in response to homicide charges (TLRI, 2015, pp. 54-71; VLRC, 2004, pp. 60-92). This is so despite the fact that many women who use lethal force in this context are responding defensively to the threat of further victimisation and victims are significantly more likely to die at the hands of, rather than kill, their abusive partners (ADFVRN, 2018; NZFVDRC, 2017, pp. 27-60).

Over the past three decades, reform measures have been introduced in many jurisdictions in an attempt to adapt self-defence so that it operates more equitably in these kinds of cases. Such measures include:

- abolishing any requirement that the defendant be responding to an imminent attack in order to raise the defence of self-defence (*Criminal Code Act Compilation Act (Criminal Code) 1913* (WA), s. 248; *Crimes Act 1958* (Vic), s. 322K);
- making it clear that evidence of the history of abuse in the relationship is relevant to the defendant's self-defence case (*Crimes Act 1958* (Vic), s. 322J; *Evidence Act 1977* (Qld), s. 132B); and
- the introduction of expert testimony in court in an endeavour to explain to the jury why women who are in abusive relationships might reasonably perceive themselves as unable to leave the relationship or call the police (*The Queen v. Lavallee*, 1990; *The Queen v. Oakes*, 1995; *The Queen v. Runjanjic and Kontinnen*, 1991).

Despite these measures, cases in which such defendants are able to successfully raise self-defence are still not common in Australia, New Zealand or Canada (Sheehy et al., 2012). The most typical outcome is that women plead guilty to manslaughter (not uncommonly to resolve a charge of murder) or are found guilty of manslaughter rather than murder (ADFVRN, 2018; Tarrant, 2018).

Julia Quilter (2011) explains, in the context of sexual violence, how “interpretative schema” are used to make sense of facts. Embedded in such schema are assumptions about factual relevance and meaning in relation to different social

phenomena that may be inaccurate but are invisible to, and unquestioned by, those using the schema. A schema:

...is used to assemble and provide coherence for an array of particulars as an account of what actually happened; the particulars, thus selected and assembled, will intend and will be interpretable by, the schema used to assemble them. The effect is peculiarly circular, for although questions of truth and falsity, accuracy and inaccuracy about the particulars may certainly be raised, the schema itself is not called into question as a method of providing for the coherence of the collection of particulars as a whole. (Smith as cited in Quilter, 2011, p. 30)

This explains why law reform can make no difference to the application of the law because the legal rules and principles may have changed but lawyers, judges and juries, in practice, are making sense of the social phenomena that the law is being applied to in exactly the same way, arriving at similar outcomes.

In this report, we attempt to further the project of reforming the criminal defences as they are applied to battered women, but we do not limit our analysis to the contemporary legal rules and principles that shape self-defence. We look deeper than this. We first render visible and critique the theories of intimate partner violence (IPV) used by legal professionals and experts in order to determine:

- which facts are selected and presented as relevant to understanding what happened in these cases;
- the language used to frame those facts; and
- the conclusions drawn from them.

Then we look at the old common laws on self-defence and marriage to examine where the current framing of violence and defensive force comes from.

In an earlier literature review (see Appendix A) we surveyed the social science literature over the last ten years in order to determine how IPV is currently understood by social scientists and academic experts. In this report, we suggest that expert witnesses, lawyers (including both prosecution and defence) and judges are using outmoded theories of

violence to frame and make sense of the facts in these kinds of cases. Our thesis is that legal professionals need to update their conceptual understandings of IPV in this context so that these better reflect contemporary knowledge.

We intend this report to function as an educational resource for law students, police, prosecution and defence lawyers, expert witnesses and judges. It is intended that the report be read by individuals and used in teaching and training materials to render visible and question the conceptual models of IPV that are currently used by decision-makers in the criminal justice process in those cases where an accurate understanding of IPV is essential to the application of the law. We also model the use of a more appropriate conceptual framework to investigate, present and respond to the facts of a particular case. We suggest this model is more appropriate because it allows a person who raises self-defence against IPV to have their legal claim heard; the form and seriousness of the violence that is the basis of their claim can be revealed and their circumstances realistically assessed.

In Part One of this report we first briefly explain the two theories of IPV that are typically used in the legal context and contrast these with a social entrapment framing, which is better supported by the current literature on IPV. We then go on to tell three stories about the facts of *Western Australia v. Liyanage*. The first story uses a social entrapment framing, the second is told by the experts in the case using a battered woman syndrome framing, and the third is told by the prosecution using a “bad relationship with incidents of violence” framing. We suggest that the latter two theories, which are currently the predominant theories used in the legal context, effectively *preclude* proper consideration of the defendant’s self-defence case on the facts. We conclude Part One by examining the responses to the facts by the trial judge and the Court of Appeal in *Liyanage v. Western Australia*, in order to demonstrate that neither tier of court understood the social entrapment model of IPV. Rather, they were informed by the outmoded theories of violence used by the experts and the prosecution in the case.

It is important to note that using a social entrapment framework to understand IPV does not guarantee any defendant access to the defence of self-defence and a consequent acquittal. It

simply means that the defendant in a particular case has the opportunity to have their case for self-defence fairly assessed on the facts. It means that their self-defence case is not automatically precluded by misunderstandings about IPV on the part of those responsible for making factual determinations or articulating the law or applying the law to the facts during the trial and appeal process. It also means that the defence is free to represent their individual client in the particular trial, without the additional burden of simultaneously having to undertake a challenging educational task in relation to all of the other professionals involved in the case. And it does not prevent the prosecution from disproving self-defence on the facts, although it does prevent them from simply appealing, explicitly or implicitly, to problematic ways of thinking about IPV in order to do so.

In Part Two, we take this one step further to look at *why* social entrapment as a conceptual framework is difficult to understand and use in the legal context. Part Two examines the old common laws of self-defence and the interpretive schema that underpinned them, to show that some of the assumptions that generated those laws still direct the law today. In other words, we examine what Quilter refers to as the “long sedimented his-tories” of the laws on marriage and self-defence (Quilter, 2011, p. 55) in order to show where the current paradigms used to understand self-defence and IPV come from.

First, we set out the old common laws of homicide, self-defence and “husband and wife,” as described by Blackstone and other foundational treatise writers, and provide an analysis of those laws which centralises the legal position of wives during that time. The analysis shows that it was difficult, if not impossible, for wives to rely on the laws of self-defence. Next, we show how the rules of marriage and self-defence have changed since Blackstone’s time. We trace briefly the legal changes that have occurred in three key rules:

- the “chastisement rule”;
- a husband’s immunity from prosecution for rape; and
- what we refer to as the “fight” rule in the law of self-defence.

Finally, we analyse the court documents in *Western Australia v. Liyanage* again to show that, although these key rules about

marriage and self-defence have changed, the State's case in *Western Australia v. Liyanage* rested on some of the same assumptions that underpinned the old common law. Its structure was limited to a "fight" paradigm of self-defence. Its construction of Dinendra's sexual conduct repeated the old common law's "invisibilising" of sexual violence against wives, and the State failed to perceive the status hierarchy in Chamari and Dinendra's marriage as part of the violence against which Chamari was defending herself and on which her claim of self-defence was based. We show that what resulted from the State's reliance on these structures and assumptions was that it failed to disprove Chamari's claim of self-defence against the non-imminent harm in Dinendra's IPV. Rather, it left Chamari's claim to have been acting in self-defence against ongoing non-imminent serious harm unanswered.

A comment on methodology

In Part One of the report we use the mechanism of narrative to distil the theoretical frameworks that are typically used to understand IPV in the legal context, and to demonstrate how the theory of IPV that is used shapes the story that is told in ways that permit or automatically preclude the defendant's equitable access to the defence of self-defence. Richard Delgado (2000, p. 61) explains that:

Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of pressuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn for a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology — the received wisdom — makes current social arrangements seem fair and natural.

Our aim in this process is bigger, however, than just telling stories about the facts of a particular case. We aim to use the individual case that is focused on in this report as a "window" into the legal system and, in particular, the underlying paradigms/conceptual frameworks that are predominantly used in the legal system to understand IPV. Our aim in retelling the facts of a particular case using an

alternative paradigm (one that is better informed by research on the nature of IPV) and undertaking a detailed analysis of the State's case by reference to the law of self-defence, is to demonstrate *how* legal professionals need to shift their thinking about IPV and *why it matters* that they do.

We have focused on the accounts of the prosecution and the experts in *Western Australia v. Liyanage* because the work of these professionals in the case provided clear examples of approaches to the facts that were informed by one of the two alternative theories of violence that are typically used in the current legal response to IPV. We have not focused on the case as constructed by the defence (although one of the experts whose testimony we discuss was called by the defence) because it is important not to understand the issue that we are describing as being about the defence strategy in any particular case. It is not the responsibility of the defence to educate the prosecution lawyers, judges and legal experts about the correct law in order for those professionals to be able to perform their proper role in the trial process (*Mallard v R* (2005) 224 CLR 125; *R v Apostilides* (1984) 154 CLR 563). Neither should it be the role of the defence to ensure that the other professionals involved in a trial have correct and up-to-date understandings of IPV in a case where a correct understanding of IPV is essential to the application of the relevant law. This is not to deny that the defence has a role in challenging errors of law on the part of any individual or suggesting ways of resolving ambiguities in the application of the law in any particular instance. But it is the responsibility of all of the professionals involved in applying the law to ensure that they correctly understand that law. We are suggesting here that the same should be true of key social phenomena that they are obliged to apply the law to, when those social phenomena are essential to the resolution of the legal dispute in issue and *where an incorrect understanding precludes the proper application of the law*. Placing the onus on the defence to challenge and shift the underlying paradigms that are typically used in the legal system to understand IPV in any particular case, whilst also presenting their particular client's case within the correct paradigm, is to give the defence an impossible task, even to the point of running counter to traditional understandings of where the burden of proof ordinarily lies in criminal proceedings. Furthermore, it follows from our theoretical

premise that defence counsel cannot remedy the kinds of errors we identify. Paradigms, or interpretative schema, are embedded cultural assumptions, so that, as illustrated at numerous points in *Western Australia v. Liyanage*, the legal professionals who are listening to defence counsel will be hearing their argument through the paradigms that the defence is attempting to challenge, unconscious of the fact that they are doing so.

In Part One, the order in which we chose to present the narratives is significant. We were concerned that, since current modes of thinking about IPV have such deep cultural roots (as explained further in Part Two), if readers were exposed first to the narratives that were in fact used in *Western Australia v. Liyanage*, they might uncritically accept them and find it difficult to be receptive to any alternative framing of the facts. We have therefore first presented the reading of the facts through the understanding of IPV as a form of social entrapment so that readers are provided with a critical perspective before they come to the accounts informed by the more traditional approaches.

We note that providing a social entrapment framework for the facts of any particular case is not an easy task. It requires discipline to counter some of the habits and assumptions that are embedded in current common sense responses to IPV — responses that we are all inculcated in (including the authors, who have been working for many years as scholars in the field and should know better). For example, it requires discipline to shift the focus from what the victim/survivor did or didn't do to an examination of the abuse strategies used by the perpetrator and the safety responses genuinely available to the victim/survivor in the circumstances. As discussed in the body of this report, we discovered that the language available to describe IPV, and in particular sexual violence, tends to reconstruct IPV as something less than serious violence (for example, bad sex rather than violence) or attributes the responsibility for the violence to both parties (for example, the issue becomes the relationship: the relationship is violent). As we note later in the report, if the information that is to be analysed has been gathered and organised by someone who has not used a social entrapment framework, there are likely to be significant gaps in that information.

Why focus on *Western Australia v. Liyanage*?

Dr Liyanage (referred to in this report by her first name, Chamari) struck her husband (referred to in this report by his first name, Dinendra) at least two times on the head with a heavy metal mallet as he lay in their bed in June 2014. Afterwards, she had no memory of having done so. She was charged with his murder in 2014. The judge made a pre-trial ruling that the defence could not introduce expert evidence from a social worker experienced in working with IPV victims/survivors about the dynamics of IPV and the results of applying several validated risk assessment instruments to the facts as recounted by the defendant. Chamari was tried for murder and convicted of manslaughter in 2016, meaning that the jury rejected her self-defence case (note that this means that her defence of automatism, unexamined in this report, was also rejected). After sentencing, and whilst serving her sentence, Chamari appealed against her conviction on the basis that the trial judge should not have rejected expert testimony from a social worker. Her appeal was rejected in 2017 in *Liyanage v. Western Australia*.

The focus in this report on the case of *Western Australia v. Liyanage* reflects, in part, the fact that the project began as research underpinning a public interest test case; a proposed appeal to the High Court of Australia from the Western Australian Court of Appeal in this case. The grounds for appeal focused on the exclusion from the trial of proposed expert testimony from the social worker.

The appeal to the High Court was discontinued because the anticipated cost to Chamari resulting from another trial was too high. However, we continued with the research because the issues that are raised are of great importance generally, and are relevant in all Australian jurisdictions.

Examining theories of violence in Part One and old common law principles in Part Two, we analyse legal documents associated with this case as an exemplar of the self-defence trials of primary victims/survivors of IPV who have killed their abusive partners. *Western Australia v. Liyanage* is typical of these kinds of cases in terms of:

- the seriousness of the IPV that Chamari was responding to when she used lethal force;
- the models of IPV used to make sense of the facts by the legal professionals involved in constructing the case; and
- the legal outcome of her homicide trial (see, for example, Sheehy, 2013; Sheehy, Stubbs, & Tolmie, 2014).

There are common features found in analysing all such cases:

- the IPV tactics used by the perpetrator;
- the systemic failures of the IPV safety system; and
- the broader structural inequities that exacerbate the entrapment experienced by victims/survivors.

Of course, the particularities in any case will be unique, and that is also true of *Western Australia v. Liyanage*. This is because, as noted below, the IPV abuse tactics are developed by trial and error over time for the individual victim/survivor by the person who knows her most intimately. People's life circumstances also obviously differ in their details in terms of the structural inequalities a specific defendant may have experienced.

Dinendra's sexual abuse of Chamari was central to this case. Sexual violence is one of the most underreported forms of abuse, in part because it is one of the least inquired about by others (Victorian Royal Commission into Family Violence (VRCFV) 2016) and because of the high degrees of shame experienced by victims/survivors:

Sexualised violence is a personal experience most difficult to approach. A wound on a person's sexuality is guarded by the strongest shame — it is often the case that even witnesses find it difficult to recall what they saw and even victims/survivors speak about it as if they were only witnesses to it. Those who manage to survive sexualised violence without visible consequences often strive to undo it even for themselves and conceal their wounds from the eyes of the other. (Kovacs, 2017, p. 43)

Sexual violence is associated with very serious and extreme forms of IPV (Braaf & UNSW, 2011; Cox, 2015; Dobash & Dobash, 2007) and is a risk factor for subsequent lethal IPV (Campbell, 2003; Dobash & Dobash, 2007). It is not surprising,

therefore, that intimate partner sexual violence (IPSV) plays a significant part in the violence against which primary victims/survivors sometimes act in self-defence (Lansdowne & Bacon, 1982; Ewing, 1987; Sheehy et al., 2014; Tarrant, 2002; VLRC, 2004). What is less common about *Western Australia v. Liyanage* is that the sexual violence used by the deceased was described in detail by the defendant at trial (see *Kina*, 1993, for another example where extreme sexual violence was disclosed by the victim/survivor, although in that case Robyn Kina's disclosures took place some time after her trial and incarceration).

We chose the approach taken in this report, an in-depth consideration of one case, so that we could examine much more closely the processes of justice, beyond the legal rules themselves. As we have said, reform measures have adapted the statutory form of the defence, but successful reliance on self-defence by women charged with killing an abusive partner is still not common. This is despite the fact that in most IPV homicides women who are primary victims are killed by their violent partners, and the small minority who use lethal force themselves (as opposed to dying at the hands of their partner) often do so in circumstances that suggest that these are defensive killings (NZFVDR, 2017). Therefore, a more detailed form of inquiry is required.

The documents associated with *Western Australian v. Liyanage* which we analysed are:

- the transcript of the trial proceedings ("Tr");
- the trial judge's judgment (delivered before the start of the trial) about the admissibility of expert evidence: *The State of Western Australia v. Liyanage* [2016] WASC 12 ("Western Australia v. Liyanage [2016] WASC 12");
- the sentencing judge's sentencing remarks: *The State of Western Australia v. Liyanage* [2016] WASCSR 31 ("Western Australia v. Liyanage [2016] WASCSR 31");
- the transcript of proceedings in the Court of Appeal ("CA Tr"); and
- the judgment of the Court of Appeal: *Liyanage v. The State of Western Australia* [2017] WASCA 112 ("Liyanage v. Western Australia, 2017").

The legal framework

Section 248(4) of the Western Australian *Criminal Code Act Compilation Act 2013* provides that “A person’s harmful act is done in self-defence if:

- a. the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
- b. the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
- c. there are reasonable grounds for those beliefs.”

Although this formulation of self-defence differs in particulars, it is consistent with self-defence laws in all Australian jurisdictions with respect to the relevant primary principles (Tarrant, 2015).

It follows that there are **two primary considerations on the facts that are relevant to any claim of self-defence** (Law Reform Commission of Western Australia (LRCWA) & Braddock, 2007) and that each of these considerations must be assessed both in terms of the accused’s “subjective beliefs” and whether there were “reasonable grounds” for those beliefs:

1. the level of threat that the aggressor posed to the defendant at the time she used defensive force; and
2. any means of dealing with that threat that was available to the defendant other than doing as she did.

The abuse that she has/is experienced/ing from her partner is central to both of these considerations and is therefore central to her self-defence case.

The Court of Appeal in *Liyanage v. Western Australia*, 2017, noted that the reforms in 2008 sought to remove gender bias in the application of the Western Australian law on self-defence to battered defendants in three ways.¹

First, it is now recognised that a defendant can use a weapon against an unarmed non-lethal assault by her stronger male partner and claim self-defence. Secondly, it is specifically stated that the threat of harm that the defendant is defending herself against need not be imminent in order to claim self-defence. Finally, these reforms mean that a defendant who is subject to severe ongoing abuse for which there is no escape might reasonably respond with lethal violence, even though she does not think the abuser will kill her so long as she stays in the relationship.

¹ WASCA [2017] 112, [74]-[77]. The analysis of these reforms by the Court of Appeal is revealing about how the court conceptualises self-defence. The court says that “the requirement that the accused reasonably feared death or grievous bodily harm [GBH] has been removed, meaning that a woman can claim self-defence in respect of the use of a weapon against an unarmed non-lethal assault by her stronger male partner.” In fact, the removal of the requirement of “death or [GBH]” is not the reason why a woman can use a weapon. The court’s formulation betrays an assumption that a woman might use a weapon (and rely successfully on self-defence) not believing she is in danger of death or GBH (i.e. very serious harm).

Neither before nor after the amendments could a woman rely successfully on self-defence for the use of lethal force in the absence of a belief on reasonable grounds that she was in danger of very serious harm. The amendments that recognise self-defence in the context of non-imminent harm mean that a woman need not believe that at that moment her intimate partner could inflict that kind of harm, but the law has not changed in this regard; the use of lethal force in self-defence comes within the law of self-defence only if a person believes they will be killed or suffer very serious harm. Removing “GBH” had a different effect. It brought Western Australian law into line with other jurisdictions by removing the possible exclusion of lethal self-defence against sexual violence, because sexual violence may not have come within the legal definition of “GBH”.

Part One

Decisions that are informed by a theory of IPV on the part of the decision maker, whether or not they are consciously aware of the theory that they are using, include:

- selecting which facts to present in court;
- selecting which facts to highlight as the most significant;
- deciding which facts can be assumed and so do not require proof;
- deciding what evidence to present in support of the facts that do require proof;
- developing the narrative used to make meaning of those facts; and
- choosing the language used to describe them.

In this part, we first explain the two theories of violence that are most commonly used in the legal context when primary victims/survivors of IPV are charged with homicide in respect of the killing of their abusive partner. These are:

- “a bad relationship with incidents of violence”; and
- “the battered women syndrome”.

We contrast these with “social entrapment”, a concept that is derived from the contemporary social science literature.

Secondly, we use the facts of *Western Australia v. Liyanage*, as gleaned from the transcript of the trial and the judgements of the trial and appeal courts, to illustrate how the theory of violence that is used can significantly change the narrative of the facts in a manner that either supports the appellant’s claim to have acted in self-defence or undercuts it. We first tell the story of the facts in *Western Australia v. Liyanage* using a “social entrapment” framing. Then we summarise the story about the facts as told by two of the expert witnesses in the case using “battered women syndrome”, and show how this story differed from that using a “social entrapment” framing. We go on to describe the narrative of the facts as recounted by the prosecution using a “bad relationship with incidents of violence” framing, and demonstrate the differences between this story and the one that we have told using “social entrapment” as a conceptual paradigm. Finally, we interrogate the judgements in the case to suggest that the theory of violence used by the courts was a combination of the two outmoded theories as used by the expert witnesses and the prosecution.

We aim to demonstrate that when legal professionals use dated theories of violence they automatically undercut women’s self-defence cases by the manner in which they construct the facts. In other words, the theory of IPV used in and of itself predetermines, to some degree, whether self-defence is likely to be successful or not.

PART ONE

1. Theories of intimate partner violence

Note that the material in this section is drawn from Tolmie, Smith, Short, Wilson and Sach, 2018.

1.1 The current legal framing: Using problematic theories of violence

Within the legal context we can identify two dominant ways of thinking about IPV, both of which utilise outmoded theories of the phenomenon.

1.1.1 A “bad relationship with incidents of violence”

Decision-makers within the legal system have traditionally approached IPV as though it is a relationship issue (NZFVDRC, 2016, p. 50). This may reflect the fact that IPV has only relatively recently been rendered visible as a form of violence potentially attracting a criminal justice response. Prior to the *attention* it was given by the women’s movement in the 1970s, it was considered self-evident that IPV belonged in the private domain as a domestic or relationship issue that the law had little business interfering in. We develop this theme in Part Two of this report.

Because adult relationships are assumed to be based on *mutuality and choice*, victims/survivors are held accountable for their contribution to the “problems in the relationship”. This includes their failure to leave the relationship in order to achieve safety once it becomes apparent that violence is taking place and that the “relationship” is a “bad” one.

Correspondingly, rather than understanding the abuse in the relationship as a *pattern of harmful behaviour* by the predominant aggressor that is bigger than any acts of physical violence and has a cumulative and compounding effect on the victim/survivor, the abuse is understood as a series of discrete violent incidents (which may amount to crimes), in between which the victim/survivor is free to leave or implement other safety strategies. Stark (2013) refers to this as the “violence model”:

Most interventions are predicated on the belief that there is sufficient time “between” assaultive episodes for victims

and perpetrators to contemplate their options and make self-interested decisions to end their abuse or exit the abusive relationship. (p. 19)

Implicit in this approach is the assumption that the *safety measures* that are currently available to respond to IPV are *effective* and that it is reasonable to place the responsibility for safety on the victim/survivor. This assumption is not supported by multiple investigations into the operation of the family violence safety response over many years in multiple Australian jurisdictions by government bodies and other organisations (see, for example: Australia. Parliament. Senate. Finance and Public Administration References Committee & Gallagher, 2015; the Australian Law Commission and NSW Law Reform Commission, 2010; The Domestic Violence Prevention Council ACT, 2016; LRCWA, 2014; the National Council to Reduce Violence Against Women, 2009; Ombudsman Western Australia, 2015; The Victorian Government Royal Commission into Family Violence (VGRFCV), 2016; and Western Australia. Parliament. Legislative Assembly. Community Development and Justice Standing Committee (WA CDJSC), 2015). Inquiries into the IPV safety system have consistently reported that it is not operating as it should, and, even if it was operating as it was designed to do, that considerable reform and development is needed if it is to be capable of effectively responding to IPV. Because IPV is, in fact, a pattern of harmful behaviour that is frequently accompanied by other complex issues, effective responses would involve ongoing management of the risk presented by the predominant aggressor, address multiple co-occurring issues and would not place sole responsibility for achieving safety on the adult victim/survivor — someone who is likely to be in a state of considerable trauma (NZFVDRC, 2016). Instead, the current repertoire of responses to IPV — expecting the victim/survivor to call the police, get a protection order, stay in temporary refuge accommodation, and/or leave the relationship — require *victim initiation* and generate a *one-off reaction* to the immediate episode of physical violence. In fact, these are not strategies that effectively manage the *ongoing threat* that victims/survivors of IPV may be living with.

It follows that a “bad relationship with incidents of violence” framing ends up placing the focus on what the victim/survivor has done or not done to address the abuse. Victims/survivors

who have not obtained a protection order, called the police repeatedly, gone into a refuge and/or tried to separate are understood to be choosing the abuse, contributing to the situation, and not really committed to their own safety. The deceased's responsibility for using violence and the myriad ways he may have acted to shut down and foreclose resistance on her part are frequently unexamined or disappear into the background. Also unexplored are whether there were *actually* any realistic safety options in the defendant's particular circumstances. Despite the extensive literature highlighting the inadequacies of the current family violence safety system, a "bad relationship with incidents of violence" approach simply assumes that the current IPV safety responses are effective and that the issue is that the victim/survivor has "chosen" not to engage them.

1.1.2 "Battered woman syndrome" and related theories

In an attempt to explain why it is not unreasonable for women to remain in relationship with men who injure and kill them, including the small minority who ultimately resort to defensive violence themselves, defence counsel began to introduce expert testimony on "battered woman syndrome" at trial (Schneider, 2000). Battered woman syndrome testimony, originally developed by Dr Leonore Walker (1979) postulates that IPV is escalating and cyclical (repeating three distinct phases: tension building, acute battering and loving contrition) and that, having gone through a battering cycle several times, the ordinary human response is to develop "learned helplessness". The victim/survivor develops the perception that there is nothing that she can do to escape the violence.

The introduction of battered women syndrome evidence was originally intended to justify the victim's/survivor's choices and explain them as reasonable. In fact, because those choices are frequently considered "counter-intuitive" in that they appear to contradict rational decision-making in response to a "bad relationship", the testimony has been taken as explaining the victim's/survivor's honestly held, but irrational, perceptions and choices (Stubbs & Tolmie, 1999). This understanding is reinforced by the fact that she is labelled as having a "syndrome" — in other words, her thinking, cast as reflective of a mentally abnormal state resulting from trauma, must therefore, by definition, be irrational.

Battered woman syndrome testimony has evolved over time to sometimes include evidence about the objective dangers women can face in separating from men who are using violence against them. The state of "learned helplessness" has also sometimes been re-characterised as a variant of post-traumatic stress disorder or a form of trauma bonding (Dutton & Painter, 1981; Graham & Rawlings, 1991; Herman, 1992; Wade, 2015 (argues that these are ways of theorising the oppressed as deficient, in need of correction and as participants in their own oppression)). Despite this, expert testimony is still almost exclusively presented at trial by mental health professionals — psychologists or psychiatrists — and still tends to be understood as explaining the victim's/survivor's inaccurate, but perhaps understandable, perceptions of their circumstances (Sheehy et al., 2014).

The key difference between a "bad relationship with incidents of violence" and a "battered woman syndrome" analysis is that the battered woman syndrome framework *excuses* the victim's/survivor's failure to make rational choices on the basis that she has been psychologically impacted by the abuse, rather than blaming and holding her accountable for those choices. Both theories focus on the victim/survivor for an explanation of what happened, and neither approach explains how her coercive circumstances might realistically match her perceptions of those circumstances or objectively justify her reaction to them.

It follows that whilst a battered woman syndrome analysis was intended to challenge previous thinking, in fact, it evidences many of the same underlying assumptions:

- that leaving the relationship or employing one of the other safety measures discussed above is the victim's/survivor's choice;
- that these measures would be effective in providing safety; and
- that it is appropriate to place responsibility for achieving safety on the victim/survivor and therefore appropriate to focus on her failure to meet that responsibility.

The underlying premise is therefore that it is necessary to explain or excuse the victim's/survivor's choices (as the manifestation of a syndrome) rather than to explain her

coercive circumstances (including the abusive person's pattern of violence) because any explanation for the continuation of abuse is to be found in the former rather than the latter (Sheehy, 2013, pp. 109-113).

Battered woman syndrome testimony has been criticised for its ineffectiveness as a defence strategy (Leader-Elliott, 1993). Testimony on the syndrome effectively undermines any defence which requires an assessment that the defendant's perception of and response to her circumstances was reasonable because it suggests that her view of the facts was distorted and that any problems lay in her own head. This fits better with a diminished responsibility defence — *reducing* rather than *removing* criminal accountability.

It has also been suggested that battered woman syndrome testimony sets up a stereotype of primary victims/survivors that does not match the realities of their lives (Stubbs & Tolmie, 1999, pp. 736-739). This means that it can be used to invalidate their experiences of violence. Battered woman syndrome suggests that women are passive in abusive relationships — which means that their resistance to the abuse must either be rendered invisible, or it will be taken as evidence that they have negotiating power in the relationship and are therefore responsible for what is a “bad relationship” rather than the experience of being abused. Decision-makers can assume that women who have professional qualifications, who are articulate, or who use physical force to fight back, are not really victims/survivors or that their experiences of victimisation were ameliorated.

There is also little by way of scientific support for the syndrome (including variants based on the concept of trauma bonding) (Leader-Elliott, 1993). For example, the notion that battering has three discrete cyclical phases or that battered women suffer from learned helplessness lacks proper empirical support (Fletcher, 1992). An escalation in the predominant aggressor's abuse may, for example, be a response to the primary victim's/survivor's attempts to resist coercive control or to keep challenges from surfacing, rather than the manifestation of an independent abuse “cycle” (Stark, 2013, p. 23). There is also evidence that primary victims are proactive help seekers within the constraints of their circumstances (Breckenridge & James, 2010, p. 4). Frequently the issue is that they receive

unhelpful and unsafe responses from those they seek help from and/or that their abusive partner deliberately thwarts their acts of resistance.

Lin-Roark, Church and McCubbin (2015) analysed responses from a sample of 196 battered women seeking services from seven women's shelters in North America to test whether these women had developed strong affective attachments to their abusive partners. In other words, their aim was to test the hypothesis that recurrent abuse caused victims/survivors to experience trauma that emotionally bonded them to the abuser. However, they found the opposite:

In both global and domain-specific assessments, participants' evaluations of their abusive partners were even lower than their typically poor evaluations of themselves. (p. 211)

Paige Sweet (2014, p. 46), reviewing recent sociological and medical literature, concludes that understanding IPV in terms of battered woman syndrome, including later variants built on the concept of “trauma bonding”, has declined since the mid-1990s and these theories are now outdated (see also Ferraro, 2003).

1.2 A social entrapment framing

The New Zealand Family Violence Death Review Committee (NZFVDRC, 2016, pp. 34-52; Tolmie, Smith, Short, Wilson, & Sach, 2018) has suggested that it is more accurate to understand IPV as a form of social entrapment that has three dimensions:

- the social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/survivor's life;
- the lack of effective systemic safety options; and
- the exacerbation of these previous two dimensions by the structural inequities associated with gender, class, race and disability.

A social entrapment framing asks us to document the predominant aggressor's *pattern of abusive behaviour* and understand how it *constrains* the primary victim's/survivor's

ability to resist the abuse, while simultaneously considering the wider operations of power in her life. Because the practical configurations of entrapment show up differently in each victim's/survivor's life, a careful inquiry into the particular facts of each case across these three dimensions is required:

- What are the coercive and controlling behaviours employed by the predominant aggressor and how have these specifically limited the primary victim's/survivor's ability to be self-determining over time?
- How have informal social networks and/or agencies responded to her (or others') help-seeking endeavours?
- How have any intersecting structural inequities (for example, those produced by experiences of poverty, historical trauma, colonisation, racism and disability) exacerbated these other two dimensions of entrapment?

1.2.1 The predominant aggressor's coercive and controlling behaviours

First and foremost, what needs to be identified and described in detail is the predominant aggressor's pattern of harmful behaviour. In 2007, Evan Stark published his groundbreaking and acclaimed work *Coercive Control: How Men Entrap Women in Personal Life*, suggesting that IPV is about coercive control. According to Stark (2012), it is a misrepresentation of the true operation and harm of IPV to frame it primarily as a crime of assault because it is a liberty crime — in other words, an ongoing attack on a victim's/survivor's autonomy or personhood:

Coercive control targets a victim's autonomy, equality, liberty, social supports and dignity in ways that compromise the capacity for independent, self-interested decision making vital to escape and effective resistance to abuse. (p. 4)

The point of coercive control by the person using violence is to enslave the victim/survivor:

...making her his personal property to do what he will[s] by terrorising her, restricting her liberty, denying her autonomy and exploiting her vulnerabilities according to his personal whims and needs. (Stark, 1995, p. 4)

Sharp-Jeffs, Kelly and Klein (2017, p. 164) describe IPV as a process “in which a woman's freedom is limited both literally and symbolically through restricting her thoughts and behaviour. Coercive control thus restricts a victim's/survivor's ‘space for action’”.

What needs to be documented is *how* the predominant aggressor has:

- hurt, intimidated and frightened the primary victim/survivor;
- undermined her relationships with those around her;
- punished her acts of resistance;
- undermined her stability and independence; and
- fostered a dependence on him.

It is not just the *behaviour* but the *instrumental effect* and the *retaliatory nature* of the behaviour that has to be examined.

Predominant aggressors can employ a range of tactics to isolate, intimidate, frighten and regulate (for a non-exhaustive list see: United Kingdom Home Office, 2015). Some of these behaviours can be subtle — only having meaning to that particular victim/survivor. Non-violent tactics, such as emotional manipulation, can be used when these are likely to be more effective in the particular circumstances (Bonomi, Gangamma, Locke, Katafiasz, & Martin, 2011; Sheehy et al., 2014, p. 3). It is important to note that these tactics are developed over time by trial and error by the aggressor, and are uniquely tailored for the individual victim/survivor. This means that, regardless of the severity or otherwise of the physical violence involved, they are designed to be equally effective in constraining the victim's/survivor's exercise of autonomy and agency. Furthermore, they are designed to constrain her even when she is not in his presence.

Advances in technology open up new scope for abuse. Bridget Harris (2018, p. 56, citing Hand, Young, & Peters, 2009) speaks of the “spaceless element of technology-facilitated violence”, which means that the “concept of feeling safe from an abuser no longer has the same geographic and spatial boundaries it once did”. This is because “women can be exposed to violence anywhere they access a device, account or profile,

creating a sense of perpetrator ‘omnipresence’” (Harris, 2018, p. 56). It also provides new scope for surveillance and monitoring of the victim’s/survivor’s social interactions and financial activities.

It is crucial to examine what a predominant aggressor has done *in response* to the primary victim’s/survivor’s attempts to resist his control (Sheehy, 2013, pp. 64-67). What retribution has been taken? What does the victim/survivor think is likely to happen in the future? Without an investigation of his retaliatory responses, decision-makers are not able to properly comprehend the primary victim’s/survivor’s behaviour (for example, why she may have only called the police once). They are also at risk of underestimating the level of danger she faced from seeking help.

Whilst itemised lists of potential behaviours serve a useful purpose, they fail to capture the cumulative and compounding effect of being subjected to a suite of such behaviours over the passage of time. Primary victims are not responding to individual *incidents* of abuse (that is, the immediate events surrounding their offending), rather their responses to escalating threats or attacks on their dignity are informed by their cumulative experiences of the predominant aggressor’s abusive behaviour (and sometimes prior abusive partners). Evan Stark (2007, p. 94) comments that:

...the single most important characteristic of woman battering is that the weight of multiple harms is born by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts....a victim’s level of fear derives as much from her perception of what could happen based on past experience as from the immediate threat by the perpetrator.

It follows that there is an element of imaginative empathy required on the part of decision-makers who must put themselves in the shoes of the primary victim/survivor for the purposes of assessing this impact.

It is also crucial to understand how the predominant aggressor’s various strategies operate to narrow the victim’s/survivor’s sphere of autonomy so that her life choices become constrained by his will. For example, in *R v. Chase* (2017), the judgment

extracted the victim/survivor impact statement of the complainant who had survived 16 years of horrific physical abuse. She said:

I am going to stop sleeping with a knife under my pillow out of fear. I am going to get my self-esteem and confidence back. I will wear my hair down whenever I want to. I will wear tights every day. I am going to be late when I want to be. I am going to work wherever I want to work. I will talk to whoever I please and make all the friends in the world. I am going to love my family unconditionally. I am going to play sport. (*R v. Chase*, 2017 NZHC 244 (NZ) (“*R v. Chase*”), para. [28])

What is telling about this statement is that being free of the abuse for her is deeper than being free of the physical abuse — it is being free to *be a person who makes her own choices* in the everyday minutiae of life. This captures the manner in which coercive control impinges on a victim’s/survivor’s personal autonomy — women manage their own safety over time by learning to contain themselves.

Separation from the predominant aggressor is often assumed to be a means by which primary victims can keep themselves and their children safe (Sheehy, 2013, p. 80). However, as the proportion of women who are killed in the time leading up to or after a separation demonstrates, separation from a predominant aggressor does not mean separation from the abuse unless agencies are effective in curtailing his abuse post-separation (FVDRC, 2016, p. 37). In these cases, the homicide occurred because the predominant aggressor “changed the project” from attempting to keep the primary victim/survivor in the relationship and control her, to destroying her, and there were inadequate societal measures in place to curtail his actions (Dobash & Dobash, 2015, p. 43). Retaliatory domination is evident in common features of such killings. For example, the perpetrator:

- often uses lethal violence in response to attempts by the victim/survivor to leave the relationship or re-partner (Campbell, 2003; Dawson & Piscetelli, 2017; Dobash & Dobash, 2007; VLRC, 2004);
- frequently uses violence far in excess of what is necessary to cause death;
- sometimes kills or hurts others who get in the way; and

- frequently plans the violence in advance — arming themselves, taking restraints, travelling distances, breaking into her home, and/or implementing strategies to avoid detection (NZFVDR, 2016).

It follows that it is not accurate to conflate separation from the abuser with the termination of the abuse. These are not “bad relationships” which are automatically resolved by the cessation of the relationship. Instead, the issue is that the victim/survivor is dealing with a person who is using violence against them. And few jurisdictions, if any, currently have good strategies for protecting women from men who are determined to dominate or destroy them and who are either careless about the consequences of doing so or adept at avoiding these.

For many primary victims separation is also not an option. Women can be pursued by their partner who simply reinstates the relationship. Some predominant aggressors terrorise the primary victim/survivor’s support networks so that she is in fear for the lives and safety of her family and friends (including elderly parents) so long as she is living apart from him.

1.2.2 Institutional and community responses to the abuse

Institutions charged with assisting victims, and family and community networks, can be ineffectual when primary victims ask for help. Worse still, they can escalate the danger that victims face (Sheehy, 2013, pp. 70-87). When this happens victims may reasonably conclude that further engagement will be unhelpful and/or unsafe (Merry, 2003) and perpetrators may feel vindicated in continuing their abuse.

Documenting institutional responses to IPV must be accompanied by a realistic appreciation of the limitations of the responses that are currently on offer and an understanding of what is reasonable to expect of someone in the victim/survivor’s position. For example, it may be neither sensible nor fair to require the adult victim/survivor to initiate or repeat strategies that may have little enduring effect other than to cause the predominant aggressor to escalate the abuse so that he can prevent her from engaging in similar help-seeking in the future.

Practitioners place a great deal of emphasis on victims gaining protection orders and these are often the focus of safety plans to deal with IPV. However, protection orders are simply court orders and do not automatically generate safety. Enforcement of a protection order requires the victim/survivor to report a breach *before* a response may be initiated. In effect, the victim/survivor has to be threatened or harmed first. The response to a breach might simply be a further warning to the perpetrator. Protection orders can, therefore, require precious resources on the part of the victim/survivor to obtain and have no effect, or worse, trigger an escalation in the abuse (Douglas, 2018). Of the 30 IPV fatalities discussed in the Western Australian Ombudsman’s report, six had previously been granted a protection order, and three had an order in place at the time of death (Ombudsman of Western Australia, 2015).

The FVDR (2016, p. 41) data demonstrates that female primary victims who kill their abusive partners have frequently called the police, sometimes repeatedly, without becoming safer. Ten of the 16 female primary victim/survivor homicide offenders in New Zealand between 2009 and 2015 had sought help from the police. One woman had contacted the police over 40 times. For other women, calling the police was not an option at all. Many women were systematically isolated from potential help by the predominant aggressor. For example, a common dynamic noted in the death reviews was the aggressor smashing the victim/survivor’s phone.

It is also important to keep in mind the well-documented limitations of the criminal justice system in relation to intimate partner and sexual violence. Convictions for sexual violence, in particular, are difficult to attain (Australian Institute of Criminology, 2007a, 2007b; Lievore, 2005; Millsted & McDonald, 2017) and the criminal justice process is renowned for re-traumatising complainants brave enough to engage with it. These difficulties are exacerbated when the sexual violence takes place within a current relationship (Lievore, 2005, p. 2). And perhaps what is even more problematic is that even when successfully engaged, the criminal justice response is a *reaction* to an *incident of physical violence* — rather than a response designed with victim/survivor safety in mind and directed at managing ongoing risk (Tolmie, 2018, pp. 51-52).

The assumption that primary victims of IPV have effective ways of achieving safety for themselves (if only they choose to take advantage of them) is contradicted by the death reviews in which victims sought assistance from multiple sources and employed a range of safety strategies (in the knowledge that they were fighting for their lives), but were ultimately killed by the predominant aggressor (FVDRC, 2014, p. 83). As noted above (see section 1.1.1), that assumption is also not supported by government and other organisational enquiries into the operation of the current IPV safety system in multiple jurisdictions.

1.2.3 Intersectional inequity

The third aspect of entrapment requires an examination of the manner in which experiences of racism, sexism, poverty, colonisation, homophobia, ageism, disability and other forms of disadvantage and inequity (and the intersection of these) (Crenshaw, 1991; Kelly, 2009) can aggravate the two dimensions of entrapment outlined above. Thus, the greater the number and extent of inequities a victim/survivor experiences, the more scope a predominant aggressor has to control and coerce her, and the less likely she is to be able to access help and safety because this third aspect of entrapment also affects the social and institutional responses that she will receive in response to her help-seeking.

Women may have histories of victimisation from multiple abusers and/or be dealing with mental health issues, physical or intellectual disabilities, immigration issues, poverty, racism and/or cultural values that support their male partner's right to use violence and discourage them from going outside the family for help (Ghafournia, 2011; Tam et al., 2016, p. 237; Tonsin & Barn, 2017; Yeon-Shim & Hadeed, 2009). Such women are more vulnerable to the perpetrator's coercive control and less likely to receive helpful responses from their community or those agencies that are charged with their protection (Tolmie, Smith, Short, Wilson, & Sach, 2018, pp. 197-201).

Intersectional inequities arising from the many disadvantages resulting from colonisation are central to the experiences of violence of Aboriginal and other Indigenous women

(Behrendt, 1993; Nancarrow, 2006; NZFVDRC, 2016; Olsen & Lovett, 2016; VGRCFV, 2016 Ch 26). These women are overrepresented as victims of IPV (ADFVDRN, 2018; NZFVDRC, 2017; VGRCFV, 2016, Ch 25-26).

1.2.4 The support for a "social entrapment" framework

The concept of "social entrapment" was originally articulated by James Ptacek (1999) as encapsulating the three elements of battering that are common to the thinking of key scholars in the academic literature analysing the operation of IPV. He explains (1999, p. 10) that:

...social entrapment emphasizes the inescapably social dimension of women's vulnerability to men's violence, women's experience of violence, and women's abilities to resist and escape. This approach links private violence to community responses and offers a way of connecting poverty, racism and political disempowerment to women's abilities to survive in violent relationships.

The New Zealand Family Violence Death Review Committee (2014, pp. 71-88; 2016, pp. 34-52; Tolmie, Smith, Short, Wilson, & Sach, 2018) endorsed social entrapment as a useful framework for realistically analysing the elements of IPV as it occurs at the serious end of the spectrum, including explaining women's entrapment in relationship with IPV offenders despite their resistance to being abused. The committee accordingly employs a "social entrapment" framework in its death reviews of IPV homicides.

A "bad relationship with incidents of violence" and a "battered women syndrome" analysis reduce the complexities of IPV to an overly simple "one size fits all" model. As noted above, these theories are either largely unsupported by the research literature (a "bad relationship with incidents of violence" model) or have been extensively critiqued and largely abandoned in that research literature ("battered woman syndrome"). By way of contrast, "social entrapment" provides a complex and multi-dimensional framework for realistically analysing the facts of any particular case involving IPV. It also draws upon and gives expression to, significant themes in the current social science research on family violence.

For example, the first element of “social entrapment” draws on the influential body of research explaining the abuse strategies employed by individual IPV offenders as forms of coercive control (these sources are canvassed above and in Appendix A of this report). This research has resulted in the recent enactment of offences of coercive control in the United Kingdom, Scotland and Ireland, in an attempt to create criminal offences that better match the operation and wrong of IPV (*Domestic Violence Act 2018* (Scotland), s. 1; *Domestic Violence Act 2018* (Ireland), s. 39; and *Serious Crime Act 2015* (UK), s. 76).

The second element of “social entrapment” gives expression to decades of government and other inquiries which have documented failings in the institutional responses to IPV and recommended reforms to the systemic safety response (a small selection of these are cited above in section 1.1.1 of this report). It requires a realistic acknowledgement that ineffective responses by agencies and communities may not only fail to provide victims with safety but may exacerbate the danger they are experiencing and further entrap them in those circumstances.

The third and final element of “social entrapment” requires an analysis of the manner in which structural inequality can support the operation of IPV and undercut the safety options available to the victim/survivor. It draws on the significant body of literature documenting the particular manner in which entrapment is experienced by and compounded for women facing multiple forms of disadvantage – for example, the effects of historical trauma and intergenerational harm in the lives of those using and experiencing IPV (including these effects on their extended family and communities), as well as lived experiences of precarity and institutional racism. This third element means that “social entrapment” is a framework that better captures the operation and harm of IPV for Indigenous women. For these women the violence of colonisation and racial oppression are more significant in understanding the severe levels of IPV they experience and the lack of appropriate, accessible and effective safety responses, than the individual behaviours of particular IPV offenders (see Appendix A).

PART ONE

2. *Western Australia v. Liyanage*: Retelling the facts using a social entrapment framework

We turn now to illustrate the three different theories of IPV set out in the previous section, using the facts of *Western Australia v. Liyanage* as a case study. In this section, we use “social entrapment” as a framework for selecting and narrating the facts of *Western Australia v. Liyanage*. This is the framework that we are suggesting should be used by legal professionals and experts in those cases where a correct understanding of IPV is essential to the resolution of the legal dispute in issue.

The information presented here is largely limited to the material that was presented at trial. As a result, the framing of the narrative in this account heavily focuses on the individual predominant aggressor’s use of coercive control. It is limited, for example, in detail about how gender inequality embedded in the cultural norms around marriage in Chamari and Dinendra’s country of origin, or how the experience of immigration supported Dinendra’s ability to use coercive control and closed down Chamari’s autonomy and safety options (the third element of the “social entrapment” framework described in the proceeding section). This is because information about these aspects was not canvassed in detail in the original trial.

In this account, expert information about social entrapment is italicised. This material is provided in order to organise and make sense of the facts.

2.1 Dinendra’s coercive control

Stark (2013, p. 22) subdivides the tactical dimensions of the predominant aggressor’s coercive control into those used to hurt and intimidate victims (coercion) and those designed to isolate and control them (control). Coercion, consisting of violence and intimidation, “entails the use of force or threats to compel or dispel a particular response”:

In contrast to coercion which is administered directly, perpetrators use control tactics to compel obedience indirectly by depriving victims of vital resources and support systems, exploiting them, dictating preferred choices and micromanaging their behaviour by establishing explicit rules for everyday living (Stark, 2013, p. 27).

2.1.1 Dinendra’s control tactics

Dinendra’s isolation of Chamari

Stark (2013, p. 27) comments that:

Controllers isolate their partners to prevent disclosure, instil dependence, express exclusive possession, monopolise their skills and resources and keep them from getting help or support....By inserting themselves between victims and the world outside, controllers become their primary source of information, interpretation and validation.

In *Western Australia v. Liyanage* it was reported that “Dinendra gradually severed Chamari’s connections with those around her so that she was left in a bubble with just him.

Dinendra was already experienced in sexually manipulating and dominating women when he met Chamari. He had “ex-girlfriends” who he still blackmailed and frightened — so that on his demand they came to have sex with him, despite having re-partnered and no longer being in a relationship with him (*The State of Western Australia v. Liyanage trial transcript* (“Tr”), p. 1006, 1032).

He initiated sex with Chamari within a short time of starting to date her. Because they were living in Sri Lanka, losing her virginity meant that she was from that point unavailable for marriage to anyone else. A bride is required to prove that she is a virgin to the satisfaction of her husband during the honeymoon and the fact that she has done so is publicly declared in a cultural ritual known as the “homecoming day” (Tr, p. 912). Chamari’s parents were trying to arrange a marriage for her, but if she was discovered not to be a virgin that would be socially ruinous for her whole family and so this was no longer an option for her “it’s going to be a big problem, big arguments and it’s going to be a — cause big — a shame on the bride’s side” (Tr, p. 912).

Essentially Dinendra had condemned Chamari to *either* a life without intimate companionship *or* a relationship with him. At that point he did not wish to marry her (Tr, p. 449).

Stark notes that:

Targets of abuse may be put to continued tests of “loyalty” with punishment meted out for “failure”....Initially, many

of the demands for “loyalty” and jealous accusations “feel” like love, e.g. a partner’s insistence that ‘I want to spend all of my time with you.’ (Stark, 1995, p. 13)

Chamari was already in this sense committed to the relationship with Dinendra when two friends tried to warn her about his character. He insisted that she drop those friends out of loyalty to him, and so she did. Then he did not like her having friends, and she stopped contacting everyone else (*Tr*, p. 918). Chamari stated: “He scold me for days for having friends who talked bad about him. I had to stop all my relationship with friends” (*Tr*, p. 448).

As soon as Dinendra had sex with Chamari and she was committed to him, he introduced pornography and then, shortly after, started having sex with other women (*Tr*, p. 915). Chamari had the shocked emotional reaction that anyone would and as a consequence left him several times. The first time she left he had a car accident and fractured his skull. He apparently had no one to care for him (*Tr*, p. 920) and so she made the decision to stay at his house overnight and look after him. She did not do so lightly:

It was a hard decision for me to make to go to Dinendra’s house because, usually in my culture, a woman does not go to a man’s house before marriage. (*Tr*, p. 917)

Chamari was already privately committed to the relationship but was now publicly committed and in a vulnerable position because he was not. He remained free to commence a relationship with, or marry, another woman without negative social consequences.

Dinendra’s private behaviour left Chamari increasingly disconnected from those around her. Dinendra had asked her not to tell anyone about him and so she did not tell her family that she was in a relationship with him for a significant period of time after the relationship commenced (*Tr*, p. 917).² Not only that, Chamari had secrets as a result of his behaviour that were at odds with the values of her community, and this was only to get worse. And she had lost the intimate friendships that might have enabled her to discuss such things

in confidence when she became desperate. These people could have provided her with an ongoing reality check, support and advice in what was to become an increasingly difficult and frightening situation. Furthermore, knowing that she had these kinds of relationships may have operated as a check on Dinendra’s behaviour.

Dinendra suggested they marry in September 2010 but told Chamari she had to accept before he changed his mind, and that the marriage was to take place without guests (other than immediate family) at a registry (*Tr*, p. 449, 450, 929). She agreed with some relief (*Tr*, p. 928). Symbolically the lack of guests to witness their union, which was what he wanted, would mean that they were not to be, as a couple, connected and in sight within their community.

The wedding took place in October 2010. Chamari’s family invited 50 guests — as was socially appropriate — meaning that he did not achieve what he wanted, and he became extremely angry with her parents (*Tr*, p. 929). At this point there was already an internal barrier between Chamari and her family, but now she consciously began to reduce contact with them. In her words, “I squeeze between his threatens and want to protect my family. I kept silent. Reduced contact with parents” (*Tr*, p. 450).

Although Dinendra had made her promise that she would have no contact with friends, Chamari had no time to pursue relationships with anyone else but him. She left for work at 6am and returned at 6pm, and when she got back was busy responding to his demands (*Tr*, p. 451). Once he left to emigrate to Australia, he made her Skype him every night from when she got home at 6pm to midnight or longer — to whatever time he wanted to sleep. In her words, “I was stuck in my room with Skype on with Dinendra. I have no other life. I talk to my family rarely” (*Tr*, p. 453).

Without Chamari’s consent, Dinendra listed her as a sex worker on several web sites and set up a facebook account with her phone number listed (*Tr*, p. 452, 931). She started getting calls from strange men for sexual services. This placed her in an embarrassing position with complete strangers and made her socially precarious because it meant that people

² Later Chamari wondered if she had talked to her parents at this early stage whether they would have been able to help her (*Tr*, p. 1048).

within her community could potentially discover her on these sites. Fortunately, she was able to get her number removed.

As a result of Dinendra sabotaging her studies in Sri Lanka, Chamari ended up joining him in Australia in 2011. Because she spent every night on Skype — Dinendra did not allow her time to study and got angry when she suggested it — she failed her pathology exam (Tr, p. 935). This was the first exam she had failed in her life. She was in “shock” and “sad and worried,” particularly because she knew that if she was not able to study because of the “mental stress and trauma happening” she would fail her diploma (Tr, p. 453). Dinendra’s response was to suggest that she join him in Australia.

Miedema and Fulu (2018, p. 867) point out that migration “can interrupt the protective factors of family networks and proximity”.

At Dinendra’s invitation, Chamari moved to Australia — a place where she had no relationships with anyone except for Dinendra, limited understanding of the culture, and where she had to operate in a language that was not her mother tongue. Dinendra did not allow her to make or meet up with any new friends (Tr, p. 408). Several work colleagues testified that Chamari was not allowed to socialise without him, or that social contact with her would drop off or cease when she was with him (Tr, p. 656, 668). She told one person she could not meet because she had to be with her husband, but told her where they were going and asked her to “pretend to bump into her” (Tr, p. 657). Dinendra set up and monitored her email and social pages so he was privy to all her online relationships and interactions. In addition, he “never allowed me to have contacts with neighbours, anywhere we live” (Tr, p. 460).

Dinendra also undermined Chamari’s relationship with her family. He permitted her minimal contact. When they returned to Sri Lanka for a visit he did not allow her to spend much time with her parents or take presents to her sister and her sister’s children — even though she was a doctor and well able to afford presents (Tr, p. 1003).

Essentially Dinendra only permitted Chamari to socialise with him, and every social interaction became an opportunity for him to source girls or young women that he could manipulate into having “sex”. Chamari felt that if she befriended anyone he would hurt them (Tr, p. 408, 459). And he made female friends uncomfortable or used them to try and access their daughters or charges — girls and young women who were vulnerable because of their youth and/or the fact that they were from Sri Lanka and without family connections or employment in Australia. For example, when they were visiting Sri Lanka on one occasion, he began a “friendship” with a 14 and a 16 year old they met in a tea shop with the aim of having “sex”. Culturally this “would be extreme humiliation” and even his mother, who supported his right to abuse his wife if she was not compliant, was very worried (Tr, p. 1015).

Chamari’s other private interactions with people were deeply violating. Dinendra forced her to sit up for hours, sometimes into the small hours of the morning, displayed on the internet as a swap for “pornography” that he wanted access to, or sexual interactions with others. He, on the other hand, would not film himself (Tr, p. 238, 953). At one point, he was downloading child “pornography” in her name, which potentially jeopardised her visa and her job. On the few occasions where Chamari did reach out to people and tell them that she was in trouble, she was not able to disclose the full extent: “by that time I — I was so ashamed of the things Dinendra ask me to do, so I did not want to go into that much detail” (Tr, p. 1109).

To make matters worse, Chamari was obliged at all times to look as though she was happy. Despite the fact that she was “alone....with that mad psychic wolf who barked at me all the time”, the face she was required to show the world was smiling — the kind of face that would ensure that no one knew what was happening for her, no one would make enquiries, and that all of her social interactions were predicated on fakeness (Tr, p. 456, 1009).

Dinendra’s deprivation, exploitation and regulation of Chamari

Stark (2013, p. 29) comments that:

In addition to isolation, control tactics foster dependance by depriving partners of the resources needed for independent

living, exploiting their resources and capacities for personal gain and gratification, and regulating their behaviours to conform to stereotypical gender roles. What might be termed the “materiality of abuse” is rooted in their partner’s control over the basic necessities of everyday living, including money, food, sex, sleep, housing, transportation, routine bodily functions, communication with the outside world, and access to needed care.

Stark (2013, p. 30) also says that:

Perhaps the most significant facet of control is the extension of regulation to how women enact the already devalued domestic roles they inherit by default as well as the micro-dynamics of everyday living. With varying degrees of explicitness, controllers micromanage how women emote, dress, drive, wear their hair, clean, cook, eat....the when, where and how of sleep, how they walk, talk, sit or what they watch on tv.

The function of control is “to exact obedience to the male’s authority without regard to its substance and so to root out even the illusion of free will (and so of resistance/disobedience)” (Stark, 2013, p. 30). Compliance for the victim/survivor becomes a means of safety:

However since the abuser’s goal is domination, not achieving a particular end (such as a clean house), rules are continually being revised or reinterpreted, making it impossible for victims to satisfy their partner, leaving them in a state of chronic anxiety. (Stark, 2013, p. 31)

Very early on in their relationship, Dinendra dominated Chamari’s time and set her career direction. In Sri Lanka, he decided that he didn’t want her to become an anaesthetist (which was what she wanted) because he did not want her doing on-calls in the night. Presumably, this was because it would interfere with his access to her. At his request she switched her specialty to pathology.

Once he was in Australia, he gave her long lectures over Skype about how she needed to:

change [to] the person he want me to be....He want me to positively take actions and show him that I am positively changing the way he want me to be. (Tr, p. 935)

Chamari attempted to comply with his demands that she have sex with other men (“he was so manipulative and threatening”), handing out her number to a strange man on a bus and later having conversations with the man that she allowed Dinendra to overhear (Tr, p. 452). She struggled to do this (“I feel I am naked in front of a crowd”) and would rather have died than have sex with the man in case “my family get into know” (Tr, p. 452-3). She eventually told Dinendra that the man had dumped her so that she could terminate the experience (Tr, p. 943).

Once in Australia, when Chamari was effectively completely isolated from her original community and her family and friendships, Dinendra’s control escalated. Dinendra determined what Chamari would do during her leisure time, who she would socialise with and when, when she would ring in sick to work (he would ring in for her if he got the day off) (Tr, p. 1016, 1158), when she would go to sleep (Tr, p. 1019, 1058-9), that she would use contraception and what type (Tr, p. 452, 1114), whether she would wear jewellery (Tr, p. 657), where they would live (Tr, p. 678), and what internet provider they would use (Tr, p. 1100). She had to do all the cooking and cleaning (Tr, p. 961). She got up in the morning to iron Dinendra’s clothing before waking him up (Tr, p. 1054). He monitored her weight because when she put on weight “she was not good for Skype chatting” (Tr, p. 657, 996).

His control over her career continued. One of their work colleagues tried to interest Chamari in a clinical placement she had just completed. When Chamari got excited about the possibility, the work colleague testified that Dinendra “abruptly stopped me”, said to Chamari “you’re not going” and then walked out of the party (Tr, p. 389).

Dinendra gave Chamari lectures or “teaching sessions” which she was obliged to sit and listen to:

He used to traumatise me mentally for hours and hours. When I feel sad he taught me that was anger. When I’m anxious he wants me to believe that was anger. So he talked for days, but I do not understand my feelings and keep — keeps bullying to make me believe what he says. They were endless lectures, even up to today. He started with some point then direct me to another point, in between scold me for all my faults and mistakes. Keep asking me

to track my thoughts. If I couldn't repeat exactly what he said or what I said before in previous conversations, he hit me, scold me, bully me. First he used to hit my head, pull my hair, then later he used me to do it myself. I had to bang my head against wall until I get bumps. I had to pull my hair. I had to slap myself. (*Tr*, p. 454)

He gave her lectures on quantum physics and if she couldn't repeat what he had said he would scold her, verbally abuse her for being "very stupid" and "a fool" and assault her or make her hurt herself (*Tr*, p. 986).

By 2014 it had reached the point where Chamari was scared to do anything at home because no matter what she did — even if she thought it was right — it turned out to be wrong. "Even a little movement of mine might make him angry" (*Tr*, p. 961, 966):

He gets angry about the way I cook, the way I walk, talk to other people, the way I do things, way I study, way I plan things. I didn't know what to do, how to behave. I am like mice hiding from giant hawk. (*Tr*, p. 461, 456)

One day he hit her because he didn't like the way she cooked some fish and he forced her to throw the meal away (*Tr*, p. 961): He first decide whether he wants make me sauce or chutney or soup, so the way he wants, he punishes. Roller pins, wooden spoons, plastic plates (*Tr*, p. 465).

She had to follow him around the house (*Tr*, p. 1018). She was given times for designated tasks — for example, gardening:

I have to agree to do Skyping and showing in websites. I have to find women for him. I have to *love him as a servant*. I can never cry or any tears, how much he beats me. I should not complain. I have to smile all the time in spite of how much pain I'm in. I have to sacrifice my life for him. I have to be like his sister in law, who loves his elder brother to do anything. He officially had ex-partner at workplace, and I should be like Anakka and help. I support such things. His elder brother had a case/legal with uploading porn. At that time Anakka helped him, and I am also supposed to be the same....I'm not supposed to go anywhere without letting him know [emphasis added]. (*Tr*, p. 464)

Chamari prepared written agreements on post-it notes — these stated that she would look after Dinendra and live with him forever and that he would have any kind of sexual relationship he wanted (*Tr*, p. 430-1): "he plays with me like a cat, I am the mouse. Until I am dead he plays" (*Tr*, p. 459).

One can see how this process began over time to shrink Chamari's "space for action" (Kelly & Westmarland, 2015, p. 35). She began to restrict her own behaviour to try and manage his (*Tr*, p. 464, 466). The result is that she put aside her own person-hood to become constantly tuned in to his wishes and needs on a moment by moment basis:

Sometimes he complained of his sadness, his inability to make me the way he want, that I cannot adapt the way he want. I tried to adapt to him. I kept calm. I kept silent. I didn't question. I just did what he want. I followed him, said yes to him, refused everything he want me to refuse. I couldn't help for my family for a long time. I was afraid of him. I talked to them rarely. (*Tr*, p. 456)

Chamari said:

When he is ready to eat, it's ready. When he wants to go out, I'm ready. When he wants to watch movies, I'm doing. When he talks, I'm listening. I minimise expressing my feelings and be a listener to him. (*Tr*, p. 461)

Stark (2013, p. 29) points out that we cannot assume that abused women can access family income or share its benefits.

In this case, Dinendra and Chamari had joint bank accounts which he controlled. He regulated what she was allowed to spend — she could not spend money without his permission. His limit for her clothes was \$20 (*Tr*, p. 978):

I have to totally depend on him for finance. I'm not allowed to spend without his permission. I have to do exactly what he want me to do. (*Tr*, p. 464)

Once he tried to get her to buy three expensive jackets. Chamari refused but she was stressed because she did not know if this was the right thing to do. She did not know whether, if she accepted, he would blame her afterwards or whether she would be in trouble afterwards because she had refused him.

2.1.2 Dinendra's tactics of coercion

Dinendra's use of violence

Stark (1995, p. 10) comments that:

The purpose of the violence in coercive control is to harm or punish a victim, establish the high costs of resistance and to create a level of fear that disables a partner's will to escape or to refuse the abuser's will....The significance of the violence in coercive control derives from its cumulative effect on a victim's level of fear and compliance, not usually from the significance of a single episode.

Dinendra had always been emotionally and sexually manipulative but, as he succeeded in isolating Chamari, he used manipulation less and began increasingly to resort to physical violence to get what he wanted. Essentially, he wanted her to assist him in accessing pornography and having "sex" with/sexually violating children and young women. Over the course of his trajectory of abuse, he went from apologising for his behaviour and promising that it would not happen again, to requesting that Chamari participate in order to please him, to using her as an exchange commodity and cover, whilst berating her and assaulting her for not performing her designated role correctly. His sexual behaviour became increasingly abusive, not only towards her but to those who he was targetting outside the relationship. It started out involving apparently consensual sex with adult women, to consuming violent "pornography" (including images depicting child rape) and raping her, to actively targetting vulnerable children/teenagers and manipulating them and their parents, using money and gifts, with the aim of having sex with them.

We have already noted that perpetrators of intimate partner violence use emotional manipulation to get what they want when direct physical abuse is not an option or is not likely to be as effective. Bonomi, Gangamma, Locke, Katafiasz and Martin (2011) have found, for example, that perpetrators use "sympathy appeals and minimisation" during phone calls from detention centres in felony level domestic violence cases to get victims to recant the allegations that form the basis of their charges.

For the first part of their relationship in Sri Lanka, Dinendra threatened Chamari, but he mostly used her natural human emotions — compassion, empathy, desire for connection and love — to engage her and, when introducing ideas/behaviours that were unacceptable to her, to re-engage her when she pulled away from him. She was still living within her original community and engaging in overt acts of resistance and independence. Each time she left him, for example, he apologised and promised not to continue the behaviour:

...he bettered and said he wouldn't do these things again, he wouldn't hurt me, he loved me, he wanted to be with me. (Tr, p. 921)

Each time she reconciled with him only to find that he broke his promises. One of the striking features of Chamari's personality, which may have influenced her choice of profession and certainly was implicated in her success within it, was her warmth and care towards others and her capacity for self-sacrifice. Dinendra became expert at exploiting this aspect of her character.

It was not until Chamari flew to Australia to be with him — leaving behind her family and her culture — that he began to use physical violence. As soon as she arrived in Australia she realised that the dynamic had changed and he was not the same person she had met in 2009: "He gave me the impression even though he's the one who asked me to come, he showed me he don't like me there." (Tr, p. 948). He told her that she had brought him bad luck and she was an unfortunate person:

The purpose of sexual violence/coercion is to degrade, frighten and subordinate a victim so that she comes to view herself as the personal property of the abuser to do with as he will. While sexual satisfaction may be an element of sexual coercion, its primary motive is to establish power over a victim. (Stark, 1995, p. 10-11)

It was shortly after her arrival in Australia that Dinendra started forcing Chamari to dress up and sit in front of the camera as a swap for him to download pornography (Tr, p. 950). She would be forced to masturbate, use sex toys or he would have sex with her on camera (Tr, p. 1017). Sometimes he found someone straight away, sometimes this did not

happen until the early hours of the morning (Tr, p. 1017) and she would have to sit there for many hours as “bait” (Tr, p. 952). At first this happened three to four times a month — less than once a week (Tr, p. 954).

Dinendra first hit Chamari in their Augustus street house in Geraldton, when he woke her up in the middle of the night to get naked for some strangers on the internet. She was uncomfortable and showed disinterest and “that’s how it started” (Tr, p. 1107). He would pull her hair and hit her or hit her head on the wall or bed to get her to sit in front of the camera. He would also hit her if she looked bored or sleepy or upset — she had to look like she was enjoying herself (Tr, p. 951). He always warned her that he was hitting her to correct her: “Chami, I’m doing this because I want you to change, because you did this wrong”. Essentially her duty as his wife was to satisfy him (Tr, p. 960, 1108).

Then he made her inflict the violence on herself — she had to hit her own head. He made her put a rubber band on her wrist and snap it — so that the pain would remind her that she had to be a “good wife” and participate (Tr, p. 951).

Dinendra’s violence did not occur in an independent “cycle”. It was instrumental — directed at getting Chamari to do what he wanted or “punish” her for resisting or trying to be independent. His repetitive use of violence wore her down and made it easier for her to comply than not comply with his demands:

Not complying to whatever he want me to do and then going through a lot of beatings and many, many days of blaming and going through a lot of harassment, I would really really mind — let him take photographs or videos. Because, at least for a few hours, I would be free of beatings or free of blaming. (Tr, p. 1010)

Compliance might mean safety but did not guarantee it because, as noted above, the rules were unpredictable and difficult to satisfy, particularly as time went on. As Stark points out, the aim was to remove Chamari’s free will, rather than to attain any particular outcome: “I just had to behave the way he want me to do. There’s no free choice. If I make any of my own decisions, he would get angry” (Tr, p. 967-8).

Stark (2013, p. 19) points out that most physical violence in coercive relationships is chronic low-level violence that has a cumulative intensity for the victim/survivor — they become worn down or exhausted. However, it is not uncommon for a perpetrator to engage in acts of terrifying violence — enough to communicate “what he is capable of” so that she is too scared not to comply with his instructions again.

In November 2012, Dinendra viciously physically attacked Chamari, leaving her under no misapprehension as to what he was capable of. She was on the phone to him walking home from work when she stopped to talk to a female client in the street. His instructions had been “don’t stop, don’t talk to anyone, come straight away” (Tr, p. 958). He came to meet her and physically felled her from behind in the street. “Suddenly, I felt a bang on the back of my head and I collapsed for a few seconds....I was fallen and lying on.... pavement” (Tr, p. 457).

When they got home he attacked her again. Chamari tried to fight back and scream but “every time I try to scream he hit me more and more until I couldn’t even breathe” (Tr, p. 959). “He hit me so hard I couldn’t get up. I never call for help again” (Tr, p. 457). From that day “I understand....there is no point of resisting” (Tr, p. 1069):

I didn’t want to do anything wrong, because I don’t know whether he’s going to hit me again. So I try my best not to do anything to make him angry and tried to stay calm and silent, not to argue or do anything. (Tr, p. 960)

In 2013, it became a daily experience for her to sit with him whilst he hunted on the internet for pornography, including images depicting children or things that he could swap her for (Tr, p. 975). He repeatedly raped her. He tied her up with “those blue flexible wire things” to have “sex” with her — which is “very very uncomfortable and painful” (Tr, p. 1116).

He would rape her whilst looking at pictures or videos of children being raped or indecently assaulted (Tr, p. 976). He would force her to look — if she looked away, he would get “very very aggressive” — hitting her in the face, chest, arms and legs. Whilst sex without her consent had occurred in Sri Lanka, at this point:

...sex became a something which is very, very unpleasant. Like, I didn't want even to think about having sex with Dinendra, because it is one of the most unpleasant things in my life which happened to me, because I did not wanted to look at people having sex with children and that totally — I don't have any interest in sex anymore, when I hear people screaming and girls crying and screaming. And he became very forceful because I'm not actively participating in sexual acts with him. (Tr, p. 976)

She didn't like anal sex so he would punish her by anally raping her (Tr, p. 1116). "It was very painful. This happened a few times a week" and in the last two to three months in 2014 became "constant". Chamari described his behaviour as "sexual torture" (Tr, p. 976).

The genital region is sensitive and women, through the process of sexual arousal, physically prepare for sexual intercourse as much as men do. This means that forcible penetration without arousal by the woman can be exceptionally painful and cause physical harm. This is not "sex" in the absence of a kind of contractual consent. It is a physically brutal and painful assault on a very tender part of the body.

Dinendra used violence against Chamari when she did not assist him in making contact with vulnerable young women and girls who he wished to entrap in order to have sex with. For example, he was very angry with her for not getting the phone number of a Sri Lankan girl who was in Australia without a job or family who one of their hosts had told them about (Tr, p. 978). While visiting with those hosts, he insisted that they leave without thanking them or saying goodbye. He threatened to kill Chamari by purposefully having a car accident. On the way home he drove fast whilst he was hitting her (Tr, p. 460). She was left with a "black eye, severe left eye pain, swollen and cracked lips and cheeks, and generalised tender areas of the body" (Tr, p. 460). After this, she got the girl's phone number and invited her to come and stay with them. She was relieved that the girl declined the invitation but Dinendra blamed her for the rejection (Tr, p. 980).

From mid-2013, Dinendra's violence escalated and he started beating Chamari many times a week (Tr, p. 999). He used weapons, such as wooden rolling pins (Tr, p. 755), wooden

spoons (Tr, p. 1000), plates (Tr, p. 1999), his fists, knees and boots (Tr, p. 999).³ He used a chair on her (Tr, p. 758, 1000). He ordered a catapult that threw tiny metal balls, and she would have to stand naked while he used them on her (Tr, p. 1000). He kept the rolling pin in the bedroom in case he "needed" it (Tr, p. 1000, 1067). He said the violence was because she was "not learning" to do as he required (Tr, p. 1000, 975). Chamari was left with bruises on her arms, legs and chest. She sometimes went to work with her whole body aching (Tr, p. 987) — wearing long sleeved and high necked clothing and long trousers that covered up her injuries despite the hot weather and the inconvenience of sleeves that went below the elbow in the hospital (See Tr, pp. 658, 987, 1155, 1158). She was obliged to take pain relief to function (Tr, p. 1105). By 2014, Chamari described the violence as "constant" and herself as "exhausted. I just let him do whatever he wants" (Tr, p. 1002).

Dinendra retaliated violently or escalated his level of micro-regulation and control in response to assertions of independence or acts of resistance by Chamari. For example, in July 2013 she sought permission to leave him, and, after letting her think this might be a possibility, he put "amplified" restrictions in place: "he is going to make my life a living hell now, as I left him once" (Tr p. 464, 1050). She had been too scared to do so beforehand but, during the few days after she "returned" when he was behaving like a loving person, she chose her moment and asked him to take the internet out of her name because he was downloading images depicting the sexual violation of children, and Chamari was afraid that she would lose her visa and job (Tr, p. 974). At this point, he put the internet into his name — taking the opportunity to install sophisticated security measures so his activities could not be tracked or accessed. It is obvious that he profited from her visa and her job and it was to his benefit to jeopardise neither, but he was still angry that she had asked: "I will suffer for that" (Tr, p. 465, 1052-3).

He said, 'You don't want to take any risk for me. I can't trust you anymore and you're not a good wife', like his elder brother's wife. And he says she would take any risk for him, his eldest brother, but I am not — it looks like I am not taking any risk for him. So he said I'm very, very bad wife. (Tr, p. 998)

3 There was a note on the computer "buy gun Geraldton" (Tr, p. 769).

It reached the point where it was enough for him to give her a “look” and she became extremely scared and would do as he wanted (Tr, p. 1096).

As already noted, primary victims of family violence do resist the abuse. However, as Stark observes, these acts of resistance take place within the increasing constraints on their autonomy that are imposed by the coercive control of the perpetrator. Furthermore, the resistance of primary victims does not stop the abuse. Sharp-Jeffs, Kelly and Klein (2017, p. 3) comment that “the cost of such assertions of autonomy is high”. Help-seeking or acts of “disobedience”/independence, if they are discovered by the abuser, may result in violent retaliation designed to close down such actions in the future.

Chamari had reason to be frightened for K — the 17-year-old Dinendra was focused on just prior to his death. She saw first hand his pleasure in the sexual violation of children and girls. Chamari had observed him downloading violent child “pornography” and trying to entrap children so that he could sexually exploit them. For example, he tried to touch and fondle a 14 year old girl in Sri Lanka who “really didn’t like it”, befriending her family, and gifting clothes, a necklace and money on her older 16 year old sister with the aim of having “sex” with her (Tr, p. 1012).

Since his violent attack on her in 2012, Chamari was managing her own immediate safety by strategies such as enduring painful anal and vaginal rapes whilst trying to look as though she was enjoying herself. However, whilst too terrified of him and exhausted by his behaviour at this point to overtly defy him, she continued covert acts of resistance. For example, when she was alone with K, she warned her that she could not protect her from Dinendra and told her not to answer the phone if she didn’t want to pursue the “relationship” with them (Tr, p. 1031).

In her testimony, K described being manipulated and pressured by Dinendra into accepting gifts and engaging in sexual behaviours that she was not comfortable with. On one occasion when her mother was away and she was staying at their house, Dinendra gave her whisky and she passed out and woke up in Dinendra and Chamari’s bed (Tr, p. 319-20).

Much later she wondered if something had happened to her whilst she was asleep (Tr, p. 364). Dinendra also touched her and took numerous photos and films of her, even when she asked him to stop (Tr, p. 323). Dinendra did not listen when she said “no”, and she found him “too controlling” (Tr, pp. 322-3, 351). On one occasion, he tied her up to photograph her, and on another occasion got on top of her and Chamari intervened to stop him (Tr, pp. 348-9, 347, 1027). K said, “I didn’t feel safe. It felt wrong” (Tr, p. 374). Dinendra was planning to isolate her from her family by taking her on a holiday where she would be alone with them so that he would be able to pressure her into having “sex”.

Dinendra’s use of intimidation

Stark (2013, p. 23) comments that:

As part of coercive control, intimidation is used to complement or in lieu of assault to keep abuse secret and instil fear, dependance, compliance, loyalty and shame. Offenders induce these effects in three ways primarily — through threats, surveillance and degradation. Intimidation succeeds because his threats are made credible by what he has done in the past or his partner believes he can or will do if she upsets or disobeys him (what is termed the “or else” proviso). If violence raises the physical costs of resistance intimidation deflates the victim’s will to resist.

Perpetrators typically threaten to kill the victim/survivor or their family or destroy the things that they most care about.

Chamari’s family, at this point, was the only important relationship left to her:

I want to leave. He threaten to kill me and my family if I leave. He said then he will do worse things to my family so I will suffer forever if I leave him. (Tr, p. 460)

Dinendra told Chamari about a person throwing acid into another person’s face in Sri Lanka and she understood this to be a threat to her sister and her young nephews: “Back home it is easy. Can give a drug addict a few rupees” (Tr, p. 988). He had money (their combined medical salaries) (Tr, p. 997) and connections through his brothers and friends in Sri Lanka and she believed that if she left him, even by killing herself

(Tr, p. 1051), he would destroy her family because she knew what he was capable of. She had calculated that she could flee and go into hiding in order to save herself, but she could not relocate and hide her family (Tr, p. 988):

By that time I didn't have friends or anyone, and I only had my family, they the only people I love in the world and I really didn't want anything to happen to them because of me. (Tr, p. 997)

He had also threatened her if she told anyone what he was doing to her:

If any way if he found out that I'm leaking information or I'm planning to do any harm, notify the police, get support from counsellor or psychiatrist or if I let my family or friends know, he is going to get revenge from me. He knows all my details, has all photos. Know about family and will destroy all of us slowly. (Tr, p. 465)

Stark (2013, p. 25) points out that crazy making behaviour by perpetrators has the effect of reminding "victims that confrontation is dangerous and that their wellbeing depends on accepting the abuser's view of reality, however irrational".

It may seem "counter-intuitive" that victims can find the perpetrator's withdrawal or threats to leave devastating. This makes sense in the larger abusive context, normalised and intensified over many years, in which:

...a partner is already isolated from other sources of social interaction, draws her sense of safety/danger from his verbal cues or relies on making him happy to be safe. Anxiety may even increase when a victim is separated from her abusive partner, particularly if no effective means are in place to sanction any contact. (Stark, 2013, p. 25)

As noted above, the New Zealand Family Violence Death Review Committee (2017, pp. 35-36) has made the point that separation from the abuser is not separation from the abuse in the absence of effective mechanisms to prevent him from continuing to abuse her.

It is telling that in July 2013 and June 2014 when Chamari "left" Dinendra she did so only after asking him to let her

leave. In other words, it is clear that she knew that there was no escape at this point unless he *chose* to relinquish her (Tr, p. 466). In July 2013, after seriously contemplating suicide, she "begged" him to release her from the relationship, and he agreed (Tr, p. 1069). He gave her a:

...list of things for me to follow if I leave him....it was like a contract. He make sure I understand all the things he want me to do for the rest of my life. (Tr, p. 990)

It is clear from both the fact that he was *granting* her permission and the *terms* that he imposed on his agreement that he had no intention of allowing her to separate from him. The separation was conditional on his continued surveillance of her daily life and access to her money. Chamari had to keep the joint bank accounts and her passwords and logins for email, social media accounts, work and phones, so that he could access these and check who she was talking to for the rest of her life. She was not to contact him. She was not to discuss the abuse or say anything to compromise his career or he would take revenge on her. She could take her clothes and half the medications in the house (Tr, p. 990).

Chamari moved out on 1 August 2013. On 10 August, she received a message from him to say she had taken a full tube of anti-fungal cream when his instructions were to only take half of the medications and she would be "facing the severe consequences for what I have done" (Tr, p. 463, 994). If that communication is taken out of context, it seems both trivial and nonsensical. He had no need for half the antifungal cream as this was her medication. To someone who was aware of what he was capable of, who had been conditioned by the repetitive use of violence to follow detailed instructions about everyday minutia (whether they made sense or not), and who was conscious that she and her family were intimately known by him and still in his sights, this was a frightening communication. She had broken the rules that bounded her permission to move out.

Chamari returned the tube to his house immediately — too scared to wait until the next day to return it at their work in case of what he might do in the interim (Tr, p. 994, 1105). When she arrived, the door was unlocked and he looked sick. She had never seen him look so miserable, so she decided

to stay a night with him and look after him. He was “crying like a child”, saying she didn’t love him anymore, and she agreed to “return” (Tr, p. 463-4, 995).

The second time Chamari asked to leave was on 1 June 2014. Dinendra toyed with her in a very obvious manner. He granted her permission to “leave” on the condition that she never contact him or his family again and gave her a list of conditions similar to those on the previous occasion (Tr, p. 1035-6). Then he said that he would be the one to go and that he had booked a flight out of Australia. He ordered a taxi. She became guilty and frightened and tried to stop him from getting into the cab but desisted when he threatened her (Tr, p. 467). He drove off but returned 30 minutes later “laughing,” saying that she did not care for him and that she had “failed” (Tr, p. 1036). He said that the relationship was over but she still had to live with him and “whatever he does to me” (Tr, p. 467). It is obvious why this behaviour would be confusing and intimidating to someone whose safety has come to depend on understanding and pleasing him — the behaviour was impossible to accurately read. In any case, she did not repeat her request to be released on that occasion.

Dinendra told me I had to live under his surveillance, the rest of my life. So it wasn’t a totally — I was — I — I’m not going to be totally free. So when he want me to stay, like, I was afraid. So that’s why I couldn’t leave again. (Tr, p. 1085)

Surveillance tactics, according to Stark (2013, p. 26), “aim... to convey the abuser’s omnipotence and omnipresence, letting his partner know she is being watched or overheard”.

As mentioned above, Chamari’s email, social media and bank accounts were set up very early in their relationship and monitored by Dinendra throughout their marriage (Tr, p. 930). He knew all her passwords and accessed all her emails. She could not access his. Rather, he sent something on to her if he wanted her to see it (Tr, p. 931):

He monitors everything, every move I take. He is paranoid that I will record his conversations. He wants to record all my phone conversation. He logged in to all my accounts and see to whom I called, what I spend, what I do. (Tr, p. 468)

In the words of the prosecution: “every form of communication you had, he had control of” (Tr, p. 1093).

Dinendra required Chamari to text him if she went shopping, when she left for work or home and when she arrived. In Sri Lanka in the early stages of their relationship, he presented this as being about her personal safety, and she thought it was “nice” (Tr, p.926-7). It became a way of monitoring her movements when she was not at work. For example, she had to call him when she left work and stay on the phone talking to him until she reached her destination — this was how he realised that she was not obeying his rule about not interacting with anyone on the way home and was the impetus for his brutal physical attack on her in 2012 (described above).

Liz Kelly (2015) talks about the concept of “space for action”, building on Lundgren’s earlier work on “women’s life space”. Sharp-Jeffs, Kelly and Klein (2017, p. 169) suggest that there are:

A number of domains across which power can be exerted, including individual, social, economic and community. The more domains in which coercion occurs, the more systematic and pervasive the pattern of control exerted.

We have already noted that Dinendra only permitted Chamari to socialise with him. However, at work she was independent and very competent: “all my pleasures are limited to work”. Several weeks before his death Dinendra, who worked in the same organisation, was transferred to the medical ward where she was working and was rostered onto the same shifts (Tr, p. 1292, 1313). This meant that he was also with her throughout the work day and was now privy to her professional interactions. Now if she spoke to someone at work he could hold her to account when they got home. By 4pm every day she was acutely anxious because it was time to go home.

At this time Dinendra had also decided that Chamari should sell her car as he “want me to totally depend on him... He didn’t want me to have a separate car” (Tr, p. 1054).

The final intimidatory tactic, “degradation”, establishes the abuser’s “moral superiority” to the victim/survivor by denying them self-respect. Stark (2013, p. 27) points out that a common

shaming tactic is to force a partner to participate in sexual acts she finds offensive. In a UK Refuge sample, for example, 24% of women had anal intercourse inflicted on them. Shaming inhibits reporting and adds to the victim's/survivor's isolation because they fear their humiliation will be exposed. Sexual violence is particularly invisible in the sense that services may be less likely to inquire about it (VGRCFV, 2016) and victims are less likely than victims of other forms of IPV to reveal their experience.

We have already documented Dinendra's "sexual torture" and degradation of Chamari and the manner in which this inhibited her full disclosure of the abuse she was experiencing. In addition to publicly auctioning her naked body on the internet, forcing her to undertake sexual acts for random strangers and vaginally and anally raping her, whilst forcing her to look at highly distressing and traumatising videos and images depicting women and children being violated against their will, he also brought other women home when she was in the house and had sex with them. Once, early in their relationship, for example, he got Chamari to call his "friend" Rasika and invite her to her house. It turned out that she was one of Dinendra's ex-girlfriends and, whilst the three were watching a movie, he started kissing and touching Rasika, and they had sex whilst Chamari was in the house (Tr, 924-5):

He didn't stop. He want one of his old girlfriends back again. He all the time want me to arrange the calls. I had to call her. Her name is Tapoo. They had sexual relations when Dinendra was at med faculty and after. So I had to invite her to my own home and they had sex. This time I was able to control myself. I didn't blast. I knew the outcome. (Tr, p. 451)

Three months after they were married and his taxi was waiting to take him to the airport to fly to Australia, his ex-girlfriend Cathuy came over and had sex with him in the bedroom whilst Chamari was in the house and fully aware of what was happening. On another occasion in Australia, Chamari lay down with a headache whilst a young doctor who was observing at the hospital visited them. Chamari woke to hear Dinendra in the lounge telling the vulnerable young woman that he would divorce Chamari and marry her so she could get a work visa and a job (Tr, p. 985). Dinendra's response to Chamari's attempts to resist these behaviours (for example, entering the room and insisting on taking

the young woman home) was rage. He felt entitled to her assistance in satisfying his desires no matter how distasteful, morally repugnant, painful and humiliating she found those desires to be (Tr, p. 462, 986).

2.2 Institutional and community responses to Dinendra's abuse

Stark (2013, p. 21) makes the point that coercive control often exploits gender roles, targeting women's default roles as mothers, homemakers and sexual partners. He says:

By routinely deploying the technology of coercive control a significant subset of men "do" masculinity....in that they represent both their individual manhood and the normative status of "men".

Because women's roles as wives and mothers involve a measure of unpaid servitude, even in otherwise egalitarian relationships, this can make some coercive and controlling behaviours "invisible in plain sight" to others (Stark, 2007, p. 14). The predominant aggressor simply looks like an old-fashioned man in his expectations of how his partner should behave and how his house should be run.

In this process traditional community values around gender, marriage, family and motherhood can be exploited by the predominant aggressor to reinforce his control. Family and community members, also informed by these values, are complicit in the abuse when they reinforce his right to abuse her and her obligation to better please him in order to avoid the abuse.

2.2.1 Informal support networks

Although Chamari was socially isolated, there were people in her social and/or work networks who noticed or were made aware that something was amiss. People had one of three responses — they directly validated her husband's authority to use violence against her; they endorsed her fears as legitimate because they shared them; or they took no action at all (as though what was happening to her was normal, of no particular concern, or simply could not be stopped).

Chamari made disclosures to several people in Sri Lanka but on each occasion Dinendra's authority to use violence against her if she displeased him was validated. After the serious physical attack she experienced in 2012, she was preparing to return home to her family when Dinendra rang his mother, who was also "like a mother" to her. Dinendra had told his "family that I tried to caught him to the police by shouting for help" (*Tr*, p. 457, 960). Dinendra's mother said that he had hit her because she made him angry. She needed to listen to her husband and stay with him rather than running home because of one incident (*Tr*, p. 960). Chamari recounted that Dinendra's mother told her, "You made a mistake which made him angry and that is why he hit, and that's the way family things happen" (*Tr*, p. 763).

Later, on a visit to Sri Lanka, Chamari spoke to Dinendra's eldest brother's wife, Anne, about what was happening. Anne said that these things happened in married life and as a married woman Chamari had to comply with her husband's demands and accept his behaviour, just as Anne had in respect of her husband who was doing the same things (*Tr*, p. 767, 1011). The prosecutor commented negatively on the fact that Chamari disclosed her situation to someone who was a part of Dinendra's family and who therefore could have reported back to Dinendra — as though selecting this person for disclosure undermined her credibility (*Tr*, p. 1130, 1356). However, within some cultures it is very shameful to disclose private family matters outside the family and this was likely to have informed who Chamari selected for disclosure (discussed further below) (Tam et al., 2016, p. 237). It also makes sense that Chamari would select someone who would understand the position she was in rather than judging her.

At the time that Chamari killed Dinendra, Dinendra's brother (Ranga) and his wife and family were arranging to come to Australia. This meant that in the near future she was not going to be dealing with Dinendra alone but also with his brother and his family — who presumably also reinforced his right to abuse her if she failed in her obligation to please him.

On their last visit to Sri Lanka, Dinendra hit her in front of his former girlfriend, Tharu. This appears to be the only time he used violence against her in front of someone who was part of their social circle. Afterwards, Chamari took

responsibility for being hit — apologising to both Dinendra and Tharu for getting upset and angry and providing them with such a terrible time (*Tr*, p. 1004). Tharu privately told Chamari that she had failed high school and missed out on an education because of her relationship with Dinendra (*Tr*, p. 765, 1005). Even years later, despite the fact that Tharu was no longer with Dinendra and had re-partnered, she said that she had to obey him (*Tr*, p. 765, 767). Chamari realised that Dinendra had naked photos of Tharu and was probably blackmailing her with them — "she was scared of Dinendra" (*Tr*, p. 1006) and he had made her a "slave of him" (*Tr*, p. 1032). In other words, Chamari's fears were validated as legitimate and shared by others who were in her position — even long after they had "separated" from him.

Despite the fact that Dinendra and Chamari presented as a happy and loving couple in Australia, a number of people in Chamari's professional community had noticed that something was amiss. People at work observed that she wore long sleeved and high necked tops under her scrubs even though it was very hot and the hospital had a "no below the elbows" policy, so this clothing was inconvenient and uncomfortable (*Tr*, p. 419). These people failed to take any action to assist. For example, another doctor, Siva Suva, noticed her clothing and, when she was "separated" from Dinendra, took the opportunity to ask if he hit her. Chamari's response was to cry, and to say she didn't want to talk about Dinendra as he "gets really angry". After they got back together, she socialised less, disclosing that Dinendra didn't like her going out and she couldn't leave home if he was there. She attended Suva's going away party whilst Dinendra was at work because that was her only opportunity (*Tr*, p. 1163-4). When Suva called her she didn't answer the phone, but rang back later to apologise and explain that Dinendra did not want her having any friends and she didn't like to go against him. Suva said she realised that Dinendra was controlling but it was Chamari's decision what she chose to do with her relationship and her relationship with her husband was more important than their friendship (*Tr*, p. 1164). They did not have contact again.

Taniya Dilshara noticed Chamari had a bruise on her arm when they were swimming at the pool. Dinendra was listening when she asked Chamari about it, and Chamari said she had

fallen “off the cycle” (*Tr*, p. 999, 417). In fact, Chamari had sustained this bruise as a result of a beating Dinendra had inflicted on her in order to get her to “support his relationship with Taniya” because he was interested in having sex with her. Shortly after this Taniya rang up to say that she didn’t wish to continue the relationship with the two of them. This was because Dinendra’s behaviour towards Taniya made her feel uncomfortable (*Tr*, p. 999, 418).

Chamari did make disclosures to three people, although she was unable to share the full extent of the abuse she was experiencing because she was afraid of the repercussions for herself, her family and the person she was making the disclosure to (in case they ended up being targeted by Dinendra) (*Tr*, p. 1037). She told Angelie Easo that she needed to separate and that Dinendra was controlling (*Tr*, p. 898). She told Charmaine Trezona that Dinendra was possessive and demanding (*Tr*, p. 658) and that he had asked for sex and, when she said “no”, sex had occurred anyway (*Tr*, p. 658-9, 662). She was “very much” worried that Dinendra would find out that she was meeting with Charmaine (*Tr*, p. 658). Chamari told Christine Owen-Morgan (the person managing accommodation for the hospital) that her relationship was “not good” and things were “not right” with Dinendra (*Tr*, p. 680, 667). When someone knocked on the door whilst this conversation was taking place she moved behind the door whilst it was being opened. No further action appears to have been taken by any of these people.

Others who were witness to the sexual abuse of Chamari, such as those who watched her being raped on camera, may have reinforced the notion that such abuses were unremarkable and even enjoyable for others to observe.⁴

In summary, the responses from those in Sri Lanka, including Dinendra’s family, validated his right to use violence to discipline Chamari if her behaviour made this necessary. Disclosures made to those in Australia were constrained by her fear of Dinendra’s retaliation if he found out her belief that nothing could be done to help her and her shame about the level of degradation she was experiencing. Even so, the lack of response by those who heard or guessed that

something was wrong mirrors the limitations of the current family violence safety system — or rather the lack of any such system (NZFVDR Ch2, 2016). Regan, Kelly, Morris and Dibb (2007, pp. 6-8) talk about the importance of informal social networks in either acting “as barriers to, or facilitators of, wider help-seeking”. They point out that such networks often do not view emotional abuse and controlling behaviour as either domestic violence or dangerous.

2.2.2 The intimate partner violence “safety system”

As discussed above, the current repertoire of responses to IPV require victim/survivor initiation and trigger a reaction to a particular incident of physical violence, as opposed to managing ongoing risk in response to the predominant aggressor’s pattern of harmful behaviour.

A protection order is simply a court order. It requires a breach before an enforcement process can be undertaken. Obtaining such an order would be the same as Chamari notifying Dinendra that she had disclosed the abuse to authorities and inviting him to attempt to use violence and abuse to preempt any future enforcement process.

Despite the fact that Dinendra had committed serious crimes under the Western Australian *Criminal Code* against Chamari — aggravated sexual penetration without consent and threats to cause grievous bodily harm (*Criminal Code* (WA), ss. 326, 338A) — she was negative about what the legal system could do if she reported these events to authorities. It was her belief that the immediate and long-term fall out from reporting Dinendra to the police would be an escalation of the danger that she and her family were in. Chamari testified that if she contacted the police, Dinendra would be interviewed and would simply deny the allegations. Because most people were under the impression that they were a happy couple (and there was significant testimony supporting these impressions at trial: *Tr*, pp. 421, 480, 572, 577, 579, 652, 666, 683-4) she was unlikely to be believed (*Tr*, p. 1037). Prosecutions were therefore unlikely to take place and, having made these allegations, she would have “to go back to the home at the end of the day”. In other words, having

⁴ Although it could be the case that those observing these encounters did not realise that she was not consenting to what was happening.

alerted him to the fact that she had disclosed the abuse to authorities, she was likely then to be left alone to deal with Dinendra and his family (who, as noted above, had made it clear that they considered reporting Dinendra to the police to be unacceptable behaviour on her part).

Whilst there was tangible evidence of the “pornography” Dinendra had downloaded, including images involving the sexual violation of children, there was no guarantee that the police would respond immediately to this. Chamari would again have to go home at night after he had been put on notice of her allegations. She stated that the police: “might tell these days everyone download pornography, and they might not do anything” (*Tr*, p. 1037). It is worth noting that the pornography that Dinendra had been downloading was subject to high-level security measures implemented by him — such that even with the extensive police resources available to a murder investigation, IT experts could not gain access to much of it (*Tr*, p. 234).

Even if Chamari survived the immediate fall out from reporting his behaviour to the police, and whatever happened to him as a result of the criminal justice process (she thought “a fine”), she stated that she would be in fear for the rest of her life about what he would do to her or her family in retaliation (*Tr*, p. 1037, 1050-1). It is important to remember that, in making these assessments, she had first-hand intimate experience over many years of Dinendra’s personal capacity for violent retaliation. She was also utterly exhausted by him.

Chamari’s appraisal of the risks involved in reporting Dinendra’s abuse to the police is supported by a number of recent critiques of the Western Australian Police response to IPV.⁵ There have been accounts of the police: failing to record incidents of IPV (LRCWA, 2014, p. 60), neglecting to provide victims with information on how to apply for a Violence Restraining Order (VRO) or access support services (Western Australia. Ombudsman, 2015), failing to provide any kind of safety response and/or incorrectly identifying the perpetrator (WA CDJSC, 2015). The VRO process is considered to be the responsibility of the victim/survivor, can be difficult and traumatic to navigate, and may actually

increase the risk of violence (Western Australia. Ombudsman, 2015). VRO breaches are common and are often not taken seriously by police.

For example, the Community Development and Justice Standing Committee (WA CDJSC, 2015, p. 52) has reported negative responses by the Western Australian Police to incidents of IPV, including that:

when responding to reports, police did not attend the scene or were often slow to arrive. When they finally turned up, they appeared unsupportive, confused about the correct procedure, or unwilling to take action. The service provided to victims at Western Australian Police stations was also criticised, with some officers making insensitive comments, claiming it was not a policing matter, or actively dissuading victims from making a statement.

The CDJSC (2015, p. 50) said:

One woman, who suffered extreme abuse and twice contacted her local police to advise them of the situation, was told that ‘there was no point in calling the police about domestic violence’ because ‘domestic violence had nothing to do with police.’

The Law Reform Commission of Western Australian and Braddock (2014) have also noted that the Western Australian Police can fail to investigate IPV and make comments to victims such as “it’s your word against his” or “there’s nothing we can do”. Victims have reported feeling blamed or judged by WA Police when reporting an incident, and that police become increasingly frustrated when dealing with multiple incidents from the same victim/survivor and perpetrator, failing to understand why the victim/survivor does not leave the relationship (CDJSC, 2015).

As noted already, applying for a VRO does not guarantee safety and may actually put the victim/survivor at increased risk of violence from the perpetrator (Western Australia. Ombudsman, 2015; LRCWA, 2014, p. 90). In high-risk cases, a VRO is less likely to be effective and more likely to be breached. Separation, and a history of violence by the perpetrator, increases the risk of a VRO breach (Western Australia. Ombudsman, 2015).

⁵ The following overview of the literature on this point is written by Jane Azzopardi.

Breaches of VROs are common and there is evidence suggesting that they may not be taken seriously by Western Australian Police (CDJSC, 2015). The Western Australian Ombudsman's Report found that there are inconsistencies between the *Restraining Orders Act* 1997 (WA) and how the police applied the Act (Western Australia. Ombudsman, 2015, p. 22). Breaches of restraining orders are often dealt with on a "three strikes" basis, which has proven ineffective, and the most common sentencing outcome for breaching a VRO is a fine (Western Australia. Ombudsman, 2015, p. 25).

When a victim/survivor is dealing with a highly dangerous IPV offender, ineffective or inadequate responses by a public agency, such as the police, do not simply fail to provide safety — such responses can significantly *escalate* the danger that the victim/survivor is in. If the strategic and retaliatory aspect of the IPV offender's behaviour is not understood then the potential for an inadequate safety intervention to escalate danger may not be understood.

Because victims are not confident that engaging with the criminal justice system will enhance their safety, IPV remains chronically underreported. In Western Australia, for example, less than 25 percent of victims of IPV seek help by contacting the police or other services, and only five percent had reported the most recent violent incident to police (Western Australia. Ombudsman, 2015, p. 59). Victims often do not wish to press charges because they believe the police response will not be effective, the perpetrator will not be punished, and therefore the trauma associated with reporting will not be worthwhile (Birdsey & Snowball, 2013, pp. 5-6; CDJSC, 2015, p. 30).

There are unique barriers to reporting violence for victims who are from culturally or linguistically diverse backgrounds (noted below) or those who are also victims of sexual assault (Western Australia. Ombudsman, 2015, p. 70). Victims may be reluctant to report sexual assault if it does not fall into a "socially accepted" idea of rape, for example, if it occurs within a marriage (CDJSC, 2015, p. 30). There are additional barriers for victims seeking help in regional areas, such as a lack of anonymity (Western Australia. Ombudsman, 2015, p. 66).

The difficulties in successfully prosecuting sexual violence, particularly when it takes place within a current relationship and is denied by the defendant, are well documented (Australian Institute of Criminology, 2007a, 2007b; Lievore, 2005; Millstead & McDonald, 2017). For example, the criminal burden and standard of proof are exceptionally difficult to satisfy when the evidence reduces to a matter of the complainant's word against the defendant's.

2.2.3 Intersectional factors⁶

Expert testimony on Chamari's cultural framework and her vulnerabilities as an immigrant Sri Lankan woman in Western Australia were not provided at trial.⁷ In the absence of specific information about Chamari's particular cultural framework, what follows is necessarily speculative and simplistic. However, it does indicate that such testimony may have given valuable insight into further dimensions of Chamari's entrapment — informing Dinendra's sense of entitlement and normalising his abuse for Chamari and those around her, thus limiting her options for seeking help. It also exposes some of the prosecutor's problematic cultural assumptions (discussed below). Research suggests that cultural and social norms tend to survive immigration to western countries (Bhandari & Sabri, 2018; Jordan & Bhandari, 2016). An added complication for women who have immigrated is that their partner may be their only social support in their new country (Rai & Choi, 2017).

Recent literature suggests that a number of South Asian cultures have a strong adherence to traditional patriarchal gender norms (Bhandari & Sabri, 2018; Clark et al., 2018; Jordan & Bhandari, 2016; Leonardsson & San Sebastian, 2017; Miedema & Fulu, 2018; Miedema, Shwe, & Kyaw, 2016; Pandey, 2016; Rai & Choi, 2017). The result is that IPV may be widely accepted as a normal part of marriage and men may be considered to be entitled to sex with their wives (Clark et al., 2018; Leonardsson & San Sebastian, 2017; Miedema et al., 2016; Parvin, Sultana, & Naved, 2016). We note that this

⁶ The following summary of the research on culture is written by Jane Azzopardi.

⁷ Although Chamari did comment that "it was very stressful to do things alone in an unknown country" (Tr, p. 456).

research is consistent with some of the responses to Chamari by her mother in law and sister in law (described above).

South Asian communities tend to be collectivist, with an expectation that family comes first (Jordan & Bhandari, 2016; Tonsing & Barn, 2017). A woman is expected to uphold the family's honour and may bring dishonour upon her family by having sex outside of marriage, including being a victim/survivor of sexual assault. It follows that sexual assault can be a tool used by abusive men to force a woman into marriage (Miedema et al., 2016). A strong collectivist culture can also intensify the controlling effects of shame associated with a marriage that “fails” through separation or divorce (Tonsing & Barn, 2017).

Miedema, Shwe and Kyaw (2016, p. 682) suggest that norms around women's sexuality “constrain women's options in the period immediately prior to marriage, excising alternative choices” and preventing them from “meaningful decision making, a core component of women's empowerment within intimate partnerships”. Such norms, therefore, precondition “power dynamics within their marriages”, setting women up for “exposure to economic, psychological, physical and sexual forms of IPV”.

Marriage is a union between two families rather than two individuals, so that the wife is expected to adopt the husband's family as her own, submitting to their wishes and demands (Jordan & Bhandari, 2016). As a result, South Asian women may be at risk of violence not just from their husband but also from their in-laws (Bhandari & Sabri, 2018; Jordan & Bhandari, 2016; Menon & Allen, 2018).

There may be a number of reasons why South Asian women who are victims of IPV are particularly unlikely to seek help from formal services (Jordan & Bhandari, 2016; Leonardsson & San Sebastian, 2017; Parvin et al., 2016). For example, in many South Asian cultures there may be a strong imperative not to take family problems outside the family (Tr, p. 763), combined with a tendency to blame the woman for problems that occur within a marital relationship. As a result, South Asian women may avoid reporting abuse out of fear that it will bring shame and dishonour to their family (Bhandari

& Sabri, 2018; Jordan & Bhandari, 2016; Menon & Allen, 2018; Pandey, 2016; Parvin et al., 2016; Rai & Choi, 2017). In addition, victims may fear that they will be blamed, shamed or not believed by those around them and ostracised by the community, including their family (Bhandari & Sabri, 2018; Clark et al., 2018; Jordan & Bhandari, 2016; Leonardsson & San Sebastian, 2017; Menon & Allen, 2018; Pandey, 2016; Parvin et al., 2016; Rai & Choi, 2017). The formal systemic response to violence against women in South Asian countries has also been described in several studies as patriarchal and victim blaming (Leonardsson & San Sebastian, 2017; Menon & Allen, 2018; Parvin et al., 2016).

2.2.4 Summary of the situation at the time Chamari used lethal force

Chamari was living with a man who was a rapist and enjoyed hurting women and children or watching women and children being hurt for his own sexual pleasure. She experienced his behaviour as “sexual torture”. He was capable of extreme levels of physical and sexual violence which he would employ if she failed to comply with his demands. He had threatened to kill her. His violence had escalated in frequency and severity over time and had become unbearable to her. She was exhausted by it.

Compliance meant adhering to his wishes in respect of the minutia of how she lived her life — when she slept, who she socialised with, what clothes she purchased etc. However, his “rules” were impossible to anticipate and follow correctly. She was tuned into his wishes on a moment by moment basis and lived in constant expectation of painful “punishment”.

Chamari was aware that her spending, her social interactions and her movements were being observed by Dinendra. Very recently, his surveillance had been expanded to her place of employment. Her last remaining safety zone had therefore just closed off. He was also proposing to remove her independent means of transport.

INFORMATION SUMMARY BOX 1

A social entrapment analysis

- The full suite of abusive behaviours by the predominant aggressor is documented. His coercive and controlling tactics include: isolating the victim from other people so he becomes her main source of connection and information, depriving her of survival resources so she depends on him for everything, keeping her under surveillance so she knows he is always watching her, microregulating the minutia of her behaviour so she becomes conditioned to following his rules whether or not they make sense, degrading her so that she becomes acclimatised to being treated as an object for his use, and using violent retaliation and threats to condition obedience and close down her resistance – she becomes exhausted and terrified and starts containing herself in order to manage his violent behaviour.
- The strategic and retaliatory dimensions of the abuse are described. In other words, how the abuse tactics are used to punish victim resistance and have the effect of limiting the victim's/survivor's space for independent action.
- How the suite of abusive tactics is developed and implemented over time is documented, along with the cumulative and compounding effect on the victim.
- Responses by family, community and agencies to any help-seeking behaviour, along with any structural inequities that support the aggressor's use of violence and compound the victim's/survivor's experience of entrapment, are also set out.
- The safety options available to the victim are realistically explored, not simply assumed.

Chamari had no friends or intimate relationships in Australia except Dinendra. She had made disclosures to various people, and other people had noticed that something was wrong, but no one had done anything in response. Her belief that the police were unlikely to respond to her allegations in a manner that provided her with immediate or long term safety is validated by the experiences of other Western Australian victims of IPV who have actually attempted to use their services.

Dinendra's family validated his authority as her husband to use violence against her if she was not compliant, as well as his right to satisfy his sexual desires. Dinendra's brother and his brother's family were coming to join them in Australia. This validation is likely to reflect broader cultural norms in Chamari's home country.

Dinendra was manipulating and attempting to entrap a teenager in order to have "sex" with her, despite the fact that this was likely to be extremely damaging for the girl concerned. He had demanded that Chamari organise a "sabbatical" from work so that he could take the girl on holiday with them, thus getting her alone and away from her family. If Chamari did not comply with his wishes he would use violence to force her to. If she did comply with his wishes she would be complicit

in the girl's violation. Chamari's safety was associated with Dinendra's happiness, however, the safety of those around them was not.

Chamari's family of origin was all she had left of genuine human connection. Dinendra had indicated that if she left him — including by suicide — or disclosed to a counsellor, associates or the police what he was doing to her he would destroy her family, and he had the capacity to do so.

Chamari was a valuable commodity to Dinendra — he was able to trade her for illegal "pornography" and other sexual commodities and services that he wanted, she provided him with a respectable cover when he was attempting to entrap girls and young women he was interested in sexually, and he controlled her income. He had no incentive or apparent intention to let her go.

If Chamari attempted to challenge Dinendra's authority or assert independence he was likely to thwart her attempts or violently retaliate, as he had repeatedly done in the past.

PART ONE

3. *Western Australia v. Liyanage*: Telling the facts using a battered woman syndrome framework: The expert testimony

In this section, we contrast the facts as previously recounted through a social entrapment framework with the account of the facts offered by the experts in the case.

Three experts gave testimony in *Western Australia v. Liyanage*. All three were psychiatrists. For the purposes of this report, we put aside their expert testimony on the defence of automatism and focus on that part of their testimony that was relevant to the defence of self-defence.

Only two of these experts gave detailed evidence relevant to self-defence. The first used a traditional battered woman syndrome framing but employed different terminology. This expert talked about how Chamari developed a “cult-like mentality” as a result of Dinendra’s abuse.

The second used a conceptual frame that was a hybrid blend of a “bad relationship with incidents of violence” analysis, with a battered woman syndrome analysis (also called a “cult-like mentality”) grafted on at the end. In this expert’s account, Chamari and Dinendra had dovetailing dependency and dominance needs which created a “dysfunctional relationship” from the beginning. Once the abuse occurred her dependency developed into a “cult-like mentality”, although presumably, she was also susceptible to developing that mentality. In this account, the abuse did not *cause* her state of mind — her personality pre-dated and contributed to the conditions in which the abuse took place and then morphed into her resulting state of mind.

3.1 Psychiatrist One

Psychiatrist One pointed out that the initial relationship between Chamari and Dinendra “appeared to be a loving normal friendship and relationship” (Tr, p. 1174). Chamari had genuine feelings for her husband — she still loved and missed him despite the things that had happened (Tr, p. 1174).

In this account, when the abuse began there were three things that caused Chamari to “lose the ability to do *logical things like leave*” [emphasis added] (Tr, p. 1177):

- The first was the cultural framework that Chamari was

brought up within. She was raised to believe that “whatever happens in a marriage, you know, you have to stick by your husband” (Tr, p. 1174). This meant that she “would put up with something like that for cultural values and expectations” (Tr, p. 1175).

- The second was her nature/personality. She was “pleasant, eager to please, you know, so she comes across as a person who, you know, tries her best to be nice with people” (Tr, p. 1175).
- The third reason, and the one that Psychiatrist One spent most time developing, was what she called a “cult-like mentality” (Tr, p. 1175), which describes the psychological consequences of being subjected to domestic violence over a number of years or decades and was a “subtype of post-traumatic stress disorder” (Tr, p. 1176). She used this term in order to avoid the “old fashioned terminology” of battered woman syndrome because the phenomenon “can also happen to men” (Tr, p. 1175).

Psychiatrist One explained that in abusive relationships there is a repeating cycle of physical, verbal, emotional and sexual violence. The cycle has three stages: the tension building stage; the period of violence; and the reprieve (Tr, p. 1176). This cycle escalates in intensity over time and has a cumulative impact on the victim/survivor.

The abuser is “a Jekyll and Hyde” person, in that they can be “loving and nice, but quickly changing into someone who is not loving and not nice or even abusive” (Tr, p. 1175).

The abuse operates as a “brainwashing exercise” of the victim/survivor and over time the victim/survivor develops “almost like an attachment to the person who is causing these cycles of violence” (Tr, p. 1175). This process was variously described by Psychiatrist One as “learned helplessness”, “traumatic bonding”, and a “funny attachment to their abuser” (Tr, p. 1176). She commented that we could “see it in people who are abducted and kept 10 years by their abductors” (Tr, p. 1176). She said “it depends on the personality of the victim, how soon they develop these psychological consequences” (Tr, p. 1176).

There are multiple dimensions to this process. One is that “over time victims develop low self-esteem, a sense of self being worthless and useless” (*Tr*, p. 1177). Shame also keeps them isolated: “Usually victims don’t seek help because of the shame” and the sense that the abuse is their fault and that they deserve it, reinforced as a “constant message from the perpetrator” (*Tr*, p. 1177). The constant fear:

...can escalate to almost like a state of constant terror. You never know when the person changes. You never know, what I did right yesterday and it was right, today it might be wrong. (*Tr*, p. 1177)

Victims lose the ability to read or predict what is going to happen next and this can result in them becoming depressed (*Tr*, p. 1177). As a result of this process, victims blame themselves for what is happening and “going to the authorities doesn’t seem like an option”.

Aside from culture, the psychiatrist briefly mentioned only two structural constraints (processes external to Chamari’s psyche) that contributed to this dynamic. She noted that Chamari was very isolated in Australia – that she had a work network, not a social network (*Tr*, p. 1173). And she pointed out that when victims go to authorities to get a restraining order they can “end up potentially being hurt by the perpetrators” so they don’t see that as the best option (*Tr*, p. 1178).

Despite the fact that Psychiatrist One eschewed the terminology of “battered woman syndrome” this is a classic battered woman syndrome analysis. It uses a cycle of violence analysis and locates the explanation for Chamari’s failure to employ her safety options predominantly in her psychological process — which in this case has origins in her nature, culture and trauma response.

3.2 Psychiatrist Two

Psychiatrist Two said that he did not “have special expertise” in the complex relationship dynamics that exist around spousal violence (*Tr*, p. 1302):

...that’s effectively what we’re talking about when we say ‘battered woman syndrome’....It’s actually referring

to an entrenched pattern of dynamics and associated behaviours that occur in abuse situations, and there may or may not be comorbid mental illnesses present, such as depression or anxiety disorders or post-traumatic stress disorder. (*Tr*, p. 1302)

He opined that Chamari did not have impaired cognitive functioning and did not suffer from post-traumatic stress disorder. He did find that she had “masked depression”. This was because her coping mechanisms in respect of what was happening to her were so good that “the full suite of depressive symptoms don’t find expression” (*Tr*, p. 1292). He described her coping strategy “as compartmentalisation” (*Tr*, p. 1291). In her workplace she was able to suppress what was happening elsewhere and get on with things. This meant that she had “a refuge” where she was able to find and give expression to herself and her personal identity, rather than becoming completely “lost” to herself (*Tr*, p. 1292).

Psychiatrist Two opined that Chamari had “a pre-existing tendency toward being somewhat dependent or submissive prior to entering into the relationship”:

...she was overprotected and oversheltered and the family culture appeared to be one that, perhaps, fostered a sense of dependency or a readiness to submit to the direction of another person. (*Tr*, p. 1284)

In cross-examination he clarified that:

...issues with her upbringing and development....made her an easier target for someone that would want to exert that level of control over — over someone because for everyone that has dependency needs, there is someone that has dominance needs. (*Tr*, p. 1290)

He noted that:

Dr Liyanage had essentially submitted to the will of the deceased within a few weeks of meeting him, and in doing that gave up her virginity which, as we have heard, is a very precious and guarded virtue for — for her culture and had been for her personally. Yet she had only known this man for a short period of time, and it was at his suggestion. (*Tr*, p. 1290)

This was a “very significant event” because it led Chamari to feel very “bonded” to the deceased (*Tr*, p. 1290). He went on to point out that the sexual behaviour that she found so distressing later in the relationship, she:

...also found unpalatable when exposed to it as early as their second sexual encounter. And so that also suggested to me that....there was a degree of dependency needs, or a readiness to submit to the direction and advice and control of an authoritative male who appeared charismatic and kind, was present for Dr Liyanage from the outset. (*Tr*, p. 1290)

Psychiatrist Two said that this was relevant in understanding both why the relationship was “dysfunctional from the onset” but also that her “submissiveness and tendency to comply and placate a dominant male figure was something that was not purely the product of an abusive relationship” (*Tr*, p. 1290-1). At an early point in the relationship Dinendra had “expressed an interest in moving on and commencing a relationship with another person” but after minor injuries in a car accident:

Dr Liyanage, in spite of his declared infidelity, supported him through his convalescence at a time when the relationship could quite rightly and justifiably have failed on — on good grounds. (*Tr*, p. 1291)

Dinendra’s “increasingly unconventional and impersonal sexual behaviours” (*Tr*, p. 1291) were:

...really starting to enter relationship territory that’s quite intense and quite complicated, and quite taxing on the psychology and the emotions....I don’t believe she was someone who was equipped to handle that level of intensity and dysfunction in a relationship. (*Tr*, p. 1291)

Psychiatrist Two pointed out that the incident of violence that occurred in 2012 added an element of fear to this dynamic:

Once she was struck on the footpath she became very anxious and living in fear all the time and the fear was about him becoming angry. So in order to manage that fear she had to prevent him from becoming angry. She went to lengths to placate him, always hopeful that he would change. (*Tr*, p. 1286)

Despite disavowing special expertise in spousal violence, Psychiatrist Two did agree that there was a “cult-like mentality that developed within the relationship, and, indeed, the abuse was part of that” (*Tr*, p. 1293). Dinendra was a “charismatic and dominant figure who showed love and kindness, and then at other times induced uncertainty, and fear, and fear of consequences were she to leave” (*Tr*, p. 1293). She was the victim/survivor of “standover tactics”, subject to threats and violence for him to get what he wanted, as well as “indoctrination and brainwashing”. In the very last two week period she was also deprived of “her coping mechanism of compartmentalisation” because he was rostered to work with her (*Tr*, p. 1292).

As a result of the abuse, Chamari over time “gradually sort of,....*lost her good sense*....in relation to making judgments about that relationship” [emphasis added] (*Tr*, p. 1293, 1202). She found herself “complying with all manner of behaviours and acts that, prior to commencing the relationship, she would probably never have imagined” (*Tr*, p. 1293) and she did not leave:

...it’s part of the abuse dynamic to feel that you can’t leave. And so it’s....an integral feature of spousal violence....and the abuse cycle that people — seemingly intelligent people — don’t leave. They continue to cling to hope, continue to believe perhaps they are the ones who are wrong, they’re the ones that need to change. That if only they did this, or if only they did that. (*Tr*, p. 1304)

This account is predominantly one of a relationship that is dysfunctional and was destined to be so — quite aside from any abuse that occurred — because of the psychological dependency and dominance needs of Dinendra and Chamari. In other words, it is a “bad relationship” in which both Chamari and Dinendra have a role to play. Once the abuse commences, Chamari simply attempts to cope, rather than taking advantage of her safety options.

Essentially Psychiatrist Two’s testimony on the psychological effect of the abuse is an abbreviated version of “battered woman syndrome”, and, in particular, the “abuse cycle” and “learned helplessness” but using similar terminology to Psychiatrist One. He departs from the concept of battered

woman syndrome and its traditional use when he characterises Chamari as *predetermined* to develop a syndrome response and partially responsible for the relationship dynamics that give rise to the abuse. In fact, battered woman syndrome evidence was developed to explain the effect of enduring IPV on absolutely ordinary people. There is no suggestion in this literature that certain women contribute to the dynamics that support abuse and are predisposed to developing such a condition. Stark (2007, p. 113) comments that “researchers have failed to discover any psychological or background traits that predispose any substantial group of women to enter or remain in abusive relationships”.

3.3 How does this differ from the account using a social entrapment framework?

First, in the experts’ testimony, Dinendra’s violence and abuse were minimised, instead of being the starting point for understanding what was happening.

For example, his violence was only referred to in generic terms by both experts. Psychiatrist One referred to a “recurrent cycle of physical, verbal, emotional, sexual, all sorts of violence” (Tr, p. 1125). Dinendra’s *actual* abusive behaviours and their strategic effect were not analysed or explained. Psychiatrist Two mentioned the fear that the incident of serious violence in November 2012 caused in Chamari. Aside from that, he conceded that there was “abuse” and an “abuse cycle” and agreed with the defence proposition that there were “threats and violence,” “standover tactics,” “indoctrination” and “brainwashing” (Tr, p. 1303), but did not describe or analyse Dinendra’s extensive suite of repetitive and specific abusive behaviours.

Furthermore, aspects of Dinendra’s abusive behaviour were not characterised as abuse by Psychiatrist Two but were instead described in language that minimised both the violence these behaviours entailed and the harm that they caused. Although Psychiatrist One did refer to “verbal, emotional and sexual violence”, Psychiatrist Two limited his discussion of abuse predominantly to physical violence and

threats of physical violence. The rapes and “sexual torture” recounted by Chamari were described by Psychiatrist Two as “sexual behaviour” that Chamari found “unpalatable” and “so distressing”, “increasingly unconventional and impersonal sexual behaviours,” and “compliance” on Chamari’s part with “all manner of acts”. Dinendra’s threats, intimidation and surveillance were not named as abuse but were described as “inducing uncertainty and fear, and fear of consequences were she to leave” and the flip side of Dinendra’s “charisma” and displays of “love and kindness” towards Chamari.

The fact that Dinendra was forcing Chamari to be complicit in, and act as a cover for, his predatory behaviour towards children and girls was not mentioned by either expert.

Secondly, Dinendra’s responsibility for using violence disappeared in both experts’ accounts. Instead, his violence was presented as a product of the *relationship* which both parties had some responsibility for.

In Psychiatrist One’s account, Dinendra was hardly mentioned because the analysis overwhelmingly focused on Chamari (although he was described as a Jekyll and Hyde person, suggesting something other than a choice on his part to use violence). However, Dinendra’s absolution from responsibility for the abuse is particularly evident in the account of Psychiatrist Two. The abuse was the apparently inevitable result of the dysfunctional relationship caused by the dovetailing at its inception of Chamari’s dependency needs and Dinendra’s dominance needs. Chamari’s tendency to submit to and placate a “dominant male figure” pre-dated and was “not purely the product of an abusive relationship.”

Thirdly, both experts assumed, contrary to what Chamari explicitly said in her testimony, that Chamari had effective safety responses and that it was illogical for her not to call the police and/or leave the relationship.

Neither expert explored Dinendra’s potential reaction to Chamari taking either of these courses of action or remarked on the fact that no evidence was provided at trial to support the proposition that either course of action was likely to enhance her personal safety. Both assumed that what needed explanation was why *Chamari acted illogically* by failing to

take these courses of action. Psychiatrist One mentioned that one of the consequences of obtaining a protection order is that a victim/survivor “can potentially be...hurt by the perpetrator”, but did not point out that a protection order is a court order and must be breached before an enforcement process can be initiated. Neither psychiatrist noted that Dinendra had a history of violent retaliation in response to Chamari failing to comply with his instructions and had threatened Chamari and her family with extreme violence should she disclose what he was doing to her.

Psychiatrist One also discussed culture as something that influenced Chamari in putting up with the abuse but did not discuss its role in causing *others* in her social network to blame her for the abuse or pressure her into taking responsibility for managing it. In other words, culture was characterised in terms of Chamari’s personal psychological process rather than as a social framework that affected the safety options available to her. The same process is evident in Psychiatrist Two’s analysis in which gendered aspects of Chamari’s cultural context are *individualised*. Psychiatrist Two described these cultural norms as Chamari’s “*family culture*,” rather than broader norms in the culture of her society of origin. Such norms were also not understood as giving expression to gender inequality — embedding male entitlement and female compliance into the institution of heterosexual partnership. Instead, Chamari is described as a uniquely dependent *individual*.

Fourthly, Chamari’s resistance to the abuse was concealed in both experts’ accounts.

The theory of violence that underpinned both accounts was not one that understood Dinendra’s violence as strategic and retaliatory in manifestation and effect. Instead, his abuse was described as a “cycle”, not unlike the seasons or the weather. In other words, the violence was assumed to have operated *independently* of what Chamari did or didn’t do. It did not take place because she, from the very beginning of her relationship with Dinendra, found ways to resist his abuse. For example:

- refusing to invite vulnerable young women into a relationship with them;

- insisting on taking a young woman home when she heard Dinendra manipulating her in order to sexually exploit her;
- secretly telling K how to discontinue a relationship with them;
- disobeying Dinendra’s instructions in order to have a compassionate conversation with a client in the street;
- fighting him with all her might when he physically attacked her and being overpowered;
- having a word to her senior consultant so that she was rostered on evening shifts to try and avoid Dinendra’s internet activities at night (*Tr*, p. 1017);
- refusing to have sex with other men (*Tr*, p. 1046);
- choosing an opportune time to ask Dinendra to change the internet out of her name in order to avoid jeopardising her job and visa;
- delaying booking study leave by pretending she had been too busy in order to try to protect K (*Tr*, p. 1057); and
- demonstrating a lack of desire to be displayed as a sexual object over the internet.

An account of the facts using an entrapment framework, by way of contrast, endeavours to express the manner in which the abuse operates strategically and over time to close down the victim’s/survivor’s resistance because, at some point, the repetitive use of violence makes continued overt resistance too costly for the victim/survivor.

Acknowledging the victim’s/survivor’s resistance exposes the full extent of the violence used by the perpetrator, but it also:

...removes blame because the account of the individual’s resistance shows that she or he did not “put up with it” or “let it happen”. It acknowledges their countless efforts to maintain their dignity (Todd, Wade, & Renoux, 2004, pp. 148, 159).

On the account of both experts in this case, Chamari was presented as entirely passive — she was “eager to please”, developed “cult-like” thinking, was overprotected and oversheltered and had a pre-existing tendency to be dependent or submissive.

Finally, on both experts' accounts, Chamari was the focus of the inquiry — she was pathologised and in the end held almost entirely responsible for Dinendra's abuse of her.

Both experts explicitly stated that Chamari was *illogical* in her thinking. Psychiatrist One attempted to explain why she could not do “logical things like leave”. Psychiatrist Two described her as lacking “good sense” and implied that her behaviour was unintelligent. But importantly he also presented her as someone pre-disposed to have this response — she was both attractive to an abuser, contributed to the dysfunctional relationship and was predisposed to having a passive response to abuse by a “charismatic” and “dominant male figure”. Part of the problem, as he understood it, was that *she* was not “well-equipped to handle” the “level of intensity and dysfunction” presented by the “relationship” she had with Dinendra.

Psychiatrist Two commented that in prison Chamari “remained very preoccupied with her perceived maltreatment on the part of the deceased and the overwhelming theme of her grievance was that of other women in his life” (Tr, 1289). This is a judgemental way of characterising the recovery process, that someone who has survived many years of severe abuse is likely to need if she is to have any prospect of healing.

In summary, the focus for both experts was on explaining Chamari's state of mind, which on only one of these experts' accounts was actually *caused* by Dinendra's abuse and then in some generically causal manner. Neither analysed the mechanics of how, over time, Dinendra's abusive behaviour closed down Chamari's scope for resistance or the manner in which he was likely to foreclose, or retaliate to, any future attempts on her part to seek help.

Both experts based their theories of IPV, despite changing the label, on a modified version of Dr Leonore Walker's theory of battered woman syndrome. As noted above, such theories have been challenged on many grounds and might now be considered dated.

Most disturbing is the fact that the expert testimony in this case arguably set self-defence up to fail on the facts. It lent

professional weight to the notion that Chamari had other effective and lawful options for achieving safety, such as leaving Dinendra or phoning the police and reporting his abuse. It therefore lent *expert weight* to the idea that she was responsible for the violence that she was experiencing, and that her perception that she was trapped and without peaceful or law-abiding means of being safe from Dinendra's abuse, was illogical and wrong. Accepting this testimony, a jury might believe that her perceptions were genuinely held and excuse her on the basis of excessive self-defence, but it would be unlikely to exonerate her on the basis of self-defence.

As pointed out by Linda Coates and Alan Wade (2002), an issue that is intertwined with, but distinct from, the theory of violence employed to frame facts involving IPV is the language used to set out those facts (Coates & Wade, 2002; Todd, Wade, & Renoux, 2004, p. 352). Part of the issue is not just having the will to describe events more accurately; it is also having the language available to do so. Sexual violence is particularly difficult to language in a manner that captures the violence that is involved. Aside from the word “rape”, the language that is currently available to describe sexual violence flattens the experience of the victim/survivor — the pain, violation and harm — into “bad sex” or sex without consent. As noted above, because women's bodies prepare for sex as much as male bodies do, intercourse without a woman's desire may be a very painful assault on an extremely tender part of her body. This experience is captured in the words of a victim/survivor:

Forcible rape is not in any normal sense intercourse. In most cases, the lubrication....required for normal completed intercourse does not exist....As a result of this crucial aspect, as well as the fact that the victim is usually in a traumatised state immediately preceding the rape and, thus, the muscles at the entrance to the vagina are not relaxed, penetration cannot either easily or immediately occur. What does happen is that the rapist repeatedly batters....the very delicate and sensitive features lying *outside* the vagina, causing the tissues to tear and to bleed. [After penetration]...[t]he tissues (this time, the lining of the vagina) are repeatedly, with each thrust, ripped and torn.

INFORMATION SUMMARY BOX 2

The psychological impact of prolonged exposure to violence

- The violence is understood as “cyclical.”
- Trauma is considered to cause the victim to psychologically “bond” with the predominant aggressor (or, alternatively, develop “learned helplessness”) so that she cannot leave him despite the abuse.

An adapted version (Psychiatrist Two)

- A “dysfunctional relationship” caused by the predominant aggressor and primary victim’s/survivor’s dovetailing dominance and dependency needs is considered to pre-date the cycle of violence and inform the victim’s/survivor’s trauma bonding.

How is this different from an entrapment analysis?

- The predominant aggressor’s abusive behaviours are not set out in detail or analysed for their effect in closing down the victim’s/survivor’s “space for action”.
- The retaliatory and strategic effect of the abusive behaviour is not acknowledged. The violence is understood as “independent” of what the victim does.
- The victim’s/survivor’s resistance is rendered invisible.
- There is no analysis of the social and structural constraints that the victim is experiencing. It is assumed, without proof, that calling the police or leaving the relationship are options readily available to the victim and would have ensured her safety.
- The victim is pathologised: Expert testimony lends weight to the idea that she is illogical and wrong in perceiving herself to be without effective options for escaping her partner’s abusive behaviours.

As can be imagined, forcible rape is traumatically painful. I believe that it is the most physically painful ordeal that an individual can undergo and still live afterward. When I was being raped I felt as though I was being repeatedly stabbed with a knife in one of the most sensitive areas of my body (Stanko, 1985, pp. 34-35, quoting Village Voice, 1979).

What this account does not capture is the psychological violation of the experience. Of course, every victim’s/survivor’s experience of rape is different and in the majority of instances there may be no lasting physical harm caused to the victim’s/survivor’s body. The point we are making here is that describing an experience as “bad sex” is unlikely to capture the reality of the act for the victim/survivor.

When children are targeted the available language is even more inadequate — phrases like “child pornography” and “child exploitation materials” fail to reflect the harm that is done to children when they are violated sexually by adults. Even the words used to describe the behaviour of adults who are manipulating children (and their parents) so that they can manoeuvre the child or young person into a situation where they can sexually exploit and violate them are inadequate. Martine Renoux comments that:

In England the legal system has now formally adopted the term “grooming”, presumably to describe coercion, abuse of trust, and manipulation with the intent to harm. I find it shocking that this term, which also refers to affectionate ways primates have of looking after one another and the care one takes with hygiene and appearance, is used to describe how pedophiles (another euphemism) entrap and violate children (Todd, Wade, & Renoux, 2004, p. 148).

4. *Western Australia v. Liyanage*: Telling the facts using a “bad relationship with incidents of violence” framework: The prosecution

The prosecution in *Western Australia v. Liyanage* used “a bad relationship with incidents of violence” understanding of IPV as a framework for selecting and narrating the facts. In this section, we set out that narrative and explain how it differs from the account using a social entrapment framework.

4.1 The prosecution’s account

The prosecution’s argument was made by repeatedly asserting his narrative framework. In the following account, his main points are summarised in italics and then examples illustrating how he substantiated that point are below.

The prosecution’s story was that this homicide was about a relationship, specifically a marriage, which was in trouble.

In his opening address (Tr, 225-236), he referred to a “very troubled marriage” an “unhappy relationship”, “relationship issues” and “difficulties within the relationship”. In cross-examination (Tr, 1075-1145), he referred multiple times to “the troubles in your marriage”. He commented, “your marriage was on the brink of disaster, wasn’t it?”. When Chamari answered, “It was a disaster from the beginning,” he retorted, “Then why did you keep trying to resurrect it?”. In his closing address (Tr, 1329-1367) he talked about the fact that most people thought nothing was amiss and it was a “surprise that there were problems in the marriage and the problems were as deep seated as you have come to hear about”. He said “It was a dysfunctional relationship” and “It seemed to be dysfunctional pretty much right from the outset”. He referred to Chamari in the police interview, as “calmly,” and with “no injuries,” “listing all the things that were wrong with the marriage, all the things that would cause someone to kill their husband” and the book in which she had written down “the litany of wrongs”.

The “level of abuse” (“physical, sexual and psychological”) in the prosecution’s account was more in the nature of “relationship problems”, stemming from the fact that Dinendra was “not a particularly nice person”.

In his opening address (Tr, 225-236), the prosecution said that Dinendra was “not too controlling” and Chamari had “some level of negotiation in the relationship”. He suggested Chamari had a “circle of friends, two mobile phones, internet access” and it was significant that she had been able to “force” Dinendra to change the internet service provider into his name after they “reconciled” in mid-2013.

The prosecution suggested in cross-examination (Tr, 1075-1145) that Chamari did not need to answer the Skype chats in Sri Lanka once Dinendra moved to Australia, but she chose to. He proposed that she was on Skype with Dinendra as a way to control him so that he couldn’t meet other women:

Isn’t it the case that the reason why the Skype chats were so often and extensive is because that allowed you to keep Dinendra under control? He wasn’t able to see other girls during the Skype chats?

He pointed out that after they got married they went to India and Dinendra wanted them to have sex with a prostitute. When Chamari refused, “Dinendra complied” with her “wishes” and did not use physical violence against her.

In his closing address, he expressed doubt as to whether the physical violence was as bad as Chamari had recounted. He suggested that she had detailed only the extreme incident of violence that took place in 2012 — “detail” on the rest of the violence “is scant.” He expressed surprise that she did not have more detail about her first experience of violence. He pointed out that when the violence was apparently escalating she provided detail about only one specific incident — when the fish was not cooked correctly.

The prosecution separated Dinendra’s history of abusive behaviour from the weeks prior to his killing and the night itself.

The prosecution suggested that Chamari’s police interview had indicated that there had not been any physical violence for several weeks prior to the killing. Chamari had attributed this to “compliance” with Dinendra’s demands and the prosecution suggested that in the last few weeks prior to Dinendra’s death the prime issues that allegedly motivated his violence — “not toeing the line for the Skyping” — were

not there and hadn't been since February because "he was getting his own way". This meant "the physical levels of violence weren't escalating at all".

Finally, on the night of the killing the "relationship" was described by the prosecution in his opening address (Tr, 225-236) as "amicable" up to the point that Chamari went to sleep: "there was a little bit of anger by the deceased about her not having booked the study leave, but nothing other than anger". She had "no injuries", and he was "horizontal" and "unaware". In cross-examination he again said: "that night you had what you might describe as a cooperative experience?" and "So for all intents and purposes, you guys were okay that night?".

The prosecution suggested that Chamari successfully left Dinendra — and could have left him on multiple other occasions — but chose to reconcile/stay.

In cross-examination (Tr, 1075-1145) he asked her repeatedly about the time that she "left" — painting a picture of complete separation and freedom:

You had your own accommodation? You were inviting friends around to your house? You were arranging your own internet? And you had access to money? I mean, transferring thousands of dollars weren't you? And so surely that was the best time of your life? You were free?

He suggested that she chose to resume the relationship — the message from Dinendra about the fungal cream was her "excuse to go and see him."

Picking up on the "bad relationship" theme, the prosecution's theory was that Chamari reconciled/stayed with Dinendra because of love.

In cross-examination (Tr, 1075-1145) his questions were: "The problem was you did love him, wasn't it?"; "You did still love him at the time didn't you?"; "You did still love Dinendra at the time didn't you?"; "And so you loved him, and you went to Kununurra?"; "And loved him at the same time. That's why you went, isn't it?"; "So you still wanted

to be with him?" Later he started again after she described Dinendra's ongoing "sexual torture": "And you still thought that one day he would change?"; "And you still loved him?" Throughout this testimony, Chamari agreed that she loved Dinendra and that she hoped that he would return to the man he was when they first met.

In his closing address (Tr, 1329-1367), the prosecution introduced the theory that her love was a kind of "bonding": "That was probably the reason why she was unable to terminate the relationship, because of this bonding". He suggested that "the separations that occurred during the marriage but failed" and where there were "opportunities to separate but separation did not occur" are explained by "this bonding". After the violent incident in 2012, Chamari and Dinendra "reconciled" in Geraldton, indicating "that this bonding was well in place by then". In 2013, Chamari could have left Dinendra "but was so bonded that she returned to him". Her return was "evidence of her attachment" because "when you think about it, the deceased being drunk on the lounge was not really a reason to return". This "bonding" "influences all her behaviour" and "has her doing things that she doesn't like".

The prosecution explained the central motive for Chamari killing Dinendra as jealousy. At the time of his death, she was afraid that he might leave her for K. And she was also frustrated — it "had got to the stage where she was no longer prepared to put up with his behaviour".

In his opening address (Tr, 225-236), the Crown said that Chamari "did not like" the "activities" involving other women, that Dinendra "was quite keen on" K, this was not the first time he wanted to "have a relationship with another young female" and K "was going to take her husband away". In cross-examination (Tr, 1075-1145), the prosecution referred to K as "a mature young woman" and suggested that Chamari was really concerned not about K's wellbeing but Dinendra's "infatuation" with her. He noted that when Chamari left Dinendra her alternative accommodation (organised by the hospital) was just across the road and asked whether that was "to get away from this monster?" or "to keep an eye on [him]?". He suggested again in cross-examination "you really were jealous of these other women he was seeing?"; "In fact, you didn't want him seeing any girls, did you?"; "So you still

didn't want him to see other women?"; "So K was a threat to you, wasn't it?" When Chamari replied, "I saw a vulnerable girl," he responded, "You saw a vulnerable marriage?"; and "K was threatening to take your husband away from you?" Looking at the photos, he remarked "K and Dinendra appeared to be very, very close"; "And she wasn't resisting his advances, was she?"; "And so you thought Dinendra was going to go off with K didn't you?"; "he was having a relationship with a 17 year old girl, or woman?"; "But she was a 17 year old?"; "And she was making the decision to be with him"; and "Dinendra's relationship with her scared you, didn't it?". In his closing address (Tr, 1329-1367), the prosecution said that the interest Dinendra had formerly shown in Chamari was decreasing and his interest in K was increasing. He pointed to the photos with K and the deceased and asked:

But if you were a wife, a bonded wife, and you saw those images, and you could see what was going on, what would you think? And this is a person who says in the witness box she's not jealous. Ladies and gentlemen, that defies common sense. It defies the evidence.

He stated that Chamari:

...did not like these other women. She did not like what she was forced to do to keep her husband. She was jealous. She had been jealous since the beginning of their relationship.

She was jealous of K "because K was not resisting":

This is a case of Dr Liyanage being jealous about a woman or young lady who is looking as if — is going to be the sexual partner of her husband. And she doesn't want it.

The prosecution's theory was that Chamari could not leave Dinendra "because of her bonded relationship" and yet she was jealous of his other women and did not like being forced to please sexual desires that ran contrary to her own values: "you can see the tension that is going to create in any relationship, when you've got to do stuff that you don't like doing". And she believed he was going to leave her: "It kind of maybe explains why this happened; because she couldn't live with him and she couldn't live without him". Her use of violent force on this account was essentially an act of frustration and possessive jealousy.

The final thread of this argument, although not one the prosecution spent much time on, was to point out that if Chamari was afraid of Dinendra, she had "other options".

In his opening address (Tr, 225-236), the prosecution said that nothing Dinendra did to Chamari made it necessary to kill him. He asserted that "there were other options" and "one of those options was just simply to leave him". In his closing address (Tr, 1329-1367), he said that even if Chamari was subjectively afraid of Dinendra and thought she was under threat of an escalating level of violence:

You would go to the police no matter what the consequences. You see, you're not entitled to just take the law into your own hands and mete out the solution....If the violence was escalating, as she was saying, she had to go to the police. That was the only reasonable response. Anything else was unreasonable...

Furthermore: "If there was an imminent threat, surely it would be out the door to the next-door neighbour's house. That would be reasonable".

There was also an attempt to portray Chamari as extremely ambitious and someone whose medical career was threatened by Dinendra's actions. In cross-examination (Tr, 1075-1145), the prosecution suggested that one of Chamari's "primary objectives" was to be "the best doctor" but she was concerned that Dinendra doing something to K would leave her medical career in "tatters"/"jeopardy". Perhaps because this is not coherent (committing homicide is guaranteed to destroy a medical career), the prosecution did not labour this point.

4.2 How does this differ from the account using an entrapment framework?

Essentially the prosecution used a conceptual framework to understand IPV that we have described above as a "bad relationship with incidents of violence" analysis. In this account, the bond Chamari had with Dinendra was not caused by his abuse but explains why she tolerated behaviour that was so destructive to her. In other words, the abuse set up a

tension in her only because her love for him made her continue to “choose” to be in relationship with him and therefore to tolerate behaviour that she found painful. Her “love” had morphed by the end of the trial, on the prosecutions account, into something less healthy — she became a “bonded wife”.

Throughout cross-examination (Tr, 1075-1145), the prosecution asked Chamari if she loved Dinendra — as though if she said yes (which she repeatedly did) he had demonstrated that she was not being abused. It is as though love meant that she was making choices and precluded coercion, violence, fear and danger, as opposed to co-existing with these things.

Acts of resistance by Chamari at different points provided evidence for the prosecution of her negotiating power in the relationship. These meant that she was not being controlled by Dinendra or that she was choosing to comply with his demands, or that she was even controlling him.

In the prosecution’s account the abuse was largely comprised of any physical violence that took place. If there was no violence in the weeks leading up to the homicide because other abuse strategies were operating effectively, this meant that there was no abuse taking place and certainly no escalation.

The night of the homicide was presented by the prosecution as a decontextualised event. On this particular night the prosecution said Chamari was under no threat and there was no violence, although Dinendra expressed a “little bit of anger”. This incident was not analysed for the meaning it had in the context of the history of Dinendra’s abusive behaviour.

The prosecution did not use language that characterised Dinendra’s sexual violence as physical violence. In his opening address (Tr, 225-236), he talked about the fact that Chamari “engaged” in “sexual practices” that were “unusual” and which “she did not like”. Nonetheless, she “went along”/“was forced to participate” because she “wanted to keep her marriage together”. In his closing address (Tr, 1329-1367) he remarked that Chamari was:

...bonded to this man who...clearly had sexual interests that ran contrary to her values. But she was prepared to put up with those, those actions, because of this bonding.

He referred to being bartered by Dinendra over the internet for illegal “pornography” as “Skype chatting”. Chamari’s complaint to a friend about being raped was described as “an event where sexual intercourse occurred and Dr Liyanage wasn’t happy about that or hadn’t — may not have consented”. In fact, as noted above, Dinendra’s sexual violence included vaginal and anal rapes that were physically painful and caused injury — so that Chamari had to take pain relief to function. It involved repeated sexual degradation and violation in front of complete strangers. And it was accompanied by being forced to watch violent crimes being perpetrated against children.

The prosecution referred to videos and images of adult men molesting children as “child exploitation material, pornography and other unpleasant things”.

Dinendra’s sexual violence was so markedly in the category of “sex” to the prosecution that he was able to say with credibility that Chamari’s testimony about Dinendra’s use of physical violence against her was “scant” and lacked detail. The notion that rape in marriage is “bad sex” has a historical and cultural legacy that will be further addressed in Part Two of this report.

What is also striking about the case presented by the prosecution is that hours of testimony, including a bevy of experts and professionals, was devoted to a minute analysis of the crime scene — the position of the body, the configuration of blood spatter, DNA and fingerprint analysis — but there is not a single piece of testimony directed at establishing that calling the police or leaving the relationship were effective safety options so that Chamari’s use of violent self-help, in the face of Dinendra’s ongoing abuse, was actually unnecessary.

For example, no experienced police officers were called to describe the immediate safety procedures that they would have put into place had Chamari laid a complaint with them about Dinendra’s threats of violence, physical assault, sexual violation or downloading of child “pornography”. No one testified that Dinendra would have been immediately arrested, prosecuted, refused bail and successfully convicted. No one testified that discharging the criminal burden of proof on the basis of evidence that largely consisted of Chamari’s testimony was not a barrier to successful prosecution. Furthermore, no

one gave testimony that Chamari would have been provided with immediate and effective advocacy and support throughout this process. Given the abuse history, it would have been impossible for her to go through Dinendra's apprehension and prosecution in the absence of psychological recovery and support — particularly if he was able to communicate with her or his family brought pressure to bear on her during the process (Kelly & Westmarland, 2015, p. 14). That calling the police guaranteed safety was considered not necessary to prove because it was assumed to be self-evidently true.

Similarly, the prosecution provided no evidence to demonstrate that leaving the relationship would have been an effective safety option. For example, no refuge manager experienced in working with women attempting to leave violent relationships was called to testify as to the measures that they were able to put in place to assure victims/survivors' safety — including where the primary victim/survivor continues, as in this instance, to work with the predominant aggressor.

Finally, no expert from Sri Lanka was called in order to suggest that Chamari's fear that her nephews' lives could be destroyed if Dinendra chose to organise someone to throw acid in their faces was unrealistic.

The strength of our collective acceptance of the fact that victims/survivors of IPV can readily achieve safety if only they seek it is evidenced by the fact that the prosecution's failure to call supporting evidence was both unremarkable and unremarked upon. This is despite the large body of literature critiquing the effectiveness of the current IPV "safety system" and documenting the numbers of women regularly killed by their violent partners despite engaging with that system (discussed above).

Central to the prosecution's case was a narrative about jealousy in consequence of possessive love, infidelity and impending separation. This is a story adapted from a frequently recurring homicide scenario involving a male offender and a female victim/survivor. In fact, there is nothing in the literature to suggest that women commonly kill their intimate partners in response to infidelity or impending separation. Instead, the literature suggests that women typically kill against a background of victimisation, and rarely after separation.

For example, the New Zealand Family Violence Death Review Committee has documented the circumstances in which offenders who are primary victims/survivors of IPV in the relationship kill the predominant aggressor and those in which offenders who are predominant aggressors kill the primary victim (NZFVDRC 2017, pp. 27-60). Overwhelmingly, offenders who are predominant aggressors are male and the deceased is their female (ex)partner who is the primary victim (or sometimes the primary victim's/survivor's new male partner) (ADFVDRN, 2018; NZFVDRC, 2017, p. 31). These killings frequently take place in response to or after separation (NZFVDRC, 2017, pp. 37-38). The circumstances of the killing frequently evidences escalation in response to victim resistance and is an expression of possessive entitlement (for example, killing in response to real or imagined infidelity, premeditation and the use of violence far in excess of what is needed to kill the victim (NZFVDRC, 2017, pp. 44-51)) and, sometimes, the offender goes on to commit or attempt suicide afterwards (NZFVDRC, 2017, p. 53). By way of contrast, offenders who are primary victims/survivors (all of who were female in the NZFVDRC's sample of IPV homicides that took place in NZ from 2009 to 2015) do not generally kill in response to separation or afterwards, and these deaths usually involve the spontaneous use of force (rarely more than one or two inflicted wounds) in response to a situation of escalating threat from a person who has badly hurt them in the past (FVDRC, 2017, pp. 54-56).

Suzanne Swan and David Snow (2006) conducted a literature review on women's use of violence against their intimate partners (See also Miller & Meloy, 2006). They suggest that women are almost always violent in the context of violence against them, women's violence against their partners tends to be at the low to moderate end and men more frequently use tactics of coercive control than women. This is not to say that women cannot be jealous and controlling but:

...it is much less common for a woman to have the ability to maintain significant control of a man's behaviour because this type of control is maintained through fear....as a general rule women simply do not inspire fear in men. (Swan & Snow, 2006, p. 1029; Note also Swan, Gambone, Van Horn, Snow, & Sullivan, 2012)

INFORMATION SUMMARY BOX 3

A bad relationship with incidents of violence

- The relationship is understood as dysfunctional and both parties as responsible for this.
- It is accepted that the dominant partner has engaged in acts of violence and controlling behaviour at different times in the relationship.
- Acts of resistance by the victim are taken to demonstrate that she has some negotiating power in the relationship and is therefore making choices and is not totally controlled.
- The victim is understood as choosing to stay in the relationship and tolerate the abuse because of her feelings of love for, and her psychological bond with, her partner.
- The victim is assumed, without proof, to have a number of safety options, such as leaving the relationship or calling the police. She is considered able to engage these safety options in between abusive incidents.
- IPV is assumed to be gender neutral. It is assumed that women kill their partners in similar circumstances to men—in response to infidelity or the threat of separation, motivated by possessive jealousy.

Furthermore, women rather than men tend to be victims/survivors of the kinds of experiences that inspire terror, such as sexual violence and injury (Ansara & Hindin, 2010b; Braaf & UNSW, 2011; Dobash & Dobash, 2004, p. 343; Dobash & Dobash, 2007).

Stark (2007, p. 102) also concludes that:

...the pattern of intimidation, isolation, and control... is unique to men's abuse of women and...it is critical to explaining why women become entrapped in abusive relationships in ways that men do not and experience abuse as ongoing.

Stark (2007, p. 105) attributes this to the fact that:

Asymmetry in sexual power gives men (but rarely women) the social facility to use coercive control to entrap and subordinate partners. Men and women are unequal in battering not because they are unequal in their capacities for violence but because sexual discrimination allows men privileged access to the material and social resources needed to gain advantage in power struggles.

The prosecution's story in *Western Australia v. Liyanage* therefore suggests a departure in this case from the patterns of gendered harm that the research literature would suggest are typical of killings by primary victims/survivors, without flagging this as a departure. The prosecution appears to have assumed, contrary to what is suggested by the research, that IPV operates in a gender-neutral manner.

This is particularly troubling because the story presented by the prosecution is also counter to the evidence in the case. For example, the prosecution suggested that Dinendra was going to leave Chamari to pursue a relationship with K and this triggered Chamari's act of lethal jealousy. This suggestion was made despite the fact that Dinendra had demonstrated on numerous occasions that he felt entitled to have sex with other women and remain in relationship with Chamari, regardless of how she felt about that behaviour. He viewed it as her obligation as his wife to support this. At no point did Dinendra indicate that he had any desire or intention to leave Chamari. To the contrary, he remained in the relationship despite her begging him to let her go on a number of occasions. In fact, as K's testimony amply demonstrated, Dinendra relied on Chamari to assist him in building relationship with girls that he was sexually interested in, including assuaging their parents' suspicions. She provided him with an innocent cover in order to establish trust and get his intended target alone so that he could touch, photograph and initiate sexual conversations with her in order to manoeuvre her into a compromising situation. Chamari testified:

One thing Dinendra said was he would never let me go, because I am a doctor and I — like in my career I don't make mistakes and I earn so I am a source of income for him. And he can use me as a cover-up so no one would suspect him of what he is doing....Everyone would look at us.... This is a respectable family. So they wouldn't be afraid to send their children.

5. *Western Australia v. Liyanage*: Telling the facts through an amalgam of frameworks: The courts

The trial judge in *Western Australia v. Liyanage* discussed the facts of the case three times: once in arriving at the decision that proposed expert testimony from a senior social worker was inadmissible; secondly, in summing up to the jury at trial; and finally in the sentencing process. On none of these occasions did he use a social entrapment framework to understand the facts.

Instead the trial judge's discussion employed *both* a "bad relationship with incidents of violence" analysis and a "battered woman syndrome" framing. The impression given is that both can be used to understand the same sets of facts — the first describing what is objectively occurring and the other elucidating the victim's/survivor's subjective state of mind.

The Western Australian Court of Appeal agreed with the trial judge and rejected expert testimony from the social worker on either the "nature of IPV" or on the outcome of applying several validated risk assessment instruments to Chamari's situation. Risk assessment evidence had been proffered to provide objective grounds for Chamari's perception that, at the time that she killed Dinendra, she was at elevated risk of being the victim of homicide, particularly if she engaged in the high-risk behaviour of separating from him.

The Court of Appeal appeared to apply a hybrid of the "bad relationship with incidents of violence" and the "battered woman syndrome" models of violence when discussing the facts. On this view, the violence in the relationship was not entirely incidental but ongoing and cyclical.

Both tiers of court were in agreement that expert testimony on the "nature of IPV" was not needed because this was something well within the jury's understanding. However, neither court appears to have understood exactly what a social entrapment model would add by way of factual analysis or to be conscious of the paradigms that they themselves were viewing the facts through and the limitations of the paradigms they were using.

5.1 The trial judge

5.1.1 Coercive control

The trial judge apparently thought that coercive control was a matter of *adjectival description* rather than a framework for analysing the *technology of Dinendra's abusive behaviours*. For example, he held that the social worker's evidence was not necessary because she:

...gives an opinion that the pattern of abuse can be summarised as highly controlling, coercive and violent.... these descriptors are all ordinary English words used in their ordinary meaning. Whether the relationship has these characteristics is something the jury does not require opinion evidence to determine. (*Western Australia v. Liyanage* [2016] WASC 12, p. 84)

5.1.2 A bad relationship with incidents of violence

Once Chamari was convicted of manslaughter, and when discussing sentence with the prosecution and defence, the trial judge said that the irresistible inference was that Chamari had committed murder but that the jury had convicted her of manslaughter on the basis of excessive self-defence.

In a classic illustration of an incident based analysis, the judge saw only two threats as having been potentially relevant to Chamari's defensive use of violence. The first was the threat made "by the deceased about her family and what he would do with acid and the like" (*Tr*, p. 1464). The judge discounted the significance of this threat by saying that these "were not threats that were unconditional. They seemed to relate to a condition; that is, if she left him and exposed him that is what he would do" (*Tr*, p. 1464-5).

In other words, the judge did not interpret those threats as compounding Chamari's entrapment in an intolerably abusive situation — involving daily sexual torture and physical violence.⁸ Instead, he interpreted those threats as

⁸ When summing up the history of abuse, the judge did not talk about Dinendra being responsible for using a suite of abusive behaviours to terrorise Chamari, close down her autonomy and condition her to obedience – instead his language suggested it was the relationship

having no teeth because as long as Chamari did not breach Dinendra's "condition" and attempt to leave him or seek help, Dinendra's threats would not be actioned. In that reading, so long as Chamari was compliant she had nothing to fear. This interpretation overlooks the ongoing predicament Chamari was in, including the possibility that there were limits to her human tolerance in the absence of imminent relief. It also places the weight of the law behind the predominant aggressor's use of coercive control. It could be viewed as an example of how social entrapment operates in the institutional (in this case judicial) responses to IPV.

The trial judge expressed the opinion that the relevant threat for the purposes of self-defence (described as "the threat to the fore on that night") was the second threat (*Tr*, p. 1465). This was the threat to K.⁹ In other words, that:

...the deceased was going to indeed do as he promised, which was consummate this relationship with K, a girl whom she saw as being vulnerable and in need of protection, and who she had indeed tried to protect by warning her off. (*Tr*, p. 1465)

Having described the threat as the "consummation of a relationship" (rather than as the defendant saw it, the manipulation and sexual violation of a child), the judge concluded that:

...when one looks at the harm that would occur to K compared to the death of the deceased, it was an excessive response. And so it was excessive self-defence. (*Tr*, p. 1465)

In a telling exchange with the judge prior to sentencing, defence counsel pointed out that the bonding referred to

by the experts was a form of entrapment. He stated that the expert "is not talking about her being in love with him, and obsessed by him, and bonded to him in that way" (*Tr*, p. 1474).

The judge remarked "but love was not always completely absent there" and he went on to say:

So this is not a situation where it's a person who is *totally imprisoned against their will*. She did have some positive feelings for him, perhaps against her better judgement [emphasis added]. (*Tr*, p. 1474-5)

In other words, to be trapped in an abusive relationship there must be a hostage situation, similar to that observed when someone is taken hostage by a stranger. So long as love is present, so is choice about being there. Feelings of love and being in a coercive relationship on this understanding are binary opposites. And coercion is only present at the points when the victim/survivor is under an immediate threat of physical harm.

This contradicts what we know from the research on social entrapment which suggests that predominant aggressors do not entrap victims/survivors by holding a gun to their heads at all times — rather they develop a suite of strategies over time that are designed to control the victim/survivor even when they are not actually using violence and even when they are not physically present. These strategies take place in the context of an *intimate relationship* where love, at least initially, is likely also to be present. Indeed the abusive behaviours directly utilise the norms of heterosexual sexual intimacy and love between a man and a woman.

Stark makes the point that one of the "myths" about IPV is that the abuse cannot have been bad if the victim/survivor professes to love the person using violence (Stark, 1995, p. 7). It is as though because the acts of the person using violence are monstrous, we expect the person themselves to be a monster — someone not human and not also capable of inspiring feelings of love and compassion from an empathetic human being who is in close relationship with them (*Tr*, p. 955).

which was problematic. He said: "The accused described a relationship that commenced well but became, on her account, more and more abusive, involving, she said, increasing physical and emotional abuse" (*Tr*, p. 1394). Minimisation of Dinendra's sexual violence occurred throughout the judge's account of the abuse in the language used. He did not describe Dinendra's sexual violence as "rape", but, for example, as the deceased making "her have sex with him against her will." The images and videos of children being sexually abused was described as "child exploitation material" (*Tr*, p. 1403).

9 The trial judge said that during the evening on 23 June 2014 Chamari and Dinendra were at their home address alone and "argued about a work related matter before retiring to their bedroom" (*Tr*, p. 7). This is a reference to Dinendra wanting Chamari to organise a sabbatical so that they could take K on a holiday in order to get her away from her family and alone with them so that he could have sex with her.

5.1.3 Battered woman syndrome

The trial judge thought the explanation for the jury outcome was to be found in the expert testimony going to “the effect long term abuse may have on the thinking of a person and their judgement”. Abuse can cause a person to develop “a cult-like mentality where the person becomes bonded to their abuser”. Chamari, “having been the victim of manipulation and control and abuse over a very long time” had impaired judgement because “somebody else might see clearly that killing someone to prevent them from taking advantage sexually of a 17 year old girl is a completely unreasonable response” (Tr, p. 1473).

As a result the defence of self-defence was not available to her, but the defence of excessive self-defence was.

5.2 The Court of Appeal

In the Court of Appeal’s view, evidence about the “social context” in which Chamari was acting and/or a validated assessment of the risk that she was in, as was proposed to be provided by the social worker in this case, was not admissible because it was either:

- not factually relevant; or
- about a subject that “a person with ordinary experience was able to form a sound judgement about” and therefore the jury did not require expert testimony to understand.

5.2.1 Dinendra’s abuse of Chamari

The court held that an “example of relevant contextual evidence, which was admitted at trial, was the history of the relationship between the appellant and the deceased” (*Liyanage v. The State of Western Australia*, 2017, p. 161). However, this evidence was given by Chamari and the jury was perfectly capable of understanding that evidence and assessing its veracity without expert assistance.

5.2.2 Non-psychological impediments to Chamari leaving

The court said that another aspect of social context evidence which could potentially require expert testimony concerned the “non-psychological impediments to an abused person in leaving a relationship characterised by domestic violence” (*Liyanage v. The State of Western Australia*, 2017, p. 165). For example, where an abused women is dependent on the income of her abusing partner and therefore may not be able to survive independently of him. However, the court said that this evidence was not relevant on the facts of the case:

[The social worker] did not give evidence about non-psychological impediments of this kind. Nor did the appellant, who as a doctor employed at a hospital had the income earning capacity to support herself financially. In any event, the impact of non-psychological impediments to an abused women leaving a situation of domestic violence would at least usually be well within the capacity of a juror to appreciate without expert assistance. (*Liyanage v. The State of Western Australia*, 2017, p. 165)

5.2.3 Separation and safety

The court rejected proposed evidence from the social worker to the effect that separation in cases involving IPV was itself a high-risk factor and that abuse may increase after separation so as to create further risk (*Liyanage v. The State of Western Australia*, 2017, p. 169).

The court pointed out that Chamari gave evidence that leaving Dinendra would lead him to take action against her family in Sri Lanka. It went on to comment:

However, the appellant’s evidence was that she did leave the deceased in August 2013. At that time the deceased did not make any express or implicit threats if she left him, as opposed to failed to comply with his conditions for her doing so. The effect of the appellant’s evidence was that she went back to the deceased because he looked ‘sick and miserable’ and professed his love for her, not because she feared assault if she stayed away. The appellant did not say that she reconciled with the deceased because he threatened her.

When the appellant threatened to leave on 1 June 2014, she changed her mind because “he keep begging me to stay, so I just had enough of it and I stayed. That day I went to work and, after my shift finished, I came home”. When asked why she did not stay away on that day, the appellant responded:

Because really, with this behaviour he really confused me. I was really confused of what to do. Like, when I tried to leave he’s — he wanted to leave. Then he come back and tell that he wanted to stay and he want me to stay. And because all of the threats he was making, if I do something to make him angry, he would do something to the rest of my life, and he would do something to destroy my family. I was so confused by that time. I really didn’t know what to do any more.

The appellant also gave evidence that she did not report the deceased’s physical abuse of her or possession of child pornography to police out of fear of his violent retaliation. The appellant said:

Because everyone who knew us outside would tell, this is a very happy couple....There would be no one to support what I am telling, and [the deceased] would still pretend like I’m lying. And if I told them he’s downloading pornography...they might tell these days everyone download pornography and they might not do anything...And, anyway, I have to go back to the home at the end of the day. So if I take a step like that, I don’t know how I’m going to live the rest of my life because [the deceased] has already threatened me he would really, really do something to destroy my life and my family if I do something like that...

There was nothing about this evidence as to the appellant’s belief as to the deceased’s response to her leaving or reporting him to the police which the jury would require expert evidence to understand. Further, the jury could assess whether there were reasonable grounds for her beliefs by reference to the conduct which the appellant described. (*Liyanage v. The State of Western Australia*, 2017, p. 161)

5.2.4 Risk assessment evidence

Risk assessment evidence was also considered unnecessary because:

...it was obvious that had the appellant stayed with the deceased and not killed him there was a high risk that the pattern of domestic violence which had been established would continue. (*Liyanage v. The State of Western Australia*, 2017, p. 148)¹⁰

5.2.5 The court’s understanding of the abuse

The Court of Appeal provided a summary of the facts as follows:

Outwardly the appellant and the deceased presented as a normal happy couple. They were both employed as doctors....having come to Australia from Sri Lanka in 2011. However, their relationship was *characterised by a cycle of violence and abuse* by the deceased towards the appellant. The appellant’s evidence was that the deceased

¹⁰ The court also held that expert testimony on risk assessment was irrelevant because s 248 of the Western Australian Criminal Code does not require the jury to make an objective assessment of the risk of harm faced by an accused:

Section 248(4)(a) raises the question of whether the person subjectively believes the act is necessary to defend the person or another person from a harmful act. Section 248(4)(c) raises the question of whether there are reasonable grounds for that belief. The reference to reasonable grounds for a belief is to grounds which would induce the relevant belief in a reasonable person. In the context of s 248, this must be a reasonable person in the position of the accused. Answering these questions did not require the jury to assess the actual level of risk by reference to facts and circumstances which were not known to the appellant, (*Liyanage v. The State of Western Australia*, 2017, p. 124).

It followed that an opinion as to the objective level of risk:

based on the results of actuarial tools which were not known to the appellant, was not relevant to whether the appellant subjectively held a belief on reasonable grounds (*Liyanage v. The State of Western Australia*, 2017, p. 125).

We would argue to the contrary, that the issue under s 248(4) was whether the applicant had *reasonable grounds* for her *subjective belief* that she was in danger of death or very serious harm – a subjective belief that was based on the facts known to her. Expert evidence was required to assist the jury to assess whether the subjective conclusion she had drawn *from those known facts and no other additional facts* had reasonable grounds. We would suggest that the court erred in treating evidence on the risk assessment tools as though it was primary factual evidence for the purposes of applying the test for self-defence. Expert opinion on risk is secondary evidence that is of assistance to the jury in interpreting the primary evidence in circumstances where, without such assistance, they are at risk of drawing erroneous conclusions. Such evidence did not have to be known to the applicant or attributable to the hypothetical reasonable person in order to be relevant.

was a violent and controlling husband who regularly assaulted her. He forced her to participate in his sexual conduct with other women. He forced her to perform sexual acts in front of an active web-camera. He also made her watch pornography (much of which depicted child abuse), including when they had sex. He impliedly threatened to harm her family in Sri Lanka. At the time of his death the deceased was grooming a 17 year old girl....to engage in sexual activity with the appellant and the deceased, some of which had already occurred [emphasis added]. (*Liyanage v. The State of Western Australia*, 2017, p. 2)

Like the trial judge, the Court of Appeal concluded that the jury had accepted that Chamari believed on reasonable grounds that she or someone else was under threat when she killed Dinendra, but:

...must also have found that her response was not reasonable and, in a circumstance in which a man was asleep, one can understand that approach....the question was — in a context where the man was asleep...was taking a mallet to his head a reasonable response when there were other options available?...she could have left him. And that's where the jury ended up. (*CA Tr*, 2017, p. 18-9)

The court cited from the Attorney-General to the effect that self-defence:

...is not expected [to] apply to situations in which it would be reasonable for the person to take other steps, such as going to the police or escaping from the harmful situation. (*Liyanage v. The State of Western Australia*, 2017, p. 78)

Defence counsel pointed out, in his oral argument on appeal, that the prosecution told the jury that Chamari could have “simply left” Dinendra which demonstrated “a complete lack of knowledge...about the nature of domestic violence” (The Court of Appeal transcript (“*CA Tr*”), p. 26). Chief Justice Martin responded by saying:

...women who are subject to domestic violence do leave. Sometimes they leave....she could have. That's obvious. There's nothing wrong with saying things to the jury that are blindingly obvious. (*CA Tr*, pp. 26-7)

What the Court of Appeal did not apparently appreciate, because it did not see an analysis of the “technology” of Dinendra's abuse as lacking, is the fact that his abuse was itself a non-psychological impediment to Chamari leaving — and that this impediment did not reside in any particular or immediate threat but rather in Dinendra's suite of abusive behaviours and their impact in closing down Chamari's “space for action” over time.

What constitutes “leaving” was therefore unproblematised in the Court of Appeal's account. The Court of Appeal suggested that Chamari had “left” Dinendra on several occasions and chose to go back for emotional reasons (*Liyanage v. The State of Western Australia*, 2017). This begs the question as to whether the primary victim/survivor has actually “left” if the person using violence refuses to accept the separation. In this particular instance, although Chamari explained multiple times under cross-examination in *The State of Western Australia v. Liyanage* (*Tr*, pp. 1102-3) that you have not “left” your abusive partner if you have had to seek their permission to leave and they have set conditions as to your “departure”, continue to monitor your social media and manage your income and plan to do so for the rest of your life, she does not appear to have been understood. Instead she was understood as having left, having achieved safety and then choosing to return.

Similarly, because the court did not appreciate the technology of the abuse it also did not apparently understand that at the time that she used lethal force Chamari did not control her income, Dinendra did (*Liyanage v. The State of Western Australia*, 2017, p. 165). And, in fact, his control over her large income, in combination with his, made him all the *more* dangerous to her family in Sri Lanka because he had the capacity to retaliate and punish them from a distance.

The only coercion that the court appears to contemplate as having the capacity to undermine Chamari's “choice” about “returning” to the relationship, having “left”, is if she had done so under *threats* by the deceased of *specific physical violence directed at forcing her to return* (*Liyanage v. The State of Western Australia*, 2017, p. 169). This is a “bad relationship with incidents of violence” analysis. In this case, because an *incident of violence* was absent on the relevant occasion she

is understood as having made a decision that is free from coercion. Similarly, the impediments that the accused has placed in the way of the victim/survivor leaving or seeking help are reduced to a single threat — the threat of violence to her family, which is conditional and may occur in the future and elsewhere.

Aside from reverting in this manner to an incident based analysis focused on the use of physical violence or the threat of physical violence, the Court of Appeal also characterised the violence as “a long history of cyclical abuse” (*Liyanage v. The State of Western Australia*, 2017, p. 165), suggesting that it was also drawing upon a theory of violence informed by the work of Dr Leonore Walker (1989) on battered women syndrome.

What is revealing about this characterisation is that it means that the court saw the violence as *independent* of Chamari’s actions and cyclical, rather than retaliatory and strategic. The Court accordingly assumed continuation, rather than dangerous escalation, should Chamari remain in relationship but continue to resist Dinendra’s attempts to target K or attempt to leave him (*Liyanage v. The State of Western Australia*, 2017, p. 148). This also explains the strength of the court’s assumption that leaving the relationship would have produced safety. There is no sense that the *threat* that Chamari was facing is bound up with her *options for responding to it* because of the retaliatory nature of the abuse itself.

For example, Chief Justice Martin, when listening to oral argument from defence counsel, drew a distinction between the “capacity of an abused woman to leave” and the nature of the threat that she faced in the relationship from Dinendra. He saw the risk assessment evidence as going to the latter but not the former, commenting:

I just don’t understand where this goes....Because the jury, by their verdict, must have accepted that your client believed, on reasonable grounds, that she or somebody else was exposed to a risk. Where the defence failed to provide a complete acquittal was that they must also have found that her response was not reasonable and, in a circumstance in which a man was asleep, one can understand that approach. I just don’t really see where

all this talk about risk assessment takes you, because you must have got a favourable decision on that aspect of the case from the jury, having regard to the verdict that was delivered. (CA Tr, p. 18)

The fact that leaving a violent relationship is synonymous with safety is contradicted by the high proportion of primary victims who are killed immediately before, during the process of separation and afterwards (FVDR, 2016). Evan Stark comments that:

The five factors most closely associated with fatal outcomes are, in their order of importance: a threatened or recent separation; the level of control; the presence of a weapon; sexual assault; stalking and the level of violence. The presence of the first three of these factors increase a victim’s risk over nine times above normal. (Stark, 1995, p. 18)

Risk assessment evidence had the capacity to problematise the assumption (evident in the expert testimony, the prosecution’s account of the facts and the court judgements at both levels) that leaving was synonymous with safety, instead exposing separation as a high-risk behaviour by the primary victim/survivor, particularly in combination with the presence of other behaviours by the predominant aggressor.

The Court of Appeal determined that evidence on the risk of separation in the context of IPV was irrelevant because the relevant issue was how the *individual deceased* would have reacted if the defendant had left him. It thought that the jury could reasonably draw inferences about that from the appellant’s description of the deceased’s past conduct (*Liyanage v. The State of Western Australia*, 2017, p. 117). At the same time the court rejected the use of scientifically validated risk instruments designed to provide a more objective measure of the dangers posed by the individual deceased.¹¹

¹¹ The Court of Appeal held that the jury was capable of drawing correct conclusions about risk without expert testimony on the outcome of applying the actuarial risk assessment instruments. The court said that most of the risk factors identified in the Danger Assessment Scale were “obvious indicators of risk of serious violence” (*Liyanage v. The State of Western Australia*, 2017, p. 143). This overlooks the fact that the Danger Assessment Scale contains specialised risk factors for intimate partner homicide (not simply serious violence); that it is not the individual risk factors but their identification in combination that places the victim in a group that is at elevated risk of homicide; and that some of the risk factors have statistically greater weighting than others. Furthermore, it was not a matter of the jury understanding “that the violence to which the appellant had regularly been subject would continue” (*Liyanage v.*

The notion that we might lack effective safety options for women who are entrapped in violent relationships was so counter-intuitive to the Court of Appeal that it did not even remark on the lack of evidence presented at trial in order to establish that there were effective safety options available to the defendant in this case. The only discussion of her safety options came from Chamari (outlined above), who had been labelled by the experts in this case as “illogical” in her assessments (*Tr*, p. 1177, 1293, 1303-4).

5.2.6 Battered woman syndrome

The court saw the defendant as having effective safety options, and the threat of physical violence that kept her in the relationship as being conditional or future orientated or balanced by other considerations such as love and choice. Therefore, the only evidence that it thought was relevant to explain why Chamari did not leave Dinendra or call the police to report his violence was “evidence concerning the psychological impact of prolonged exposure to domestic violence” (*Liyanage v. The State of Western Australia*, 2017, p. 92). This is effectively a re-labelled battered women syndrome analysis. Such testimony was admissible in court on the basis that it was “counterintuitive” and “contrary to what an ordinary person might expect” (*Liyanage v. The State of Western Australia*, 2017, p. 101, citing *Osland v. The Queen*, 1998).

The court held that evidence about the psychological impact of prolonged exposure to domestic violence was appropriately given by a mental health professional such as a psychologist or psychiatrist. A social worker did not have sufficient expertise to qualify.

Evidence about social entrapment, as the concept is used in this report, by way of contrast, requires:

- identifying patterns of coercive and controlling behaviour by the predominant aggressor;
- identifying acts of resistance by the victim/survivor and what the predominant aggressor did in retaliation;

- documenting the community and agency responses to the abuse; and
- exploring the manner in which intersectional inequity may have supported the predominant aggressor or closed off safety options to the victim/survivor.

This is not evidence about the primary victim/survivor or predominant aggressor’s *psychological processes* as suggested by the Court of Appeal (*Liyanage v. The State of Western Australia*, 2017, p. 180). Rather it is evidence about:

- typical patterns of abusive behaviour;
- the strategic impact of those patterns of behaviour; and
- the broader limitations in the social protection currently available for victims/survivors.

Professionals from sociological disciplines, such as social workers, who have expertise in IPV are appropriately qualified to give testimony on such matters. For example, Professor Evan Stark, who is a social worker, developed the concept of coercive control and has given expert testimony in the US Federal Court, in numerous state courts, in both civil and criminal trials. He has also given testimony in Canada in a case involving a primary victim/survivor of IPV who killed her abusive partner (See *R v. Craig*, unreported, Ottawa Superior Court of Ontario, 14 April-15 June 2008; Ontario Court of Appeal, Decision No. 142, 2011; Sheehy, 2013).

The State of Western Australia, 2017, p. 153), but that she belonged to a group of family violence victims who had an elevated risk of significant escalation because of the number and combination of key risk factors that were present.

PART ONE

Conclusion

A “bad relationship with incidents of harm” paradigm understands IPV on an incident by incident basis. It limits a consideration of the defendant’s abuse to any acts of physical violence by the deceased. Victim/survivor choice is read into any situation that does not involve physical domination by the deceased. As a consequence, safety options are assumed to be available but unchosen by the victim/survivor throughout the relationship at all points where she is not under direct physical attack or impending attack.

The use of this model in constructing and interpreting the facts means that the defendant’s acts cannot be intelligible as self-defence unless she is being physically attacked or under immediate threat of attack at the time she uses defensive force. And even then she can still be considered partially at fault for *choosing* to allow things to get to that point. This is despite the clear intention of the legislature to extend self-defence to situations where a defendant who is using defensive force in response to IPV and is not responding to an immediate threat of physical violence.

Whilst a battered woman syndrome analysis was intended to challenge the assumption of unfettered choice contained in a “bad relationship with incidents of violence” analysis, it builds on some other shared assumptions to do so — for example, the assumption that leaving the relationship, calling the police or obtaining a protection order would have been effective in providing the victim/survivor with safety. In fact, expert testimony on battered woman syndrome lends additional *expert weight* to the notion that the victim/survivor had effective and lawful options for achieving safety had she engaged in those options. It therefore lends *expert weight* to the idea that the victim/survivor has to take some responsibility for the violence that she was experiencing, and that her perception that she was trapped and without law abiding means of safety, was illogical and wrong.

Like a “bad relationship with incidents of violence” analysis, a “battered woman syndrome” analysis also fails to analyse the full range of abusive strategies employed by the predominant aggressor and how they might have operated strategically to close down the victim’s/survivor’s autonomy over time. Instead, the abuse is considered to be independent of what the victim/survivor does — it has cycles, not unlike the weather,

and closes down her options only because of her individual psychological reaction to it.

It follows that the key difference between a “bad relationship with incidents of violence” and a “battered woman syndrome” analysis is that the battered woman syndrome framework *excuses* rather than *blames* the victim/survivor for failing to make rational safety choices in response to the abuse. Neither approach contemplates that her coercive circumstances might realistically match her perceptions of those circumstances or objectively justify her reaction to them.

As a consequence the “battered woman syndrome” model, far from supporting self-defence, makes it extremely difficult for the jury to appreciate the defendant’s responses as reasonable defensive force, unless she is actually under physical attack at the time she used defensive force (and even then she can be considered to have allowed things to get to such a point). Accepting such testimony, a jury might believe that the defendant’s perceptions were genuinely held and it might excuse her on the basis that she acted unreasonably but defensively to a genuine threat, but it would be unlikely to acquit her on the basis that she acted reasonably, in self-defence.

By way of contrast a “social entrapment” framing renders visible and explains the effect of the raft of non-physical abuse strategies that accompany the deceased’s use of physical violence, shows how these develop over time and exposes their strategic and retaliatory nature. It requires a realistic appraisal of the victim’s/survivor’s safety options and makes it clear that these are bound up with the nature of the threat that she faces. Thus it is possible to see the predominant aggressor’s coercive power as extending beyond those moments in which the defendant is under physical attack, not because of the victim’s/survivor’s psychological weaknesses but because of the manner in which the technologies of abuse operate. It is also possible to begin to empathise with the process by which the defendant found herself in the situation that she has and to appreciate the cumulative burden of harm that she is carrying.

An IPV victim’s/survivor’s social entrapment is therefore relevant to an assessment as to whether her lethal violence

was a reasonable defensive response to the circumstances as she believed them to be and whether she had reasonable grounds for her beliefs as to her circumstances.

Once there is evidence that a defendant may have acted in self-defence, the *State* has the burden of proving on the facts that she did *not* believe it was necessary to kill to defend herself, or if she did, she did *not* have *reasonable grounds* for such belief¹², or her response was *not reasonable* in those circumstances.¹³ Thus, the best evidence-based understanding of IPV, although developed by social sciences other than law, is the direct concern of the *State* because it is their obligation to disprove self-defence on the facts beyond reasonable doubt. Merely asking a jury to decide what was “reasonable” without bringing substantive evidence to prove that case of “(un)reasonableness” does not meet this obligation.¹⁴ The *State* must produce relevant and sufficient evidence, including with respect to questions of what is “reasonable” (*Silvia v. R*, 2016; *R v. Stephen (No 6)* 2018). Put simply, if the *State* does not have this substantive evidence it is not in a position to prosecute. Alternatively, the court should rule there is no case for the defendant to answer.¹⁵

12 Section 248(4) of *Criminal Code* (WA) requires a belief on *reasonable grounds* and a *reasonable response*. This is different from other jurisdictions such as Victoria (*Crimes Act 1958* s. 322K) and New South Wales (*Crimes Act 1900*, s. 418) where only one objective inquiry is required (about a reasonable response). This difference does not affect the issues discussed (Tarrant 2015a).

13 A defendant must produce or point to evidence, or evidence must be before the court, which, if believed, would be sufficient to raise a reasonable doubt about each of the elements of the defence (*Steel v. Western Australia*, 2004; *Van den Hoek v. The Queen*, 1986). The *State* must then disprove beyond reasonable doubt at least one of the elements of the defence.

14 The *State* in *Western Australia v. Liyanage* relied on a concept of “necessity” unsupported by substantive evidence. See section 8.1.2, below.

15 In *The State of New South Wales v. Stephen (No 6)* (2018), after the commencement of the trial, the *State* conceded that it did not have sufficient evidence to prove murder or manslaughter against Jonda Stephen. The case concerned the substantive issues discussed in this report about the judgment of women who kill their abusive partners in self-defence. However, Jonda killed during a physical attack so the *State’s* case does not involve the more complex question about self-defence against IPV as non-imminent harm. Moreover, although defence counsel argued that the *State* had insufficient evidence to disprove one of the elements of self-defence (Jonda’s belief that she needed to stab her partner to defend herself), the *State’s* withdrawal of its case was based on a concession that it did not have sufficient evidence to prove Jonda *intended* to kill or cause very serious harm to her partner. This basis for withdrawal does not address the issues discussed here, which are concerned with the circumstances in which women *believed they needed to kill* their partners. Indeed, a defence

As we have shown, “common sense” assumptions and a form of judicial notice were substituted in *Western Australia v. Liyanage* for some of the evidence required to disprove elements of self-defence in s. 248 of the *Criminal Code* (WA); for example, that Chamari’s response in killing Dinendra was not reasonable, because she could, simply, have averted his violence in a non-violent way. In other words, the use of alternative and outmoded theories of violence automatically rendered the defendant’s use of defensive force unreasonable without the Crown actually disproving self-defence on the facts.

of self-defence presupposes such an intention on the defendant’s part – to do as they did. Thus, the *State’s* decision in *Stephen*, but not the basis for the decision, is in line with the suggestion made here. In *The State of NSW v. Silvia* (2016) the New South Wales Court of Appeal ruled that the jury’s decision that Jessica’s defence was not “reasonable” could not be supported on the evidence (p. 89; p. 177). This means, also, that the *State’s* case against Jessica Silva was insufficient to disprove self-defence because the insufficiency was not created by anything that occurred at trial. Again, this case was approached on the basis that Jessica was defending herself in the course of a physical confrontation (a “fight”).

Part Two

In Part Two we dig a little deeper to examine why IPV as a form of “social entrapment” is difficult for legal professionals to “hear”, and why self-defence continues to be applied as though defensive force on the part of an IPV victim/survivor is “unreasonable” unless she is actually under physical attack at the time, despite law reforms directed at changing this. We suggest that ancient common law schema (Quilter, 2011) explain why coercive and controlling behaviours, even when they are described by the defendant in court in great detail, may not be “coded” as serious abuse by those responsible for constructing and understanding the defendant’s self-defence case. We also suggest that ancient schema explain the failure of legal professionals to do the work involved in disproving self-defence, for cases where the defendant was not using defensive force in response to immediate physical violence by her abusive partner. We demonstrate that the State’s case in *Western Australia v. Liyanage* was constrained by the same paradigms of violence that underpinned the old common law of self-defence and the cultural and legal paradigms of marriage that underpinned the old common law on husbands and wives. We are suggesting that despite formal law reforms directed at addressing these ancient norms, some of the same implicit assumptions are being made by legal professionals now, as they were then. In other words, in Part Two we examine the “long sedimented his-tories” of the laws on marriage and self-defence which continue to operate in the practices of the law to undercut formal reforms of the law (Quilter, 2011, p. 55)

In the first section of Part Two we set out the common laws of murder, self-defence and “husband and wife” contained in the foundational common law treatises of Blackstone and other influential common law jurists of the seventeenth, eighteenth and nineteenth centuries. We use primary legal materials so that both the principles are explained and the language of the old common law is apparent. We then provide an analysis of those laws which centralises the legal position of wives during that time. The analysis shows that “wives” and lethal self-defence law were two separate provinces, and identifies some of the legal mechanisms by which this separation was effected. In the second section of Part Two we show how the rules of marriage and self-defence have changed since Blackstone’s time. We trace briefly the legal reforms that have occurred in three key rules:

- the “chastisement rule”;
- a husband’s immunity from prosecution for rape (the “rape immunity rule”); and
- what we refer to as the “fight” rule in the law of self-defence.

In the final section of Part Two we again analyse the trial transcript in the *Western Australian v. Liyanage* with the aim of showing that although these key rules about marriage and self-defence have changed, the State’s case in *Western Australian v. Liyanage* rested on implicit assumptions similar to those that generated the older common law.

We will show that the State’s case against Chamari’s claim that she acted in self-defence against the non-imminent harm in Dinendra’s IPV:

- was conceptually and legally opaque;
- “invisibilised” Dinendra’s sexual violence against Chamari; and
- failed to “code” the status hierarchy in Chamari and Dinendra’s marriage as violence.

Moreover, in these ways it can be seen that, in spite of the express law reforms, the State failed to address Chamari’s claim of self-defence against non-imminent harm. And it follows from that failure that the State failed to *disprove* Chamari’s claim to self-defence.

6. The old common law — rules, paradigms and analysis

This section first summarises the common law of homicide and self-defence and “husband and wife”, derived primarily from Blackstone’s *Commentaries on the Laws of England* Vol I-IV (1765-1769). Blackstone was a pre-eminent eighteenth-century jurist whose legacy is known to all students of the common law. The influence of his *Commentaries*, a four volume treatise, on the development of the common law remains unsurpassed. The aim of the summary is to explain the primary principles and the paradigms of violence and relationship that underpinned each field of law. Those fields (self-defence and marriage) were, in a doctrinal sense, understood to be virtually discrete. Second, an analysis of the laws are undertaken which interprets them from the perspective of wives. Although the fields of marriage and self-defence were discrete, the self-defence laws as they applied to wives can only be understood in the context of laws about marriage. The analysis demonstrates that being a wife made the laws of self-defence unavailable, not only because the paradigms of “fighting” and “protection” were more applicable to men but because what it was to be a wife, legally, in relation to a husband, worked directly against the limited permission to kill provided by the law of self-defence.

6.1 The old common law – rules and paradigms

6.1.1. Homicide and killing in defence

Crimes and misdemeanours (a category of public wrongs) were classified by Blackstone as those against the person, habitation or property. Murder and manslaughter were felonious homicides, neither justified nor excused. The “grand criterion” that distinguished murder was malice aforethought which “is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart” (Blackstone Vol IV, 1769, p.198). At least by the nineteenth century malice aforethought need not have involved pre-meditation, but calculated or secret killings were more culpable (Stephen, 1887). For example, murder by poison (calculated rather than impulsive) was the “most punished” because it was least preventable “by manhood or forethought” (Blackstone Vol IV, 1769; Coke, 1644/1979). The “most odious” form of

murder, however, was petit treason, named as such because historically it had “ranked in the same class with crimes against the state and the sovereign” in that it “breached both natural and civil relations” (Blackstone Vol IV, 1769, p. 203-4). It was murder committed by an inferior in a status-relationship; a “servant killing his master, a wife killing her husband, or an ecclesiastical person...his superior” (Blackstone Vol IV, 1769, p. 203-4; Coke, 1644/1979, p. 19). Thus, a wife killing her husband was a special and more serious form of murder.

As a crime against the person, homicide was a felony unless justified or excused (Blackstone Vol IV, 1769, p. 177-8; Foster, 1792, p. 273-4; Stephen, 1887, p. 163-4).¹⁶ According to Blackstone, justifiable homicides included those committed “in the advancement of public justice”, which in turn included killings by private persons in the prevention of crimes, including murder, robbery and house-breaking. “If any person attempts a robbery or murder of another, or attempts to break open a house, in the night-time...and shall be killed in such attempt, the slayer shall be acquitted and discharged” (Blackstone Vol IV, 1769, p. 180). Killings in defence against house-breaking were justified because the law “will never suffer” a “man’s house” (his “castle”) to be “violated with impunity” (Blackstone Vol IV, 1769, p. 223).

Killing in defence against rape or in defence of “chastity” came within this category of killings (Blackstone Vol IV, 1769, p. 181; Foster, 1792, p. 274; Stephen, 1887, p. 274). A woman killing in defence of “chastity”, according to Foster, amounted to justifiable defence because:

The injury intended can never be repaired or forgotten; and nature, to render the sex amiable, hath implanted in the female heart a quick sense of honour, *the pride of virtue*, which kindleth and enflameth at every such instance of brutal lust. Here the law of self-defence plainly coincideth with the dictates of nature. (Foster, 1792, p. 274)

Excusable, as opposed to justifiable, homicides included those committed *se defendendo*, in self-defence, in a sudden affray,

¹⁶ The distinction between justified and excused killings was that a justified killing resulted in no liability but, historically, an excused killing resulted in forfeiture of goods and chattels. By Blackstone’s time forfeiture was a formality because a writ of restitution returned goods and chattels as a matter of course or a verdict of acquittal was entered (Blackstone, 1765-1769).

during a “brawl or quarrel” by chance-medley (Blackstone Vol IV, 1769, p. 184).¹⁷ Chance-medley meant by chance, without pre-meditation. These were distinguished from justifiable homicides (of an attacking felon) in that retreat from mutual combat was required where it was possible. If the killing occurred during a fight where a person was pushed back to a “hedge, wall or other strait beyond which he cannot pass”, then he can “kill in his own defence to safeguard his own life” (Coke, 1644/1979, p. 55-6). The party assaulted must “flee as far as he conveniently can....[to] some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him” (Blackstone Vol IV, 1769, p. 185). A person must have retreated or “given back” unless it was too dangerous to do so:

...for [the assault] may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm: and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law. (Blackstone Vol IV, 1769, p. 185)

A killing in self-defence was proportionate where a person was overwhelmed by an attack which was life-threatening or which threatened very serious harm, or “mayhem”. Mayhem was a very serious, non-fatal injury which compromised future fighting ability. It was:

...defined to be....the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary....And therefore the cutting off, or disabling, or weakening a man’s hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to be mayhems. (Blackstone Vol IV, 1769, p. 205-6)

Killing *se defendendo* in the face of a threat of death or mayhem was therefore excusable.

¹⁷ Another excusable homicide was a killing done *per infortunium*, a form of accident. Blackstone gives examples of a parent “moderately correcting” a child, or a “master his apprentice”, where they “happen to occasion his death”. Blackstone does not include a husband “correcting” his wife, but earlier sources do (Kelly, 1994).

Se defendendo is a “doctrine of universal justice, as well as of the municipal law” (Blackstone Vol IV, 1769, p. 185). Its rationale was that a person was permitted to rely on a “natural”, or pre-social right to defend themselves where social institutions were unavailable to assist. Otherwise, “past or pending” wrongs should be remedied by recourse to the “proper tribunals” of social institutions (Blackstone Vol IV, 1769, p. 184; Foster, 1792, p. 273-4).

Thus, killings were justified where a person “repel[led] force with force” against another with felonious intent, and killings were excused in the context of a sudden fight (Foster, 1792, p. 273). It could be said that a person who killed either as a *protector* against a serious crime or for *self-preservation in a fight* did not commit a crime. The “protector” paradigm is most explicit in the justifications for killing to prevent house-breaking:

Burglary, or nocturnal housebreaking,....has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature....But in civil society, the laws also come into the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor, if he can....the law of England has so particular and tender a regard to the immunity of a man’s house, that it styles it his castle, and will never suffer it to be violated with impunity. (Blackstone Vol IV, 1769, p. 223)

The “fight” paradigm is most evident in construction of chance-medley, the *suddenness* of appearance of need and the requirement of *retreat where possible*. Where “A [is] assaulted by B and they fight together, and before any mortal blow [is] given” A is pushed back to a hedge or wall that he can’t pass, then he can “kill in his own defence to safeguard his own life”, or if “A assaults B so fiercely and violently and in such a place and in such a manner as if B should give back he should be in danger of his life, he may....defend himself” by killing his attacker (Coke, 1644/1979, p. 55-6).

Thus, murders were killings committed with malice aforethought. Culpability increased with secrecy or calculation

because by these strategies the deceased was rendered especially unable to defend themselves. And if a wife killed her husband she committed a murder of a superior form based on status rather than circumstance. A person did not commit murder and was permitted to kill where it was necessary to do so, either to prevent the commission of a felony (a justified killing) or for self-preservation (an excused killing), where waiting for assistance from civil institutions was not possible. Especially in relation to the latter excusable killings, the suddenness with which the need for defence arose and the requirement to retreat, or “give back”, where possible (by “running away”) were key features of the paradigm. Suddenness distinguished permissible killings from calculated murders. And the retreat-where-possible requirement tipped the moral balance in favour of the person who killed, away from the mutuality of combat that underpinned the structure of the defence. Thus, *suddenness* and retreating where possible by “giving back” or *running away* provided strong limits on the scope of permissible killings by distinguishing between self-defence and calculated murder.

6.1.2. The law of husband and wife

The law of husband and wife – Blackstone’s framework

The law of husband and wife created the legal status of both parties and those statuses impacted very significantly on the laws of self-defence as they applied to wives. Volume I of Blackstone’s (1765) *Commentaries* sets out the fundamental *Rights of the Person* in the common law, including those of the “Individual”, “King”, “Magistrates” and “Clergy” as well as the three “great relations in private life”. “Husband and wife” was one of those relations, the others being master-servant and parent-child.¹⁸ Volume III of Blackstone’s (1768) *Commentaries* deals with *Private Wrongs*, which were the causes of action between “subject and subject” for redress of civil injuries and Volume IV covers *Public Wrongs*, including the criminal law of homicide and self-defence described above. The relation of “husband and wife” set out in Volume I had significant effects in shaping both private and public laws.

The relation of husband and wife was, according to Blackstone (Vol I, 1765, p. 410), “founded in nature, but modified by civil society: the one directing man to continue and multiply

his species, the other prescribing the manner in which that natural impulse must be confined and regulated”. Marriage was, in the common law, a civil contract, treated as “all other contracts” where the parties were “willing....able to....and... actually did contract, in the proper forms and solemnities required by law” (Blackstone Vol I, 1765, p. 421).

The principle of “marital unity”, or coverture by which a husband and wife became one legal person, was the defining doctrine of the “husband and wife” relation:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. (Blackstone Vol I, 1765, p. 430)

Blackstone (Vol I, 1765, p. 430) wrote that “almost all the legal rights, duties, and disabilities, that each of them acquire by the marriage” depended on this principle. The legal effects of this union in both private and public law were summarised as follows:

I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself....A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord....The husband is bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them: but for any thing besides necessaries, he is not chargeable....If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband’s concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant.

¹⁸ A fourth was guardian and ward which is a form of “artificial” parentage (Blackstone Vol I, 1765, p. 410).

But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable; except it be a fine, or the like matter of record....And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder. (Blackstone Vol I, 1765, pp. 430-2)

The law of “husband and wife” was further developed in Blackstone’s treatment of private wrongs (causes of action brought by an individual). He identified three private law injuries that may be “offered to a person, considered as a husband”: abduction, or taking away a man’s wife; adultery, or criminal conversation with her; and beating or otherwise abusing her” (Blackstone Vol III, 1768, p. 138-9). Following the principle of marital unity, no private law injury was offered to a person as a wife.

As for the private action by a husband of abduction of a wife, or “taking her away”, this may have been by fraud and persuasion or by force, but in all cases the law “supposes force and constraint”, the wife “having no power to consent”. The husband could seek redress in a writ of ravishment (abduction) and “thereby the husband shall recover, not the possession of his wife, but damages for taking her away” (Blackstone Vol III, 1768, p. 139).

As for adultery, or criminal conversation with a man’s wife as a civil injury “(and surely there can be no greater)”, the law recognised it as a tort against the adulterer. Damages recovered were usually very large and exemplary, and:

...properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant;... the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband’s obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious (Blackstone Vol III, 1768, p. 139-40).

Blackstone included no crime of adultery (it was a private wrong), however, the wrong in adultery formed the basis for the provocation defence in homicide law. That is, a murder could be reduced to manslaughter where a husband had witnessed adultery. There was no concept of adultery by a husband for which a wife could claim damages in private law or which was recognised in the criminal law of provocation and homicide (Stephen, 1887, pp. 168-9).

With respect to the third injury for which an action could be brought and damages recovered by a husband, the beating of a man’s wife, Blackstone wrote:

...if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages....which must be brought in the names of the husband and wife jointly: but if the beating or other mal-treatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy....for this ill-usage.... in which he shall recover a satisfaction in damages. (Blackstone Vol III, 1768, p. 140)

Blackstone (Vol IV, 1769, p. 210-1) makes no mention of an action for the rape of a husband’s wife by another man and rape was generally considered as a public wrong by the Crown. Thus, the law of “husband and wife” affected a wife’s legal position in numerous ways, emanating from the doctrine of coverture or “marital unity”. Two further effects of this doctrine can be seen in the criminal law, in how rape laws applied with respect to wives and the “chastisement rule”.

The law of husband and wife – a husband’s immunity from prosecution for rape

Rape was the “carnal knowledge of a woman forcibly and against her will” (Blackstone Vol IV, 1769, p. 210) and carnal knowledge was “the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation” (Stephen, 1887, p. 194).

A husband’s immunity from prosecution for rape (the “rape immunity rule”) was declared in Hale’s *The History of the Pleas of the Crown*, published in 1736:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract. (Hale, 1736, p. 629)

Stephen, in 1887, restated the rule: “A husband (it is said) cannot commit rape upon his wife”. He wondered whether “the consent is not confined to the decent and proper use of marital rights” and that in some circumstances, though not rape, forced carnal knowledge by a husband of his wife may have amounted to an offence. “If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted at least of an indecent assault” (p. 194).¹⁹

The law of husband and wife – a husband’s right to chastise his wife

A husband’s right to chastise his wife (“the chastisement rule”) was not expressed as an exception to the law of assault in the criminal law but it was a *de facto* exception emanating from the principle of marital unity. There was, or was formerly, according to Blackstone, a husband’s right of “correction” of his wife:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds; and the husband was prohibited to use any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinent* [Otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife (Jones, 1889)]....But....in the politer reign of Charles the second, this power of correction began to be doubted:

and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour. (Blackstone Vol I, 1765, pp. 432-3)

Thus, according to Blackstone, the chastisement rule *per se* operated for some husbands, resulting from a form of choice of the “lower rank of people” and all other wives were subject to “restraint” (Kelly, 1994, p. 364). That a wife had security of the peace against her husband was evidenced by Blackstone by the writ of *supplicavit*, a writ on which a woman could rely when she was threatened with bodily harm by her husband. Where a wife was “under grave and manifest threat of her life and the mutilation of her limbs” a court could require her husband to guarantee “that he will not do, or cause to be done, any harm or evil to her body, other than licitly and reasonably pertains to a husband for ruling and chastising his wife” (Kelly, 1994, p. 353).

Thus, the law of “husband and wife”, or marriage law, was based on the legal principle of marital unity, or coverture, which constituted a status hierarchy. A wife and husband became one legal person, represented by the husband who acquired authority. In “adopting” a wife a husband assumed legal personhood for her and became responsible for her in a legal hierarchy (Blackstone Vol I, 1765, p. 431). This included acquiring liability for her debts and in some circumstances her criminal conduct. And a husband acquired the private law entitlements related to his wife’s abduction and adultery and her being beaten or otherwise abused by someone else. A wife’s legal personhood was subsumed within that of her husband in ways that affected both private and public law. The principle of marital unity and the associated authority of a husband also affected the criminal law. In particular, it made it legally impossible for a husband to rape his wife and it modified the laws of assault in their application to the marital relation, based on a husband’s right to “correct” his wife.

¹⁹ Moreover, Stephen (1887) notes that Hale gave no authority for the rule but made the remark “only by way of introduction to the qualification contained in the latter part of clause”, that a man may be guilty of aiding the rape of his wife.

6.2 The old common law – analysis

Within this framework of the common law, how did the law of self-defence apply to wives? Killing in defence of rape was justified under the common law, though restrictive evidence laws for proving rape (Blackstone Vol IV, 1769, p.214) and the very low prosecution and conviction rate, indicate that it would have been almost impossible for a woman to justify a killing on this basis (Beale, 1903, p. 568; Durston, 2007; Gammon, 2013; Lindemann, 1984). In any event this justification, as a matter of law, was not available to a wife for killing her husband because a husband could not rape his wife. This was made clear in Hale's dictum and also in the requirements for proving rape. Historically, according to Blackstone, to demonstrate a fresh complaint, a woman must have "immediately after...[gone] to the next town and there ma[de] discovery [of the rape] to some credible persons". She should have "acquaint[ed] the high constable of the hundred, the coroners and the sheriff of the outrage", and "searched for the offender" (Blackstone Vol IV, 1769, p. 211, 213). These requirements did not contemplate a wife whose rape by her husband would have been embedded in domestic life (Foyster, 2005, pp. 114-5). So, although killing in defence against rape was part of the common law of self-defence, it was not available to a wife who killed her husband in defence of rape.

For other reasons also it would have been difficult for a wife to rely on the common law of self-defence. Both justified and excused defensive killings were shaped in accordance with the circumstances that men, rather than women, found themselves in.²⁰ Acting in defence against a felon with murderous intent or who intended to rob or invade a home, was shaped in accordance with a husband's social and moral obligations to protect and defend. Mutual combat that afterwards turned into something dangerous, threatening a person's future ability to fight or "annoy" their "adversary" (Blackstone Vol IV, 1769, pp. 205-6). It was also something men rather than women would have tended to do. The mutuality that underpinned this category of defence did not accord with the asymmetry of the relationship between husband and wife. In most cases a marriage would have been asymmetrical with respect to the physical size and strength of the two parties, and in all cases

with respect to the hierarchal roles and structure of marriage. If a wife engaged in a confrontation with her husband she would have been very likely to lose and if she used a weapon she would not have been perceived as overwhelmed or having retreated ("given back"), the "balance" of blameworthiness having tipped against her.²¹ If she acted in the absence of confrontation she would have been distanced from the suddenness (chance-medley) rationale for the excuse and would have engaged in the "most punished" forms of murder involving "secrecy" and calculation (for example, poisoning), and the "most odious" of murders, petty treason.

So, in summary, because the law did not recognise rape by a husband, wives would have been excluded from self-defence as a matter of law, if they killed to prevent rape within their marriage. In all other ways also, laws of self-defence did not have wives in mind. There was, therefore, a "mismatch" between wives (and women generally) and the law of self-defence. And this was so despite it being known as a matter of fact that wives were not uncommonly in very serious danger from husbands (Durston, 2007; Foyster, 2005), and also despite, on a political level, the liberal principle of equality — even equality for women (Wollstonecraft, 1792/1974) — being a strong driving force of the common law during Blackstone's and subsequent centuries.

If the difficulty for wives in accessing self-defence laws could be seen in this way as a "mismatch" (and that the mismatch existed alongside social knowledge that violence against wives did occur) it was reconcilable in the common law because of the importance of social order and, particularly, by the natural differences between women and men. Strongly confining the circumstances in which it was permissible for a person to kill another was vital in the interests of social order. The suddenness with which the need to kill arose in a fight, and a reasonable effort to retreat by "running away" and not standing on honour (Beale, 1903), functioned as those strong limits. The fact that women would not be likely to be able to defend themselves against their husbands during a confrontation and the absence of confrontation would have involved premeditation and therefore no access to self-defence laws, was explicable as the result of natural differences. Women were naturally physically weaker than men but were also by

²⁰ See later reforms discussed in the next section.

²¹ Again, see later reforms discussed in the next section.

nature gentler and less inclined to fight. Lethal self-defence laws could be assumed therefore to be “less applicable” to women and wives, because they did not need them as much.

But the legal framework governing the use by wives of lethal force against their husbands was much more complex than this. That self-defence laws reflected the social context in which men fought or protected, meant that women were mostly excluded from these laws (as a matter of fact). But looking at the wider context, it could be said that there was no real concept of lethal self-defence by wives against their husbands. If the law could not recognise the violence wives often suffered, then the need for their use of lethal force was rendered unperceivable, and it followed that no legal mechanics to frame the application of the defence would be developed. This can be explained further in a number of ways.

Hale reasoned that the principle of marital unity made rape a legal or conceptual impossibility within marriage (and other legal relations were similarly affected, for example, “for a husband to covenant with [his wife] would be only to covenant with himself” (Blackstone Vol I, 1765, p. 430). In the same way self-defence could be said to have been an impossible concept where a marriage consisted of a union of selves. There was no self in a wife to act in defence against a husband and at the same time no *need* for defence against a husband, because he was, by definition, her protector. The two ways in which a wife found herself unable to invoke lethal self-defence against her husband (practically and conceptually) can be illustrated in the specific rule structure of self-defence where lethal force in protection against a home burglar was permissible. A husband will tend to be cast in the role of protector; a wife as the embodiment of the “castle” and family in defence of which a person was justified in using lethal force without retreat (Blackstone Vol IV, 1769, p. 223). So self-defence was “inapplicable” to a wife. But this conception of self-defence cannot explain a wife’s defence *against her husband*. To attempt to conceptualise self-defence by a wife against her husband it was necessary to try to conceive of self-defence against oneself or, since the husband was the person within the union, self-defence against one’s defender.

This analysis of self-defence is analogous to Hale’s analysis of the non-existence of rape within marriage. Hale’s analysis is also directly applicable insofar as the common law constructed a category of justifiable self-defence against rape. Self-defence was, as discussed, unavailable to a wife in defence of rape because it was not possible for her to be subject to the violence of rape as a wife.

The impossibility of conceiving of lethal self-defence by a wife against her husband within the common law of marriage was not merely a logical or analytical “puzzle”. The very real bind it created can be seen if the paradigm of self-defence is considered alongside the paradigm “wife”. The very conceptual lines comprising the paradigm of self-defence, which divided permissible from impermissible force, tracked the conceptual lines that defined “wife”. A person was permitted to use defensive force where the only other option was to submit to an illegitimate force they faced. To be a wife was to submit to a legitimate authority; her husband. Again, this was a real part of the rule structure of marriage, not a semantic “puzzle”. It meant that any idea of violation — harm or threatened harm — predicated on a demand for a wife to submit would tend to be “unseeable” within this paradigm. Those claimed harms would tend to be seen as a person being a wife. The exemplar of sexual relations is central: rape would tend to be seen as having marital “sex”. Moreover, if demands for a wife to submit would tend to be perceived as part of marriage rather than violation, then a wife *not* submitting would tend to be seen as a person not being a wife, rather than as resistance to (or defence against) claimed harms.

Another way in which it can be seen that the paradigm of self-defence at common law was “untranslatable” to a wife killing her husband in self-defence was that a wife killing her husband was petit treason. Blackstone (Vol IV, 1769, p. 203) stressed that this offence was an aggravated form of murder rather than a different offence, but the structure of liability in petit treason was different from murder *per se*, and it was a structure with which self-defence was incommensurable.²²

²² This term is used to mean that there is “no common measure” (Oberheim & Hoyningen-Huene, 2009), or no means of conceptual recognition (Kuhn, 1962/2012) (here, between self-defence and petit treason), rather than its more common use, as merely “disproportionate”.

The culpability in treason lay in killing a superior in a status-relationship. As Blackstone wrote (about a time earlier than his own), as an “inferior species of treason”, a wife killing her husband “ranked in the same class with crimes against the state and the sovereign” because it “breached both natural and civil relations” (Blackstone Vol IV, 1769, p. 203). Self-defence in the context of treason is not a coherent concept. It is not that a person could not access the law of self-defence for killing the King. As a status crime there was *no concept* of killing the King in self-defence that could answer a charge of treason. Similarly, there was *no concept* of killing a husband in self-defence that could have answered a charge of petty treason.

Three further observations can be made, all of which are predictions of what might be expected from a fundamental incommensurability between the permission within the paradigm of self-defence not to submit and the paradigm of marriage in which a wife consensually submitted to her husband as her protector. The first is that physical force used by a husband against a wife will be minimised. Expressed in a different way, the distinction between violence against a wife and authoritative and guiding force used by a husband on his wife will be difficult to discern, because a husband must guide and control but not be violent, or not too violent.²³ The tension produced by this difficulty in discerning the distinction was evident in the common law. Blackstone’s statement of the “chastisement rule” quoted above contains his effort to discern between a husband’s role and violence. Only “reasonable” correction was permitted; restraint was permitted but only for “gross misbehaviour”; and what would be violence in higher classes was correction in the “lower ranks”: “Yet the lower ranks of people, who were always fond of the old common law, still claim and exert their antient privilege” (Blackstone Vol I, 1765, p. 433). This was consistent with social mores in which the use of force by a husband was “softened”, and associated with “a certain.... jocosity”, inclining people to “smile” (Power Cobb, 1878, p. 57; Foyster, 2005, pp. 85-7; Durston, 2007).

The second observation that could be expected from the incommensurability between acting in self-defence against

a husband and being a wife is that sexual violence from a husband against a wife will tend to be “invisibilised”. According to Kuhn, the paradigms or underlying schema we employ determine how the significance of mere facts is produced (Kuhn, 1962/2012, pp. 23-4, 62-4). Understood in this way a husband having sex against the will of his wife as a *fact* will tend to be perceived as *marital sex* where what it is to be a husband is to have continuous sexual access to his wife. This analytical assessment is consistent with historical research about perceptions of violence against wives (Barclay, 2013; Walker, 1998). To say that a paradigm of ideal sexual love between man and woman made sexual coercion and violence against wives difficult to see does not mean of course that there was no social awareness that husbands used force against wives to gain sex. It is to say that such force was not conceived of as sexual violence, or rape. Barclay’s (2013) historical analysis of the relationship between rape of seduction and forced marriages in eighteenth century England demonstrates how physical brutality in gaining sex from a woman was perceived to be (licit or illicit) *sex* rather than *sexual violence* or rape. Even extreme violence could be understood as a prelude to marriage. This could be understood as a culturally coherent outcome of the “possession” by a man of a woman central to Western conceptions of ideal heterosexual love (Naffine, 1994).

This “invisibilising” of sexual violence against a wife is quite literally expressed in the common law rule that it was not possible for a husband to rape his wife. And it follows directly from that rule that a claim to permission to use defensive force against a husband because of a threat of sex against a wife’s will would not be cognisable.

Moreover, this lack of “visibility” of a wife’s claims of rape was sustained *even next to the rule* that lethal self-defence against a threat of rape was justified. That is, the common law made sense of these dissonances — between the rape of a woman and a wife, and between fact and law — through the principle of marital unity, which was composed of a marital submission or subordination (Williams, 1947, p. 20) on the part of wives. Furthermore, although the common law sustained this structure, the tensions produced by the legal assumption of the non-existence of sexual violence by a husband against a wife were nevertheless evident. They were

²³ A distinction was drawn between “violence” (inappropriate or illegitimate conduct) and “cruelty” (Foyster, 2005, p. 40).

expressed in the doubt about Hale's categorical expression of the rule that a wife could not be raped (for example, in Stephen's statement of the law: "it is said" a man cannot rape his wife). They were also expressed in the accommodating construction of immunity from prosecution. That is, that a husband was immune from prosecution for rape (as opposed to there being a law that a husband having forced sex with his wife was not a crime) allows for the factual possibility of forcing sex on another person while providing no remedy, and sustaining the construction of unity.²⁴ This might be described as an implicit adjustment which preserved the coherence of an existing paradigm (Kuhn, 1962/2012, pp. 46, 77, 81-82).

The third prediction that could be made from the idea that action in self-defence against a husband and being a wife within the common law rules were incommensurable concerns the relationship as a whole, not only as it is expressed through physical "correction" or sex. The fact that marriage was constituted *as* submission/control made it impossible to perceive that hierarchical relationship as *itself violating*. Expressed in a different way, the paradigm of marriage as a status hierarchy meant that that status hierarchy could not *itself* amount to a form of violence. Again employing "paradigm" as a framework that organises perception (Kuhn, 1962/2012, pp. 23-4, 62-4), here it could be said that the paradigm of marriage as status hierarchy itself *rendered unobservable* that status hierarchy *as violence*.

The "natural opposition" (Naffine, 1994) within a particular marriage may have been conforming (to the ideal), a good marriage — or aberrant, a bad marriage. But the status hierarchy itself was un-perceivable as violence or violating. The perception of *inhabiting a role* defined by submission as being violated, or of *inhabiting a role* of authority over another as violating is nowhere reflected in the common law even though it was the premise of much of the law reform advocacy from at least the mid nineteenth century.²⁵

Thus, in summary, common law self-defence laws themselves were virtually inapplicable to women and especially wives, but more than that, what it was to be a wife in relation to a husband under the common law ran contrary to what the laws of self-defence permitted a person to do. The doctrine of marital unity produced a conceptual conundrum, as it did in other areas of law: how was a wife to defend herself against herself? Rather, because a husband was a superior, killing him was a status offence. And, killing outside the context of mutual combat meant a calculated killing (murder) had occurred. Moreover, this incommensurability between self-defence and being a wife was reflected in:

- a difficulty in discerning a husband's role distinct from violence against his wife, or too much violence;
- an "invisibility" of sexual violence against a wife; and
- the impossibility of perceiving the status hierarchy of marriage defined by consensual submission as itself abuse.

24 Compare the Australian criminal codes discussed in the next section. Siegel (1996) makes the same point about an informal immunity from prosecution as opposed to a formal rule in the context of non-sexual "chastise" of a wife.

25 Advocacy that lead up to the major reform Acts, *The Divorce Act 1857* (UK) and *The Married Women's Property Act 1882* (UK), linked women's subordination to men on a structural level, and that subordination to legal structures of marriage. For example, a Declaration of

Rights and Sentiments, written at the foundational women's rights convention held at Seneca Falls in the United States in 1848, contained a declaration opposed to the status hierarchy of marriage in the following terms: "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns....In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master – the law giving him power to deprive her of her liberty, and to administer chastisement" (McMillen, 2008 pp. 1-2).

INFORMATION SUMMARY BOX 4

The old common law — rules, paradigms and analysis**The old common law of homicide and self-defence:**

- Murders were killings committed with malice aforethought. Culpability increased with “secrecy” or calculation.
- If a wife killed her husband she committed a murder of a superior form based on status rather than circumstance.
- A killing was permitted in some circumstances to prevent the commission of a felony, including rape (a justified killing) or for self-preservation (an excused killing).
- Requirements of suddenness of threat and retreating where possible by “running away” were strong limits on the scope of permissible killings, and distinguished such killings from calculated murder.

The old common law of “husband and wife”:

- The law of “husband and wife” or marriage law, was based on the legal principle of marital unity which constituted a status hierarchy. A wife and husband became one legal person, represented by the husband who acquired authority.
- The principle of marital unity, and the associated authority of a husband, affected the criminal law. It was the basis for a husband being immune from prosecution for rape of his wife. It also modified laws of assault in their application to the marital relation, based on a husband’s right to “correct” his wife.

The old common law — analysis:

- Common law self-defence laws were virtually inapplicable to wives in relation to their husbands. Killing in defence of rape could not apply within marriage and the laws of self-defence were shaped in accordance with the circumstances that men, rather than women, found themselves in. Women were more likely to need to use a weapon or “calculate” their own defence. The threat that they were dealing with was more likely to be contained in their ongoing relationship with an aggressor rather than in one immediate physical attack.
- In addition, what it was to be a wife in relation to a husband under the common law (submission in a status-relationship) ran contrary to what the laws of self-defence permitted a person in some circumstances to do (refuse to submit to another person).
- The incommensurability between the concept self-defence and being a wife was reflected in the following:
 - a difficulty in discerning a husband’s proper role from violence against his wife (the “chastisement rule”);
 - an “invisibility” of sexual violence against a wife (a husband’s immunity from prosecution for rape); and
 - the impossibility of perceiving the status hierarchy of marriage (“marital unity”) as itself violating.

7. Rule changes – the chastisement rule, the “rape immunity” rule and the “fight” rule in self-defence

On the analysis, so far, then, it was difficult if not impossible for a wife to rely on the old common law of self-defence if she killed her husband. This was not only because it was unlikely she would have done so in a fight underpinned by mutual combat, or as a “protector”, but also because the law of “husband and wife” (primarily the doctrine of marital unity) rendered even the *concept* of lethal self-defence by a wife against her husband very difficult to conceive of. However, a tremendous volume of advocacy in the nineteenth and twentieth centuries was directed at this catch-22, and as a result legal rules have changed. This section briefly outlines the law reforms through which two of the rules that made up the principle of marital unity, the marital chastisement and “rape immunity” rules, were abolished, and self-defence was recognised or declared not to be restricted to violence contained in an immediate physical attack (a “fight”).²⁶ We set out these legal rule changes in this section in order to demonstrate in the following section that paradigms of marriage (intimate partnerships), violence and self-defence which underpinned the old common law have persisted in spite of these reforms.

For the purposes of this summary of the law reforms it is important to note that from the beginning of the twentieth century some Australian jurisdictions adopted criminal codes: Queensland in 1899, Western Australia in 1913 and Tasmania in 1924. Queensland and Western Australia enacted the same code (the Griffith Code), and Tasmania’s code was influenced substantially by the Griffith Code (Crofts, Burton, Martin, Nisbet, & Tarrant, 2018).²⁷ These codes, with some exceptions, were drafted to enact the common law at the time in statutory form (Griffith, 1897). This section traces briefly the abolition of the chastisement rule and the rape immunity rule and the change to the “fight” rule of self-defence in both the Australian jurisdictions that continued to apply the common law and those that codified their criminal law.

7.1 The chastisement rule

As a formal rule of law the right of a husband to use physical force to “correct” or restrain his wife was stated, even by Blackstone in the late eighteenth century, in qualified terms. As discussed, he declared the rule to be that a husband could “give his wife moderate correction” and had the “power of restraining her, by domestic chastisement” within “reasonable bounds”, and he limited the rule *per se* by distancing its contemporary form from the “old law” (Blackstone Vol I, 1765, pp. 432-3). Some legal textbooks in the nineteenth century declared that a husband had such a right; for example, he could legally restrain his wife “by force within the bounds of duty, and may beat her, but not in a violent or cruel manner” (Bacon, 1807, cited in Foyster, 2005, p. 40). Others doubted the rule in strong terms:

In a ruder state of society the husband frequently maintained his authority by force...But [in recent times] the wife has been regarded more as the companion of her husband; and this right of chastisement may be regarded as exceedingly questionable at the present day. The rule of persuasion has superseded the rule of force (Schouler, 1882, cited in Siegel, 1996, p. 2143).

In the latter part of the nineteenth century some courts expressly repudiated the rule. For example, in 1871, in *Fulgham v. State*, the court wrote:

Judge Blackstone....published his commentaries above one hundred years ago, when society was much more rude....than it is at the present day in this country.... The wife is not to be considered as the husband’s slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. (*Fulgham v. State*, 1871, cited in Siegel, 1996, p. 2121-2)

And in *R v. Jackson*, in 1891, a husband claimed that, even though he may not confine his wife to one room, he was entitled to confine her to the house. In response the Court declared:

It was said that by the law of England the husband has the custody of his wife. What must be meant by “custody”

²⁶ At common law a husband and wife could not give evidence about each other, be guilty of conspiring with each other, or steal from each other, and were immune from actions in tort with respect to each other (the “inter-spousal tort immunity”) (Williams, 1947). At common law a husband became the owner of his wife’s property, including wages. A major piece of legislation, *The Married Women’s Property Act 1882* (UK) provided for married women to own their own property, their legal capacity to enter contracts and to sue and be sued.

²⁷ The Griffith Code was drafted by Sir Samuel Griffith.

in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. (*R v. Jackson*, 1891 cited in Manchester, 1984, p. 416)

Thus, the common law repudiated the rule, often by distinguishing then current law from the “ruder” customs of the past.

Therefore, from at least the turn of the twentieth century, in Australian states that continued to apply the common law, there was no formal rule of chastisement. This was also the case in the code jurisdictions, evidenced by its omission from the codes. The Griffith Code provided for reasonable “discipline” by a parent of a child and by a master of an apprentice but no equivalent right in a husband was enacted (*Criminal Code* (WA), s. 257, as originally enacted).

7.2 The rape immunity rule

The rape immunity rule is no longer part of the Australian law in common law or code jurisdictions. However, its abolition in some jurisdictions was relatively recent and it is unclear precisely when it was repudiated at common law. As with the chastisement rule, common law lawyers expressed ambivalence about the rape immunity rule even in the nineteenth century. In 1887, Stephen included the rule in his statement of the common law but commented that Hale had given no case authority in support of the rule and, as discussed, questioned the scope of the immunity. In fact, although prosecutions of husbands had not occurred and no court had rejected the rule, in 2012, in *PGA v. the Queen* (*PGA*), the High Court declared that the rule had been rejected by the common law sometime in the nineteenth century.

The appellant in *PGA* was charged with raping his wife in 1963 in South Australia. A majority of the High Court reasoned that the rape immunity rule depended on the common law rule that a wife gave irrevocable consent to sexual relations when she married her husband, and because that consent rule had been rejected, the rape immunity rule had also ceased to exist. The rule that a wife gave irrevocable consent to

sexual relations on marriage, the Court said, must be taken to have been rejected sometime in the nineteenth century, the rejection being implied from changes to divorce laws and from ecclesiastical law from which divorce laws developed. With respect to nineteenth century divorce laws:

If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage “contract”, may she not also revoke a “term” of that contract, namely, consent to intercourse. (*State v. Smith*, 1981, p. 44 cited in *PGA*, 2012, p. 60)

With respect to ecclesiastical law from which divorce laws developed, the Court adopted Brennan J’s reasons in *The Queen v. L* (1991, p. 396.). Ecclesiastical law placed an obligation on marriage partners to provide connubial relations. Brennan J reasoned that such an obligation implied a capacity to withdraw consent to sexual relations because in the absence of such capacity, it would not be possible to breach the duty to provide connubial relations.

The dissenting judges in *PGA* reasoned that a common law rule continued to exist until it was repudiated by a decision of a common law court and that the absence of prosecutions of husbands for rape was positive evidence of the existence of the immunity. In their view, therefore, the immunity continued to exist as a common law rule until it was abolished by South Australian statute in 1976. It is to be noted that although the majority’s conclusion in *PGA* may be seen at first to recognise wives’ entitlement to justice since at least the nineteenth century, the decision has been criticised for failing to account for the lack of prosecutions of husbands and the real “consequences for wives of the law’s silence” (Larcombe & Heath, 2012).

Thus, there is no common law rape immunity rule in Australia, though the date at which it was rejected cannot be pinpointed. It is clear nevertheless that each common law jurisdiction rejected the rule by statute, between the 1970s and the 1980s.²⁸

28 The *Criminal Law Consolidation Act Amendment Act 1976* (SA); *Crimes (Sexual Assault) Amendment Act 1981* (NSW); the *Crimes (Amendment) Ordinance (No 5) 1985* (ACT); the *Crimes (Amendment) Act 1985* (Vic). As late as 1991 the immunity was declared to be no longer a rule of the common law of the United Kingdom in the case of *R v. R* [1991] 1 A.C. 599.

The point in time at which the rape immunity rule was abolished as a rule of law in Australian code jurisdictions is clearer. When the Griffith Code was enacted at the turn of the twentieth century rape as a criminal offence did not apply to a husband. “Any person who has carnal knowledge of a woman or girl, not his wife, without her consent...is guilty of a crime which is called rape” (*Criminal Code* (WA), s. 325 as originally enacted).

The code jurisdictions repealed the immunity in the 1980s.²⁹ In Western Australia it was removed in 1976 with respect to a husband who was separated from his wife and living separately, and was abolished altogether in 1985.³⁰

7.3 The “fight” rule in self-defence

The rule structure of the old common law of self-defence, which reflected defence in a “fight” context or as protector against a serious crime, continued into the twentieth century both at common law and in the Australian code jurisdictions. Although features of both these rule structures survived, it was the *se defendendo* (the sudden “fight”) killings that most resembled the defence of self-defence that continued into the twentieth century.³¹

The Australian common law of self-defence was restated by the High Court in 1987, in the case of *Zecevic v. Director of Public Prosecutions* (Vic) (“*Zecevic*”). A person would be acquitted of homicide on grounds of self-defence if they “believed upon reasonable grounds that it was necessary in self-defence to do what [they] did” (*Zecevic v. Director of Public Prosecutions*, 1987, p. 174). This formulation is the

same in substance as that in Stephen’s 1887 introductory statement of common law principle, except that in Stephen’s formulation the attacker’s conduct must have been unlawful. More specific matters relating to the level of attack that was required for lethal self-defence, defence of the home and retreat from a fight, were stated as principles of law in Stephen’s formulation but were relegated to relevant questions of fact to be decided by a jury in *Zecevic*. Thus, the common law of self-defence in 1987 was very similar to the law a century earlier, although Stephen’s formulation emphasised the “fight” context slightly more with its legal requirement that the assailant offered strictly unlawful violence.

The law of self-defence enacted in the Griffith Code at the turn of the twentieth century remained in the same statutory form for over a century in Western Australia and remains in the same form in Queensland even today. It followed Stephen’s common law formulation very closely, providing that if a person was “assaulted” “such as to cause reasonable apprehension of death or grievous bodily harm”, and the person using the force “believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous bodily harm”, then “necessary force” was permitted even if death resulted (*Criminal Code* (WA), s. 248 as originally enacted).³² Questions about the magnitude of the threat that would justify a killing and requirements to “quit” or retreat from conflict were retained as questions of law (though in general terms), and the requirement that the attacker used unlawful force emphasised the fight context.

From the 1990s both the common law and statutory rules of self-defence were restated/amended in ways that were aimed at addressing the difficulty in accessing the defence by women abused by their legal or de facto husbands (see e.g. Australian Law Reform Commission (ALRC), 1994; Bradfield, 2002; Ewing, 1987; Leader-Elliott, 1993; LRCWA, 2007; Rathus, 2002; Sheehy et al.,; Stubbs & Tolmie, 1999; Tarrant, 2002; VLRC, 2004; Wallace, 1986). As explained, in *Zecevic* the High Court simplified the formulation of the common law self-defence rules, but the Court in that case did not have in view the issue of whether self-defence laws could apply to contexts other than an immediate physical

29 *The Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld); the *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas); *Criminal Code Act 1983* (NT).

30 *Criminal Code Act (No.3) 1976; Acts Amendment (Sexual Assaults) Act 1985* (WA).

31 Self-defence is usually now considered a justification rather than an excuse (e.g. self-defence is “lawful” under the criminal code whereas a person who is excused merely has “no criminal responsibility” for their conduct). The category of justified killings in the old common law, against burglars and other felons, has similarities with statutory defences of “lawful force” used in defence of property (see, e.g., *Criminal Code* (WA), ss251, 254) but with few exceptions (e.g. *Criminal Code* (WA), s244) very serious or lethal force is not permitted. See also, Beale (1903).

32 Repealed in 2008 by the *Criminal Law Amendment (Homicide) Act 2008* (WA).

INFORMATION SUMMARY BOX 5

Rule changes

- The chastisement rule and the rape immunity rule no longer exist.
- Self-defence law was restated or amended to recognise that permission to kill in self-defence is not limited to the “fight” context. A person may defend themselves against “non-imminent” harm.

attack. However, as the reformulation of the defence was articulated in *Zecevic*, it required no immediacy of combat as a matter of law. This meant that in subsequent cases such as *Chhay v. R* (1994), courts could allow self-defence to be put to a jury where there had been a “delay” between a physical attack (a “fight”) and a wife killing her husband.

The same adjustment in the code jurisdictions was more difficult for courts to make because self-defence included a statutory requirement to show that the attacker had used unlawful force; that the person who killed had been “assaulted”. As a matter of law, assault requires that an assailant was about to apply force. Courts accommodated this statutory restriction by interpreting the meaning of “assault” such that a woman who killed her partner a short time after a physical attack by him could rely on self-defence if she was under a continuing threat which would be effected at a later time (*Secretary v. R*, 1996; Sheehy et al., 2014). This remains the law of self-defence in Queensland, with a statutory requirement that lethal self-defence is only permitted where a person is defending themselves against an “assault”, but the meaning of assault is interpreted to provide flexibility in the timeframe. The law of self-defence in Western Australian was amended in 2008. In the new formulation a person is permitted to kill to defend themselves against a harmful act that need not be “imminent”, so it is clear a person may have a reasonable belief in the need for lethal defence in the absence of a fight.³³

Thus, the rule-structure of self-defence in Australian criminal law remained largely consistent with the old common law until the 1990s. Both common law and statutory formulations of self-defence have been restated/amended since then to abolish the common law or statutory rule that required a suddenness of response in self-defence.³⁴ With the possible

exception of Queensland, there is no rule of law that the threat against which a person defended themselves need be imminent, and therefore, no rule of law that self-defence is limited to the context of a “fight”. As discussed, in Queensland a person can only rely on self-defence if they were “assaulted” and “assault” is defined to require an immediate application of force (*Criminal Code* (Qld), ss. 245, 271). Although the definition of assault has been interpreted to imply some flexibility in the timeframe (*R v. Secretary*, 1996), the statutory requirement remains.

Rule changes, then, occurred in the twentieth and twenty first centuries. The rules allowing chastisement and the immunity for husbands from prosecution for rape no longer exist, and self-defence law has been restated or amended to recognise that the limited permission to kill in self-defence is not confined to the “fight” context. In other words, whether or not a person is faced with a physical attack, they may be acting in self-defence and should be acquitted if there is a reasonable doubt they were.

33 A new defence was enacted in s. 304B of the Queensland *Criminal Code* in 2010 which applies where domestic violence has been perpetrated in a domestic relationship, and includes killings in “intimate personal relationships”. This defence is not based on the paradigm of a “fight” but it is not a self-defence law of the kind in the old common law or considered here because it results in a manslaughter conviction.

34 Other rule changes occurred during this time. For example, statutory

provisions that declared the relevance of evidence of domestic or family violence (see *Crimes Act 1900* (Vic), s. 9AH (now s. 332J); *Evidence Act 1977* (Qld), s. 132B). Provisions relating to jury directions given by a judge on how family violence evidence may be relevant to self-defence were introduced in Victoria in 2014 (now *Jury Directions Act 2015* (Vic), ss. 59, 60). These provisions are part of evidence and procedure law and, though they do not alter the rule structure of self-defence, they are aimed at incorporating realistic understandings of IPV in homicide trials (*Collom, 2016; McKenzie, Kirkwood, Tyson, & Naylor, 2016; Tyson, Kirkwood, McKenzie, & Naylor, 2015*).

8. Rule changes — but continuing paradigms: *Western Australia v. Liyanage*

The analysis to this point, then, has demonstrated that under the old common law it was very difficult, if not impossible, for a wife to rely on self-defence if she killed her husband, but that the old common laws have changed. There is no Australian jurisdiction now that requires a person to have been defending themselves in a fight, in order to rely on self-defence laws.³⁵ Moreover, husbands commit a crime when they assault or rape their wives and marriage is based on concepts of mutuality not hierarchy. However, what do these rule changes mean? In this section we examine the court documents in *Western Australia v Liyanage* again to demonstrate that, despite these rule changes, paradigms or interpretive schema, relied on in the old common law to understand self-defence, marriage and violence, are still operative.

In Part One we documented the tactics of coercive control Dindendra used against Chamari, including isolating her from those around her, micromanaging her behaviour, using extreme violence, including sexual violence, and also repetitive violence to enforce compliance. In this section we look at three aspects of the State's case against Chamari's claim of self-defence against the non-imminent harm in Dinendra's IPV:

1. Through lack of legal clarity, a failure to adduce substantive evidence and an implicit assumption that "self-defence" and "relationship" are dichotomous concepts, the State's case against Chamari was essentially limited to a case relating to *imminent* harm, of the kind that arises in a fight.
2. Through characterisations of Dinendra's sexual conduct, obfuscation of the State's position with respect to that conduct and the structure of its case theory in both trial and sentencing, the State's construction of sexual *violence* against Chamari as *marital sex* can be seen to have survived the abolition of the rape immunity rule.
2. The State's case failed to "code" the status hierarchy in Chamari and Dinendra's marriage as violence. In this way a de facto marital unity principle underpinned the trial.

In these three ways it can be seen that in spite of law reforms the State failed to address Chamari's claim of self-defence against non-imminent threats of harm, and in that failure, failed to disprove self-defence.

8.1 The State's case – anchored to the "fight" paradigm of self-defence

Chamari raised self-defence in two discrete ways. She claimed she had the required, relevant beliefs when she killed her husband because:

- a. she may have been defending herself against a physical attack from him when she killed him; and/or
- b. she was defending herself against non-imminent harm from her husband — the ongoing IPV he was continuing to perpetrate on her.³⁶

Although the State recognised of course that self-defence against non-imminent harm is included in s. 248(4) of the *Criminal Code* (WA), the structure of its case was anchored implicitly to the old common law limitation, that lethal force is confined to the context of a "fight".³⁷ This can be illustrated in three ways in the State's opening address.

8.1.1 The State's case – an unclear case against non-imminent harm self-defence

To restate: two key elements of self-defence (where lethal force was used) are that the person believed on reasonable grounds that they:

- i. needed to defend themselves against lethal or very serious imminent or non-imminent harm; and
- ii. had no reasonably available means of averting the threatened harm except by doing as they did.

³⁵ The Western Australian self-defence provisions enacted in 2008 are uniquely worded among the Australian jurisdictions, drafted to include an additional objective requirement. This drafting elucidates the issues discussed here (Tarrant, 2018) but does not affect them substantively.

³⁶ Chamari had no recollection of these events, although she did have "dreams" or "flashbacks" in which something was flying at her and there was a damaged can at the scene of the crime.

³⁷ The focus of the discussion in this Part is on the prosecutor's case, however, "State" is used, rather than designating particular participants in the trial process, to emphasise the collective responsibility of the State to try Chamari, whether through the role of prosecutor, including through expert witnesses, or the court.

With respect to this law, the State's case relating to Chamari's claim to have acted against imminent harm from Dinendra (the possibility there had been a physical attack on her on the night) was structured with clarity and precise evidence was indicated to disprove elements of self-defence. On the other hand, the State's case with respect to non-imminent harm self-defence (that Chamari was defending herself against ongoing IPV) was unclear: both in how it related to the legal elements of the defence and what evidence was relevant to each element. With respect to imminent harm self-defence, the prosecutor said:

...the blood spatter that was identified in the bedroom... the State says...will establish that the deceased man was on the bed, horizontal...And so the State says that the irresistible inference that you can draw....Is that he was at least horizontal. (Tr p. 230)

That there was evidence of two blows indicated he was probably asleep, and:

Dr Liyanage was taken to the police station and photographed and she had no injuries....the state says those two factors involved, in other words, the positioning of the deceased plus the no injuries to Dr Liyanage, proves that this was not done in self-defence there for an immediate threat. (Tr p. 231)

On the basis of this evidence, "the State says that he had done nothing to cause Dr Liyanage, at that time, to have a belief that it was necessary to do this" (Tr p. 231). This outline of the State's case was followed by very extensive, meticulously prepared and presented evidence during the trial from numerous experts.

The State's case against Chamari's claim of non-imminent harm self-defence was far less clear. After his explanation of the State's case against imminent harm self-defence the prosecutor did not use the term "self-defence" at any point in his opening address, but asserted seven times that the State's case was that it was "unnecessary" or "totally unnecessary" for the defendant to have killed her husband. It is "asserted" because the statements were not made by reference to the elements of the law of self-defence or connected to how the State would prove the proposition on the evidence. It is not essential that the State use particular terms in its explanation,

but its presentation must in substance be structured by reference to the specific elements of the defence and relevant evidence.

In his opening address (Tr, 225-236), immediately after setting out the State's case with respect to the "fight" context of self-defence, the prosecutor reintroduced an issue unrelated to self-defence (its case that it was Chamari and not someone else who killed the deceased). Then the first comments that presumably related to the State's case that Chamari had not defended herself against non-imminent harm, were as follows:

From Ms Liyanage's [diary] and the record of interview, you may find that her husband was not a particularly nice person. You may accept what Dr Liyanage says about him, but I would urge you to consider the evidence very carefully on that point....But the issue the State says that is paramount here is that nothing that the deceased did made it necessary for Dr Liyanage to kill him. It wasn't necessary for her to kill him. (Tr, p. 231)

As defence counsel stressed, that a killing was "necessary" is not a legal element of self-defence; once self-defence is raised the State is required to *disprove* a person's *belief on reasonable grounds* they needed to act as they did (Tr, p. 237). Moreover, it is unclear what legal principle(s) the prosecutor meant to refer to. Was the State's case that it was unnecessary for Chamari to kill her husband because there was no non-imminent harm (equivalent to its case relating to the "fight" context)? Or would the State prove that, although there was non-imminent harm, it was not sufficiently serious to found a reasonable belief in the need to *kill*? Or was the State's case that it was unnecessary to kill because the defendant had other reasonably available non-violent means of averting very serious harm? Neither this first statement, nor subsequent passages, made this clear.

Considering the prosecutor's address more generally, with respect to the first of the two main questions required to be determined by self-defence (whether the defendant believed, on reasonable grounds, she was in very serious danger), at different places in the opening address the prosecutor implied that the State's case was that Chamari was lying about having any such belief at all:

You will need to look carefully at the evidence of the allegations that Dr Liyanage makes against the deceased man, because the State says that if you have a motive to kill someone and...if you come to the decision that you're going to kill your husband, then, after the event it's unlikely that you're going to say very nice things about him....It's a credibility issue. (*Tr*, p. 231-2)

In other places the State's case was that Chamari may be believed: "That doesn't mean that those things that are said are untrue" and "that doesn't mean that those issues didn't exist" (*Tr*, p. 232). At other places the State's case appeared to be that Chamari could be believed insofar as she said her husband harmed her, but the harm was not serious: "you may find that her husband was not a particularly pleasant person", and he "engaged in sexual practices which may be regarded as unusual" (*Tr*, p. 227). The shifting and ambivalent statements by the State with respect to the existence and seriousness of the threat of harm Dinendra posed to Chamari meant that the State did not state its case on either of the two aspects of this first main requirement of self-defence — the defendant's "belief" as to the violent threat, or the "objective existence" of reasonable grounds for such a belief.

Moreover, it followed from the State's case being unclear that it was also unclear what evidence the State would bring with respect to this requirement of the defence. In contrast to the extensive and systematically arranged evidence relating to the imminent harm self-defence case, for the non-imminent harm case the prosecutor referred to evidence from people who had known the defendant in these terms: "the State says that the evidence will say that no-one that had regular contact with Dr Liyanage ever suspected that there were any issues that she complained of" (*Tr* p. 232). We have shown in the analysis of the transcript in Part One, section 2.2.1 that this was not true, that a number of people who had contact with Chamari suspected or knew she was in trouble but for different reasons did not act on their knowledge, or actively supported what they thought was Dinendra's entitlement to abuse her, as her husband.³⁸ The further point made here is that the evidence the State pointed to was logically incapable of proving its case. The non-existence of knowledge of intimate violence on the part of those not in the intimate partnership

is incapable of disproving its existence (as the prosecutor appears to acknowledge at the end of the trial) (*Tr*, p. 1335, 1337). This would be so, logically, with respect to any sort of fact but it is clearly so in this context. The high likelihood of people around a woman who is experiencing IPV not being aware that it is occurring or not acting on suspicions is very well established, including (or especially) in cases where the IPV is very serious and includes intimate partner sexual violence (IPSV) (Australian Law Reform Commission (ALRC) & New South Wales Law Reform Commission (NSW LRC), 2010, p. 1113; Ansara & Hindin, 2010a; Cox, 2015; Queensland. Crimes and misconduct commission, 2003, p. 12; Messing, Thaller & Bagwell, 2014; Larcombe, 2017, p. 145-146; Outlaw, 2015; Ombudsman of Western Australia, 2015; Pain, 2014; VGRCFV Ch 12, 2016). The experience of IPSV is associated with the highest degree of shame Messing et al., 2014) and with very severe and lethal IPV (Campbell, 2003; Dobash & Dobash, 2007; Messing et al., 2014). It is less likely to be revealed (Cox, 2015) and is a form of IPV that is least inquired about by helping professionals (VGRCFV Ch 12, 2016).

In this context, apart from the evidence that "no-one that had regular contact" with Chamari suspected there were "any issues" (*Tr*, p. 232), it is unclear what other evidence the State proposed to bring, though it brought the expert psychiatrists' evidence during the trial.

The State's case with respect to the other main requirement of self-defence, the defendant's belief on reasonable grounds that she had no reasonably available non-violent means of ensuring safety, was stated as follows: "There were other options which she should have taken at the time. And one of those options was just simply to leave him". The prosecutor gave no indication of what evidence would be brought to prove this part of the State's case, what the other options were that it was implied existed, or how it would be proved that those other options were also reasonably available to Chamari. The opening address as a whole suggests that one way the State may have intended to prove that Chamari could reasonably have secured safety was by proving the abuse the defendant said she suffered from her husband did not occur or was not serious. This would amount to relying

38 Above, Part One, section 1.2.2.

on the first of the main self-defence questions; that is, a case that — she could simply have left because there was minimal and unconstraining violence.

However, the prosecutor was not, or was not only, relying on the first legal requirement of self-defence. He said:

“But even if you find all of that evidence is substantiated, in other words, even if you find that Dr Liyanage was in a highly abusive, manipulative relationship, the State says it was not necessary for her to kill her husband” (*Tr*, p. 232).

In this statement the State is proposing something beyond the first element because, in seeking to prove the killing was “not necessary” even if Chamari faced very serious harm, the State was promising to prove that Chamari had reasonably available non-violent routes to safety in response to such very serious danger. Yet, the prosecutor gave no indication about any evidence that would be brought by the State to prove Chamari could reasonably have left, or had reasonably available to her any of the other unspecified routes to safety that the prosecutor had implied existed.³⁹ And as we have shown in Part One, no evidence was in fact brought throughout the trial about the availability of safety systems which Chamari could reasonably have accessed.

Thus, with respect to Chamari’s imminent harm self-defence claim — the form shared with the old common law — the State’s case was systematic and detailed. And, as would have been the case in the old common law as we have analysed it above, it was easy for the State to disprove this “fight” paradigm of self-defence in Chamari’s case. Just as wives subject to the old common law would have known they would be likely to lose if they fought their husbands, Chamari knew, at least from the time of the Kununurra attack in which she

fought back with all her might, that she would have lost a fight with Dinendra. In fact, she took steps to make sure that didn’t happen again. Chamari’s case was different from the old common law insofar as she could *raise* non-imminent harm self-defence. But the State’s case against this case of self-defence by Chamari was unclear, not constructed by reference to the legal elements of the defence and was asserted in parts without identification of evidence in support. The non-imminent harm self-defence case was unformed, as if the State did not have the conceptual tools to address the relevant beliefs and circumstances.

8.1.2 The State’s case – reasonably available non-violent routes to safety

Another way in which the State’s case can be seen to be anchored to the common law limitation to imminent harm self-defence (the “fight”) is in the State’s omission (as we have noted) to bring evidence in support of its case that Chamari had “other options” to achieve safety. It is remarkable that the State would seek to prove an element of its case without evidence, because this amounts to invoking a form of judicial notice: there were “other options” Chamari “should have taken” and “one of those options” was “simply to leave him” (*Tr*, p. 232). Later, the prosecutor said that in the face of a threat from her husband, “surely it would be out the door to the next-door neighbour’s house. That would be reasonable” (*Tr*, pp. 1362, 1361). However, realising that the State’s case was structured according to the “fight” paradigm of self-defence makes sense of this.

The need to show that a person did not have a reasonably available route to safety other than to kill when they killed, is a fundamental principle that underpins the moral (Thomson, 1991; Quong, 2009) as well as legal structure of self-defence. Moral permission to kill only arises when a person is trapped, and determining that she or he had no other reasonable alternative but to kill distinguishes between permissible self-preservation and morally “lazy”/culpable killings. Even if a person’s life is threatened, they have an obligation to apply effort to preserving themselves by non-violent means before violent means will be sanctioned. As discussed, Blackstone referred to the need to use “proper tribunals” (Vol IV, 1769, p. 184) where that is possible before *se defendendo* can be

³⁹ The State need only disprove one of the elements of self-defence. This is because it is necessary that a jury find there is a reasonable doubt with respect to every element of the defence for it to be successful. However, it was not logically possible for the State to disprove a defendant’s belief on reasonable grounds that she did not have reasonably available to her non-violent means of averting the injuries she believed she would suffer, without making clear its case with respect to the defendant’s belief about the injuries she believed she would suffer. That is, the question of whether non-violent means were reasonably available *necessarily entails* the question of the existence, nature and seriousness of the violence which the State seeks to prove could reasonably have been avoided, and which was the basis of a defendant’s claim of self-defence.

invoked. The old common law's proxy for determining this fundamental assessment, about whether a person had applied reasonable effort to find a non-violent route to safety, was a requirement to "give back" where possible, until a "hedge or wall" prevented further escape: to run away. This proxy for determining whether a person had applied sufficient effort to preserve themselves in a non-violent way before resorting to lethal force is appropriate in the context of a fight. And the simplicity of the demand may make it possible to assert that a person had made insufficient effort (to run away), without substantive evidence to prove that assertion. That is, "common sense" might well be applied. But the proxy-running-for-one's-life is not capable of determining the necessary, fundamental moral and legal inquiry as to whether a person has applied sufficient effort to preserve themselves in non-violent ways before resorting to lethal force in the case of non-imminent harm in the form of IPV. Indeed to apply this proxy renders non-imminent harm self-defence non-existent because it is virtually *always* possible to "run for one's life" in this sense from a person who is sleeping or otherwise engaged. This was the "obviousness" underpinning the prosecutor's statement of the State's case: "just" "leave". Different conceptual tools (more complex than the proxy relevant to the "fight" context of self-defence) are necessary, and evidence will be required.

Thus, the State's case mixes up imminent and non-imminent harm concepts. Speaking of "leaving" Dinendra, the prosecutor was clearly in the province of *non-imminent* harm self-defence; "leaving" a "relationship" in which Dinendra was perpetrating ongoing IPV against her. But the prosecutor's paradigmatic assumption that the State need not bring substantive evidence to *prove* that Chamari could reasonably have found other routes to enduring safety, and that it could rely on "common sense" that that was so, was an implicit reliance on the old common law proxy (running away or "giving back" — "out the door to the next-door neighbour") for this legal requirement. The concept of "just leaving" is relevant for determining reasonable moral commitment and practical effort in the face of imminent harm but not non-imminent harm.

8.1.3 The State's case – pitting "self-defence" against "relationship"

The prosecutor expressly pitted the concepts of "self-defence" and Chamari's "relationship" against each other, in a way that accurately reflected the State's case. Immediately following the passage quoted above in section 8.1.1., which concluded the prosecutor's summary of the State's case against Chamari's claim of imminent harm self-defence (the State's "fight" case), the prosecutor states that its case in *answer* to "self-defence", is all about "relationship":

...in other words, the positioning of the deceased plus the no injuries to Dr Liyanage, proves that this was not done in self-defence there for an immediate threat. And that brings you back to the reason [the killing] occurred was because of the relationship issues. (*Tr*, p. 231)

Here, the State constructs a dichotomy between its self-defence case and Chamari's "relationship" (her marriage) — which encompasses the State's case of murder, as if a conceptual move to "relationship" is an *answer to* self-defence. But Chamari's "relationship", her marriage, *embodied* her non-imminent harm self-defence claim. This is a reflection of the same assumed incommensurability between "self-defence" and marriage which underpinned the old common law. Moreover, the oppositional relationship between "self-defence" and intimate "relationship" in these passages was not merely a matter of expression; it reflected the structure of the State's (as discussed, for example, in the previous section). The implicit assumption in this structure is that self-defence occurs *outside of* an intimate relationship.

8.1.4 The State's case – summary

Thus, although the State obviously did not contest the legislative recognition of self-defence against non-imminent harm, its case against Chamari's claim of self-defence was anchored to the common law schema of defensive force in a sudden fight. Its case against imminent harm self-defence was precise and systematically arranged by reference to the elements of self-defence. Its non-imminent harm self-defence case (a framework not recognised in the old common law) was unformed, as if the conceptual tools for arranging its case were unavailable to the State. The State's omission to

bring evidence to prove its case with respect to Chamari's belief about any non-violent routes to safety is remarkable by reference to her non-imminent harm self-defence claim, but makes analytical sense when it is seen that the State's case was based on a perception of defence within a fight. And that the State pitted Chamari's marriage *against* her claim of self-defence, when her marriage *contained* her claim of non-imminent harm self-defence, is explicable as a version of the assumed incommensurability between "self-defence" and "marriage" which underpinned the old common law.

8.2 The State's case in *Western Australia v. Liyanage* relating to Dinendra's sexual conduct

As we have shown in Part One, sexual violence formed a major part of Chamari's non-imminent harm self-defence claim. Chamari gave detailed evidence about Dinendra's sexual conduct, both in a record of interview with police and oral testimony. And substantial evidence of the deceased's "pornographic" images and videos was given by an expert called by the State about encryption and the use of laptops for sexual activity. Yet, despite its presence in the trial as fact, the deceased's sexual conduct played little or no legal part in the case against Chamari as *violence*. In this way the State's case implicitly repeated assumptions that underpinned the old common law rape immunity rule. This is illustrated in four aspects of the State's case.

8.2.1 Language and characterisation of sexual conduct

We have shown in the analysis of the court documents in Part One how Chamari's evidence of sexual torture was characterised in the State's case as, for example, the deceased's "unconventional and impersonal sexual behaviour", "sexual practices she did not like" or conduct that "may be regarded as unusual" and "unpleasant" (Tr, pp. 226-7, 232). In making these characterisations the State simply re-stated the defendant's evidence in terms that extruded the use of violence against her. In some parts of the trial (but not all) the State argued by implication (and occasionally expressly) that what the defendant claimed to have occurred did not

occur. But credibility is different from the point being made here. The point about re-characterisation of evidence is that the State asserted a "different point of view", as it were, but without acknowledgement of difference. That is to say without contest, but by restatement.

The State's process of characterisation makes its constructions of the conduct unavailable for analysis and debate, and protects the State from an obligation (discursive, moral and legal) to justify its construction. In doing this, therefore, the State is side-stepping, rather than registering and contesting, Chamari's claim of sexual violence by her husband. This is the same mechanism as that of the rape immunity rule: the claim to an experience of sexual violence by a wife went unregistered by means of an asserted recharacterisation of the conduct as benign, something other than violence, and culturally coherent.

8.2.2 Obfuscation of the State's position on Chamari's account

The State's main case against Chamari was its case of murder based on "motive": Chamari killed her husband because she was jealous of K. This case depended squarely on the untruth of Chamari's account of her husband's sexual conduct towards her. Despite this, in many places the State's contest to that account was implied, not expressed, and in a number of places the State accepted the truth of Chamari's evidence about the deceased's sexual conduct. However, these acceptances were fleeting or obscured such that the State's position with respect to the defendant's evidence was obfuscated. An example of this occurs in the State's closing address (Tr, 1329-1367). Referring to Chamari's evidence that the deceased had forced her repeatedly to perform sexually in front of Skype cameras and that he had raped her when she resisted watching child sexual abuse on laptops in their bedroom, the content of the prosecutor's statement was an acceptance that this could "possibly" have happened. However, this acceptance was buried in discourse about who had operated the laptops, concepts about the jury's right to decide for themselves and a conclusion that it "probably doesn't matter":

Dr Liyanage says she was forced to do that [perform sexually in front of Skype cameras] and the evidence is that someone was driving those machines at the time.

She says it was the deceased and the State can't disprove it was or it wasn't. The State just doesn't know who was driving the machines and neither do the experts. You will remember even [the electronics expert] yesterday couldn't say who was behind the account "Dine". But you may think, well, if the account is name[d] Dean and it's on a device that is usually operated by Dinendra who was also known as Dine, then it may have been Dinendra or was probably Dinendra that was driving the device.

It's a matter for you. But remembering that's [*sic*] it's not a conclusion that is necessarily beyond doubt. But it's one of those issues which a jury has to deliberate over and apply common sense. And if you come to the conclusion, well, "we don't know", the State would say, in this regard, it probably doesn't matter in relation to the Skype sex chatting. Because Dr Liyanage says she was forced to Skype chat and it's quite possible, if not entirely within the realms of possibility in this case, that that was happening. (*Tr*; p. 1348)

In this passage the State accepts Chamari's evidence of forced sexual conduct. But its acceptance is faint, ambivalent and unclear ("it's quite possible, if not entirely within the realms of possibility") and it is obscured by details about a question that "probably doesn't matter" (who was driving the laptop). The acceptance is also obscured by rhetoric about the jury's right to decide. It is the jury's right to decide questions of adjudicative fact where the existence or weight of a fact is in dispute, but it is not the jury's right or task to decide what the *State's position* is about a question of fact. Uncertainty about the existence of a fact is quite distinct from obscuring one's position. The effect of this illustrative passage (see, also, e.g., *Tr*, pp. 234-235, 1337, 1358.) is that the State's position with respect to Chamari's evidence was obfuscated — the State neither clearly accepted nor clearly denied the evidence of extreme sexual violence. This process, even as it contained an acceptance of the fact of sexual violence, rendered that acceptance meaningless in the trial.

Moreover, to stress, this is not a matter of mere lack of clarity in the prosecutor's address; it is a matter that goes to the legal substance of what occurred. The State's obfuscation meant that acceptance by the State of the facts of sexual violence

against Chamari was rendered meaningless in law because of the constructed confusion. This is more than to say the violence was minimised through confusion and distraction ('sex-Skyping' rather than sexual assault). It is to say that the legal questions that would have *followed from* a State's plain acceptance of the existence of sexual violence against a defendant facing a homicide charge in answer to which self-defence is raised are truncated. These are the questions that need to be answered in any claim of self-defence:

- What did the defendant actually believe about the danger they were in?
- Were there reasonable grounds for a defendant's belief that they were in *very serious* danger?

Thus, although this is not explicit, as was the rape immunity rule, the mechanism is the same. An immunity from prosecution for rape was composed of an acceptance of the factual possibility that a wife could be raped by her husband, but evidence of that fact was diverted from sounding in law.

8.2.3 The State's case theory

Another way in which it can be seen that evidence of Dinendra's sexual conduct played little or no role as violence can be seen in the State's case theory. As we have explained, the State's main⁴⁰ case theory was that Chamari was jealous of K's sexual relationship with her husband, and wanted to keep her marital relationship with him.

The State's theory was therefore all about Dinendra's sexual conduct, and Chamari's marriage to him, but it takes no account of any of Dinendra's sexual conduct as *violence*. Again, as with the State's recharacterisations of evidence of sexual violence discussed above, the analytical form of the State's case theory does not contain a contest about Dinendra's sexual violence, either its occurrence or severity; rather it was one in which the very idea of sexual violence was put to the side and rendered "invisible". The form of the State's case was that the relationship (including marital

⁴⁰ In its opening address the prosecutor named various "motives" Chamari may have had—concern that her husband's sexual relations with K would jeopardise her own career, jealousy of K, and jealousy of her husband, because she wanted a relationship with K. By the end of the trial the State's case theory was that of jealousy of K.

sex) with her husband was one Chamari was desperate to *keep*. There is no conceptual room in such a narrative for the sexual conduct of her husband to amount to violence (unless Chamari wanted sexual violence). Moreover, this case structure rested on the pinpoint concept of “motive”; on a singular proposition that Chamari lied, as a wife: she was jealous not frightened. In other words, the primary framework of this case theory relieves the State of doing anything other than establishing one pivotal proposition — that Chamari’s evidence of violence should not be believed. (And, as discussed the State challenged Chamari’s credibility through implication, recharacterisation and obfuscation of its position in many places rather than substantive contest to the truth of her evidence).

Therefore, similar to the common law rape immunity rule, the case theory was one in which any facts of sexual violence were absorbed into a legal framework that interpreted them as a marriage.

8.2.4 The sentencing judge’s sentencing rationale

The State’s case theory that Chamari killed her husband because of sexual jealousy of K was rejected by the jury.⁴¹ Chamari was sentenced for manslaughter on the basis that she acted to protect K. When sentencing Chamari the judge wrote:

You had a genuine concern...that the deceased wanted to go further and have a sexual relationship with the girl. You related to her because....what had happened to you as a naïve, albeit much older woman, was something that you saw happening to the girl. You were concerned that he would discard her, having had a sexual relationship with her, and destroy her life. (*Western Australia v. Liyanage* [2016] WASC SR 31, [18])

And, later:

I do take seriously the history of domestic violence and I accept that that was something that influenced your thinking. It influenced your thinking in this way; given what you know of the deceased you believed him when he

said he intended to consummate his relationship with the girl and that it would occur soon....that he would treat it lightly and discard her, possibly to her great detriment. Your own experience showed that he was a cold and manipulative and controlling person. (*Western Australia v. Liyanage* [2016] WASC SR 31, [31])

This account of Chamari’s experience is, similar to the State’s case theory, that she had been “discarded” after a “relationship” with her husband, a relationship which she would have wanted to keep. Moreover, it is the danger of being “discarded” that she acted to protect K from. The sexual conduct of the deceased towards the defendant, even as he is recognised by the sentencing judge to be a “manipulative and merciless abuser” [29], functions only as background experience which motivated Chamari to act in K’s interest in not being “discarded”. This is a simplistic and unrealistic rendition of the facts but the point here is more important. The deceased’s conduct *as sexual violence* towards Chamari (and predatory sexual behaviour towards K) is entirely extruded from this account.⁴² This means that the outcomes of Chamari’s trial, her conviction and punishment, contained *no registration of Dinendra’s sexual violence towards her*. The sentencing judge’s construction (and the State’s case theory) make it clear that, legally speaking, it is as if it never happened.

Thus, the State’s case relating to Dinendra’s sexual conduct put that conduct as sexual violence to the side of the trial through re-asserted characterisations of the conduct as minimal and non-violent, and obfuscation of its own position with respect to Chamari’s account of the conduct. And this “invisibility” (not registration and contest) of Dinendra’s conduct as sexual violence resulted in the sexual violence against Chamari by her husband playing no role *at all* in either the State’s case theory or the sentencing judge’s sentencing rationale. Although the rape immunity rule has been abolished, Dinendra’s raping of Chamari was “invisibilised” in a way very similar to the ways such violence against wives was rendered invisible in the old common law. And just as it did for wives at that time, this invisibilising undermined Chamari’s claim to the very violence that was the basis of her defence.

41 This is clear because Chamari was acquitted of murder and convicted of manslaughter.

42 Siegel (1996) makes this point in the context of the development of the chastisement rule. “Assertions about love and intimacy in a relationship [and here, jealousy] rhetorically efface the violence of sexualised assault” (p. 2205).

8.3 The State's case with respect to the status hierarchy in Chamari's marriage

We have said that in the old common law the status hierarchy of marriage was unperceivable as violating. Marital unity, a status hierarchy in which a wife submitted to her husband for protection, was the legal basis of the marriage relationship and therefore the subordination in a wife's role could not be conceived of as violence. Marriage is no longer a legal status hierarchy; almost all of the rules that made up the marital unity principle have been reformed, including the rape immunity rule and the chastisement rule,⁴³ and social mores have altered along with reform to legal rules. Conceptions of marriage have changed from authority and obedience to mutuality and partnership. The language of "intimate partnership" itself reflects a model of equality and mutuality, and gender neutrality. However, if a status hierarchy is a systematic arrangement which determines who has decision-making authority by reference to the role they occupy, status hierarchy as a basis for heterosexual marriage may survive a change in legal rules (Siegel, 1996, p. 2146; Stark, 2007, p. 197).

Dinendra's assumption of authority to decide for Chamari as well as for himself in his role as her husband was central to Chamari's claim of non-imminent harm self-defence. Yet the State's case in *Western Australia v. Liyanage* failed to perceive the status hierarchy in their marriage as violence. This can be seen in two ways. First, in some respects the State's case denied Chamari's marriage was a status hierarchy at all and, second, insofar as it recognised a relationship of dominance and submission this was characterised as an aberrant marriage, not itself a form of violence against which a person might defend themselves.

8.3.1 The State's case – denial of a status hierarchy

A status hierarchy in which a husband assumed the superior role was how marriage used to be structured as a matter of law but this was also how Chamari and Dinendra's marriage was structured.⁴⁴

- Dinendra (a husband) decided that he would have access to his wife's emails, phone and other correspondence throughout their marriage and had access to those things. Chamari (a wife) did not make that decision.
- Dinendra (a husband) decided his wife would not have access to his emails, phone and other correspondence throughout the marriage and she did not have access to those things. Chamari (a wife) did not make that decision.
- Dinendra (a husband) decided he would control both his and his wife's money during the marriage and he did control that money. Chamari (a wife) did not make that decision.
- Dinendra (a husband) wanted anal sex and decided he would have it with his wife. Chamari (a wife) did not make that decision.
- Dinendra (a husband) wanted his wife to inform him where she was when leaving a place and arriving at a destination and told her to do that. Chamari (a wife) did not make that decision.
- Dinendra (a husband) wanted to have sex with girls from 16 years old and women and decided his wife would work for him to achieve that want. Chamari (a wife) did not make that decision.
- Dinendra (a husband) wanted his meals cooked in a certain way and decided his wife should do that for him. Chamari (a wife) did not make that decision.
- Dinendra (a husband) wanted to determine who his wife socialised with and who had sexual access to her and he decided those things. Chamari (a wife) did not make those decisions.
- Dinendra (a husband) wanted his wife to abide by terms of separation and decided what those terms were. Chamari (a wife) did not make those decisions.

⁴³ As noted above, section 7.1, remnants of this principle remain. In some circumstances parties to a marriage are not compellable to give evidence in criminal proceedings and the "special wives equity" (*Garcia v. NAB*, 1998) protects wives giving guarantees in some circumstances.

⁴⁴ See above, section 7.2.1.

These examples demonstrate where the decision-making authority lay in Chamari and Dinendra's marriage and includes only lawful activities, or activities that are not necessarily unlawful.⁴⁵ Systematically (not exceptionally) Dinendra, as a husband, made decisions about primary facets of life, such as money, sex and human society.

We have suggested that in the old common law a wife submitting to her husband's authority will tend to be perceived as a person being a wife because submission to him was expected and constituted that role, and perception followed those expectations. The same will be true of perceptions of heterosexual marriages today where a husband has systematic decision-making authority where the exercise of that authority accords with our cultural expectations about gender (Guerin & de Oliveira Ortolan, 2017; Naffine, 1996).⁴⁶ A status hierarchy may be "invisible in plain sight" (Stark, 2007, p. 14). Submission and authoritative decision-making will tend to be perceived as marriage to the extent that it resembles a normal arrangement, for example, if the husband handled the finances, the wife cooked and performed the menial household chores, the husband was sexually "adventurous", the wife sexually "reserved". Where this is so, even the existence of a status hierarchy will be difficult to perceive. Thus, although Dinendra's exploitation was unusual, their marriage was not unusual in being based on this kind of status hierarchy.

In some aspects of its case, the State's position was that Chamari and Dinendra's marriage was not based on a status hierarchy. As our analysis in Part One demonstrates the State's case was that Chamari was free to choose, to stay in a relationship with Dinendra or leave. Key to the State's proposition that there was no status hierarchy in Chamari and Dinendra's marriage was that Dinendra changed the internet provider account into his name because Chamari wanted him to. But the State failed to register that this was a capitulation which reversed Dinendra's own decision that his wife's name would be associated with materials he decided to access via the internet. Chamari in this marriage did not decide who would have access to her own email, phone and

other accounts, or who would have access to her husband's email, phone and other accounts. She did not decide how much of her husband's money he would spend and on what, what kinds of sexual practices he would engage in, how he should cook meals for her, who he would socialise with and who would have sexual access to him. She did not decide she wanted to have sex with men and boys aged from 16 years old, or that her husband would facilitate her want to have that sex. Kuhn (1977) refers to the now familiar concept of a "thought experiment", the idea that an implicit assumption can be revealed by imagining a contrary configuration. The asymmetry in a marriage that can be unperceivable insofar as it conforms to normality can be revealed by a thought experiment that reverses the roles. Had the status hierarchy of the marriage been composed of Chamari performing towards Dinendra as Dinendra in fact performed towards her, and Dinendra *submitting to that conduct*, the status hierarchy is likely to have been more readily perceived.⁴⁷

In this aspect of its case, then, there was no abuse of Chamari based on Dinendra's controlling authority as a husband because there was no asymmetry in their intimate relationship at all.

47 *DPP v. Bracken* (2014) may be an example. Phillip Bracken was acquitted of the homicide of his partner on grounds of self-defence. Helen, his partner, had abused him over the course of their relationship. She had "rages" and belittled him frequently, including in front of others. An expert testified that men will tend to have an additional aspect of shame about being controlled or beaten by their female partner. Helen did not control Phillip's finances, though he worked for her, in a business she owned involving large transport vehicles. Phillip owned the house they lived in. Helen did not have normal access to Phillip's phone or other devices, though she snuck into them on a number of occasions to find out if he was "cheating" on her or using pornography. Helen did not inflict any sexual violence on Phillip, though some verbal abuse related to sex. Phillip had to do a lot of the cooking and was ordered about frequently in an aggressive way. The abuse included some physical hitting which the trial judge described as "low level". "Believe me, I've seen all levels, this is low level". (Trial Transcript, p. 802). Co-workers noticed bruises and asked about them and Phillip's family encouraged him to leave Helen because of the abuse she was perpetrating, rather than stay with him. Helen's violence and controlling behaviour was characterised as the result of her mental illness, described by psychiatrists and other medical witnesses, associated with alcohol abuse and linked to her having been sexually abused by her father for three years as a child.

45 And does not include any means by which the deceased implemented his decisions or maintained the status hierarchy against resistance integral to an entrapment analysis discussed in Part One.

46 See above, Part One, sections 2.1.1 and 2.2.

8.3.2 The State's case – status hierarchy unperceivable as abuse

In important ways, however, the State's case recognised Chamari and Dinendra's marriage as based on a status hierarchy similar to that of a marriage under the old common law. But it did so in a way that made the status hierarchy as *itself violating*, unperceivable. Through Psychiatrist Two, the State described the marriage as a distinct status hierarchy. Chamari had a "readiness to submit to the direction and advice and control of an authoritative male", a "tendency to comply [with] and placate a dominant male figure" and was "dependent and submissive" (Tr, p. 1290). Dinendra, in the relationship, was a "dominant figure who showed love and kindness, and [was]...at other times [frightening]" (Tr, p. 1293). "For everyone that has dependency needs, there's someone that has dominance needs" (Tr, p. 1304). In the State's case, therefore, this marriage could be said to have the same roles as comprised the paradigm of marriage in the old common law, and the same complementarity — the wife as submissive, the husband as authoritative.

But, as analysed in Part One, the State sought to explain the prior *reasons* for an "excessive" asymmetry explicable by individual "personality" or choice, rather than perceiving the occupying of a role of submission itself as being violated and the occupying of a role of dominance *as exercising violence* (see Part One, 3.2, 3.3).

Perception of a status hierarchy (that is, a systematic arrangement where authority is asymmetrical) *as violating* is the basis for understanding coercive control as conceptualised by Stark (2007) and in the entrapment model of IPV we have analysed in Part One.⁴⁸ Seeing the status hierarchy of a marriage *as itself violating* reveals the human rights dimensions of this form of violence and resistance to it (Pain, 2014, p. 129; Stark, 2007, pp. 165-167, 218-222). Realising its profundity makes the status hierarchy itself perceivable as a foundation for a claim of lethal self-defence. It is also very challenging because it requires revealing for scrutiny very deeply held cultural values. We may be more capable of perceiving such

status hierarchy in minority cultures⁴⁹ but the effect of this analysis is that the same is true of mainstream Australian society whose heritage is the old common law.

Just as in the old common law the incapacity to perceive a marriage status hierarchy as violence, has profound effects. It reverses a wife's claim that she used defensive force; her defensive actions become aggression. This can be explained as follows. In the absence of perception of a status hierarchy as itself violating, the status-quo is benign (perceived to be benign). Conduct that contests, or shatters, the status-quo can only be (perceived to be) pro-active aggression. The defendant's claim of self-defence *becomes* the State's case of violent murder. This is reflected in the State's closing address (Tr, 1329-1367) where its case that Chamari was the aggressor who murdered her husband was supported in this way: there was no sexual torture or escalating violence in the few weeks before the killing "*because* [Chamari] did what [Dinendra] wanted [during their holiday] in Sri Lanka" and afterwards. What Dinendra "*wanted*" was Chamari working for him to achieve his want to have sex with girls and women. There was *no violence*, the State, said *because* "[H]e was *getting his own way*" (Tr, pp. 1357-1358, emphasis added). If a status hierarchy is perceivable as violence, Dinendra "*getting his own way*" *was violence*. If a status hierarchy of submission and dominance is not itself perceivable as violence, a killing, erupting from a benign status quo, can only be aggression. (This would be like, within a "fight" paradigm where a person has a knife at their throat, interpreting their act of killing in order to break free as aggression *because they would not have been killed had they stayed still*, which we are not inclined to do).

Thus, the status hierarchy that defined Chamari's marriage, in which her husband occupied a role of dominance and she as his wife occupied a role of submission, was in parts of the State's case denied and in other parts recognised but by way of a paradigm of relationship that made that status hierarchy impossible to perceive as itself violating. On the contrary, it was Chamari's "excessive submissiveness" that explained the existence of a status hierarchy that itself remained beyond perception as an experience of violence. But the violation in occupying a role of intimate submission, along with the sexual violence discussed in the previous section, were two

⁴⁸ This is the sense in which coercive control is a liberty crime (Stark, 2007).

⁴⁹ See above, Part One, section 2.4.

of the very foundations of Chamari's self-defence claim. That is, both these forms of violence (which are not discrete) were integral to her claim that she believed on reasonable grounds she needed to kill her husband to defend herself from the violence he was perpetrating on her, and that her response was reasonable. Thus, in not exactly the same way, but similarly, Chamari and Dinendra's marriage and

their roles within it were perceived by the State, as were the roles of husband and wife, in the old common law. Sexual violence was "invisibilised" as marital sex — this is a de facto version of the rape immunity rule embedded in the law of self-defence. And nowhere in the State's case did the gendered status hierarchy within their marriage register as *itself* violating — this is a de facto version of the common law principle of marital unity.

INFORMATION SUMMARY BOX 6

Continuing paradigms — *Western Australia v. Liyanage*

- Although rule changes have recognised that a person may act in lethal self-defence against "non-imminent harm", some of the same underlying assumptions of the old common law still operated in this case, making it difficult or impossible for Chamari's claim of self-defence to sound in law.
- The structure of the State's case was anchored implicitly to the old common law, where self-defence applied only in the context of a "fight":
 - The State's case against non-imminent harm self-defence was unclear.
 - The State mixed up concepts of escape applicable to imminent and non-imminent harm self-defence.
 - The State pitted "self-defence" against "relationship", when Chamari's claim of self-defence was contained in her "relationship".
- The State's case "invisibilised" the sexual violence committed against Chamari in ways similar to the mechanisms underpinning a husband's immunity from prosecution for rape under the old common law. Her claim that Dinendra had used extreme sexual violence against her did not sound in law.
- The principle of "marital unity" has been abolished but status-hierarchies similar to that which underpinned the old common law of marriage may persist. In parts of its case the State did not recognise Chamari's marriage as a status hierarchy and in other parts represented the status hierarchy as the result of Chamari and Dinendra's personalities. In these ways the status hierarchy in the marriage, and Dinendra's coercive and controlling behaviours towards Chamari, were rendered invisible as abuse.

Conclusion

Self-defence laws in the old common law were structured to reflect the expectations placed on men, around the need to protect against felons or to preserve oneself where mutual combat turned into a life-threatening circumstance and no reasonable opportunity to quit the fight presented itself. In the *se defendendo* excuse, which most resembles current self-defence laws, two of the mechanisms that distinguished these killings from murder were the suddenness with which a very serious threat arose and the requirement that, where possible, a person “give back” or run-for-their-life rather than kill. Without the suddenness of a fight and evidence of a physical barrier that prevented her running-for-her-life, any attempt by a wife to rely on the law of self-defence straightaway ran into concepts both of *calculated* killings and of a status killing (petit treason); these were not only not killings in self-defence, but especially heinous forms of murder.

Moreover, the laws of marriage, based on the principle of marital unity, were structured such that violence by husbands against wives was, though known of in fact, “unseeable”, culturally and legally, and therefore wives could point to no (or not “enough”) violence as the basis for a claim of self-defence. These paradigms, we have suggested, resulted in there being no perceivable construct of lethal self-defence by a wife against her husband. Without a clear concept of violence by a husband against a wife, rape by a husband against a wife or status-subordination as abuse, there was no real foundation for a claim of self-defence by a wife if in fact she had defended herself against these forms of violence. This is to say that the incommensurability between the “fight” paradigm of violence and marriage structures based on a status hierarchy of personhood, left wives unable to access the fundamental protections contained in the law of self-defence.

However, the old common law has been reformed. It is clear the current form of the law requires conceptualising the types of violence a wife can experience, so that the universal entitlement to self-preservation contained in the law of self-defence is available to her, just as it is to others.

Our analysis in the final section of this Part showed, however, that assumptions which shaped the old common law have survived these formal law reforms. The State’s case in *Western Australia v. Liyanage* was: (i) anchored to the “fight” paradigm

of self-defence; (ii) presented and structured so that sexual violence against Chamari was “invisibilised”; and (iii) failed to perceive the status hierarchy in Chamari’s marriage as itself abusive.

- i. One of the reasons conceptualising lethal self-defence in the absence of a “fight” is difficult is that the suddenness of an altercation serves as a very strong limitation on permissible killings. It draws a line in that paradigm between the few killings we would ever want to excuse and the calculated, deliberate killings we would not. The law that recognises non-imminent harm self-defence removes that constraint, and makes some killings in the *absence* of *sudden*, physical attack permissible. So it is a complex idea, that lethal force can be used in self-defence against non-imminent harm. If this law is to be implemented, it requires a reframing of understanding.

If the suddenness of a fight and a restriction to instances of physical violence are non-functional as limits in order to judge a wife’s claim that she defended herself with lethal force, what conceptual tools will allow those prosecuting, trying and judging her to determine whether or not she acted to preserve herself; whether she acted in self-defence or committed a calculated murder? We have shown in this Part that effective conceptual tools were not sufficiently developed or applied in *Western Australia v. Liyanage*, making it impossible for the law of self-defence as it applies to non-imminent threats of harm to operate properly.

- ii. We have noted that sexual violence against women in intimate partnerships is one of the most underreported forms of abuse (Cox, 2015; VGRCFV Ch 12, 2016), in part because of the very high degree of shame associated with it for victims/survivors (Messing et al., 2014) and also because it is one of the least inquired about by others (VRCFV Ch 12, 2016). Yet IPSV is one of the identified risk factors for eventual lethality in IPV (Campbell, 2003; Dobash & Dobash, 2007). It follows directly from this well established social knowledge that a woman’s claim that she defended herself against her partner’s sexual violence against her cannot be properly assessed as a matter of law in the absence of as thorough an understanding as possible of the nature of IPSV, both within its social contexts and within the particular circumstances of each woman.

Our analysis shows this was not the case in *Western Australia v. Liyanage*. The State's case engaged in re-characterisations of conduct, without explanation, as non-violent, and obfuscated its own position with respect to evidence of Dinendra's sexual violence (including any acceptance of the evidence). The obfuscation prevented the legal questions required by the law of self-defence which would have flowed from the acceptance of the existence of a threat of very serious violence, from being "heard" and properly addressed. And, (even without denying that Chamari had been threatened with sexual violence) the State implicitly structured its case theory and sentencing rationale as if Chamari had experienced no sexual violence at all.

- ii. Marriage as a status hierarchy that is a normal expression of heterosexual intimacy, so that a status hierarchy in which a husband is dominating his wife does not (or does not fully) "register" as itself abuse, has survived the abolition of the marital unity principle. In the absence of any perception of a status hierarchy within an intimate relationship as abuse, coercive and controlling behaviours will be, as Stark says, "invisible in plain sight". In as much as control by one person of another tracks the contours of a culturally normalised intimate relationship, the behaviours will not be seen or will barely register as acts that are in and of themselves IPV. In *Western Australia v. Liyanage* the State's case was constructed such that, even insofar as it recognised that Dinendra occupied a role of dominance and Chamari a role of submission, it failed to recognise that hierarchy itself as violence.

Our analysis makes it clear that understanding self-defence against IPV is not a straightforward task. But it is also clear that unless consideration is given to the cultural and legal assumptions we may be employing about IPV and realistic contexts of defence, it is not in fact possible to apply the law of self-defence in these circumstances. It is not only that the State's case in *Western Australia v. Liyanage* was anchored to a "fight" paradigm, invisibilised sexual violence and failed to recognise an intimate status relationship as abuse in line with the old common law. It is that, because of these features, the State did not discharge its obligation to prove that Chamari did not act in self-defence. The implicit assumptions and

analytical frames made it impossible for the violence Chamari claimed she was defending herself against to be perceived, making it impossible also for her claim to be disproved.

Moreover, if the State's case failed to disprove (because it failed to address) Chamari's claim of self-defence against non-imminent harm, it follows directly that there are problems in the justice process prior to the trial itself, for example, in the process through which a prosecutor goes to decide whether or not to prosecute. Consideration of the embedded assumptions about violence in the context of a marriage (intimate relationship) and a realistic knowledge of IPV are necessary not only for the construction of a case at trial but are integral to decision making prior to trial and throughout the justice process.

Conclusion

All Australian jurisdictions now recognise that a person can have acted in self-defence whether or not they were defending themselves from an imminent physical threat at the time of a killing. These reforms directly resulted from the recognition that the forms of violence experienced in a “fight” do not encompass the forms of violence experienced by battered women from their partners. However, legislative reform alone does not determine what law is applied in practice. Despite the law reform measures, cases in which such defendants are able to raise self-defence successfully are still uncommon in practice.

The suddenness of a threat and a requirement to literally run-for-one’s-life where possible are fundamental conceptual tools used in traditional legal process to distinguish a calculated murder or “unnecessary” killing from self-defensive force in the context of a “fight”. But different conceptual tools are required where violence is IPV, including IPSV and tactics of coercive control, because these are non-imminent and ongoing harms that include, but are not confined to the use of physical violence. Sexual violence and systematic domination in a status hierarchy relationship are forms of violence which have no counterpart in the forms of violence conceptualised as a fight.

The legal recognition that lethal self-defensive force may be used in a situation where there is no immediate physical confrontation reflects (and requires) a different “interpretative schema” for understanding what occurred and determining whether the defendant was reasonably using defensive force against very serious, extreme or life-threatening violence. The law reforms that have occurred therefore require complex reflection about the reality of violence inflicted and threatened in IPV and IPSV if a battered woman’s claim of self-defence is to be justly assessed. It follows that the theories of violence employed, and reliance on the best available knowledge in selecting what theory to use, matters.

In this report we have used the case of *Western Australia v. Liyanage* to model the presentation and interpretation of an IPV victim’s/survivor’s circumstances at the time she employed lethal force against her abusive partner using a “social entrapment” paradigm. We have done this in order to demonstrate that a “social entrapment” theory of IPV is

relevant to a proper assessment of whether her harmful act was a reasonable defensive response to the circumstances as she believed them to be, and whether she had reasonable grounds for her beliefs as to her circumstances — the questions required to be answered by the law of self-defence.

We have also suggested that the current use within the legal system of alternative and outmoded theories of violence that lend expert weight to the assumption that we have a well-functioning safety response for victims/survivors of IPV, if they would only choose to use it, automatically render the defendant’s use of defensive force unreasonable. Such theoretical frameworks preclude a proper consideration of the defendant’s self-defence case on the facts and undercut the legislative reforms that have taken place.

Where to from here?

We intend this report to function as an educational resource for:

- law students;
- police;
- prosecution and defence lawyers;
- expert witnesses; and
- judges.

In the report we suggest that conceptual shifts in thinking by multiple criminal justice decision-makers are required if the criminal defences are to be equitably available to primary victims/survivors of IPV and IPSV who use lethal violence in response to their experiences of violent victimisation. It is intended that this report be read by individuals and used in teaching and training materials to assist in shifting this collective thinking. Such paradigm shifts require intellectual/analytical *and* empathetic engagement on the part of all participants in the criminal justice process.

We make the following recommendations. Some address directly the collective shifts in thinking we believe are required, and others describe some of the measures that would support (and result from) those shifts:

1. All those who are involved in investigating, charging, prosecuting, defending or trying a woman who has killed her intimate partner should have developed an understanding of IPV as a form of social entrapment. That is, an understanding of:
 - i. the social isolation, fear and coercion that a predominant aggressor's coercive and controlling behaviour may have created in a victim's/survivor's life;
 - ii. the systemic safety responses that were realistically available to the defendant and whether these were likely to be effective in addressing the ongoing abuse she was experiencing; and
 - iii. how structural inequities associated with gender, precarity, race, age, disability or other marginalised communities may have exacerbated the predominant aggressor's coercive and controlling behaviours and the systemic safety responses that were realistically available in the circumstances (see Part One: 1.2; 2.).

IPSV is often a significant but unseen and misunderstood aspect of IPV. Therefore, particular focus should be given to the role of IPSV in IPV (see Part One: 1.2; 2.1; 2.4; 3.4 and Part Two: 8.1; 8.2.).

2. In order to implement Recommendation 1, education in "social entrapment" should be provided to all those involved in the justice process, including:
 - police interviewers and investigators;
 - prosecution lawyers;
 - expert witnesses;
 - defence lawyers; and
 - judges.

The question in the law of self-defence as to whether or not a person's defensive response to the violence they faced was "reasonable" requires a different conceptual framing and different kinds of evidence depending on whether the person was defending themselves in a fight or against ongoing IPV.

In considering whether the State has sufficient evidence to prove beyond reasonable doubt that a woman's defensive action against IPV was not reasonable, a prosecutor, before laying a charge or in the preparation for a trial, and a trial judge at the end of the presentation of the State's case, should give particular consideration to whether or not the State has sufficient substantive evidence to prove that the woman could have accessed services or other means that would have realistically provided enduring safety from very serious harm or death, in her particular circumstances.

Serious harm should be understood as including rape and other forms of serious sexual violence (see Part One: 1.2, 2.1, 2.2 and Part Two: 8.1, 8.3).

3. Where a case proceeds to trial, the prosecutor, on behalf of the State, must make the State's case clear and unambiguous on the evidence and use accurate understandings of IPV with respect to each legal element of a woman's claim of self-defence.

In particular, where the State accepts that IPV, including IPSV, was perpetrated against the defendant, that acceptance must be communicated with clarity to the jury, and the State must make it clear to the jury how that acceptance relates to each legal element of self-defence (see Part Two: 8.1; 8.2.).

4. Where a case proceeds to trial, the trial judge should meet her or his duty to oversee the trial process by ensuring the State's position with respect to evidence that IPV, including IPSV, was perpetrated against the defendant by her intimate partner, is made clear to the jury. The trial judge should ensure that the State makes its case clear with respect to each element of a woman's legal claim to self-defence.

The State's position on both these points should be reflected in the trial judge's summing up to the jury (see Part Two: 8.1; 8.2.).

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LEGISLATION

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Appendix A:

Literature review

Transforming legal understandings of intimate partner violence

This literature review examines how intimate partner violence (IPV) is understood in social science research. It aims, first, to assess whether the understandings of IPV reflected in the criminal justice system, in homicide cases, are consistent with understandings of IPV in the social sciences, and second, to contribute to the development within the criminal justice system of fuller, more complex understandings of IPV.

Research question

- How is intimate partner violence (IPV) understood in social science research?

Method

The literature review used a repeatable search methodology to review social science sources, supplemented with other key sources and relevant grey literature.

The review began with a search of two academic literature databases, EBSCO and Scopus, with parameters set for literature in the social science field published in English from 2008-2018 (see Table 1). The parameters were further limited by jurisdiction to include publications from the United States, the United Kingdom, Canada, New Zealand and Australia. After an initial return of 1494 results across the two databases, a manual review of titles and abstracts was completed to exclude irrelevant or duplicate publications. After this process, a total of 201 results remained for review. Grey literature was then added to the review from relevant sources, and a small number of other key sources, most of which were located through backward citation searches to include key sources published before 2008, such as: Campbell (2003); Dobash and Dobash (2004, 2007); and Stark (2007). Further research about Aboriginal women's experiences of family violence was also included. These resources were scoped outside of the two databases (EBSCO and Scopus) due to database limitations (see note below).

No review can do justice to the research about, or experiences of, IPV in all contexts. The use of lethal defensive force occurs in a range of family and intimate relationships. This project aims to further understanding of the use of force in intimate adult heterosexual partnerships. For this reason, the review excluded some publications retrieved from the database searches which focused on:

- children, youth, adolescents and college students in non-intimate relationships;
- medical issues such as HIV/AIDS and substance abuse, where it didn't relate specifically to intimate partner violence;
- the elderly and elder abuse;
- LGBTIQ+ relationships;
- educating and education of social workers;
- shelter programs and their reporting duties;
- policy development in jurisdictions other than Australia; and
- immigrant women too far beyond the Australian scope, such as Muslim women relocating to South-East China.

The literature retrieved included publications that focused on:

- theoretical overviews of IPV, including historical theoretical developments;
- the nature of IPV, including those that focused on coercive control or entrapment;
- indicators of high-risk (of serious injury or death), including non-fatal strangulation and stalking;
- women's use of violence, particularly those focusing on their use of violence as resistance;
- women's resistance to IPV and "help-seeking" strategies;
- the nature of harm suffered from IPV;
- why perpetrators commit IPV;
- the intersectionality between different forms of identity and disadvantage that determine experiences of IPV, and the interaction between individual experience and broader societal influences;
- IPV and immigrant women; and
- IPV and intimate partner sexual violence.

Table 1 Electronic Search of EBSCO and Scopus

Set 1:	theor* OR "nature" OR construct*
Set 2:	"domestic violence" OR "intimate partner violence" OR "family violence" OR entrap* OR "battered wom* syndrome"
Set 3: Set 1 AND Set 2	Limited to publications in English, published 2008-2018

Database Limitations

The two databases returned results with a jurisdictional focus on northern hemisphere research. This meant that very little Australian research was retrieved. Furthermore, very few results focused on Indigenous peoples and IPV and only one considered IPV in an Australian Aboriginal and Torres Strait Islander context. Finally, the databases searched included academic articles and book chapters but did not include reports by government and other key bodies. Given these database limitations, the review proceeded:

1. on the assumption that the database research from the United States, the United Kingdom and Canada about non-Indigenous women and men's experiences of IPV is likely to be relevant to non-Aboriginal Australians experiences of IPV; and
2. supplementing the database sources with literature on Australian Aboriginal women's experiences of IPV.

Key grey literature and targeted research report sources were:

- the Report of the Victorian Royal Commission into Family Violence (VRCFV) (2016);
- New Zealand Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015* (2016); and
- Cox, P., "Sexual Assault and Domestic Violence in the Context of Co-Occurrence and Re-victimisation: State of Knowledge Paper" (Australia's National Research Organisation for Women's Safety [ANROWS], 2015).

It is worth noting that the understanding of the phenomenon of IPV as separate from the social response to IPV, as well as the fact that the databases searched do not include government and other organisational reports, mean that this review does not include the voluminous literature in multiple jurisdictions documenting the failings of the systemic crises response to IPV. In other words, this literature review does not speak to the second tier of social entrapment as it is described in this report.

Review of literature

(1) Introduction

As was to be expected the literature covered a very wide field with respect to methods and aims and the contexts in which research was conducted. Some of the sources were in themselves theoretical accounts or surveys of theories and approaches, and many were empirical studies which discussed research findings in the context of general theories of IPV. Very often within the literature, researchers own understanding of the theoretical frameworks of IPV were evident either as the object of conceptual research or, in many cases, where research was situated within general theoretical frameworks. Those that situated their research described the general theoretical approaches to IPV in various ways, however basic distinctions were frequently drawn between theories that focused on:

- individual psychology or learning processes;
- family or community influences; and
- broader societal structures and influences.

For example, Ali and Naylor (2013a; 2013b), in a review of IPV research publications between 1990 and 2011, classified research according to "biological perspectives", "sociological perspectives" and "nested ecological framework theory". Gilfus, O'Brien, Trabold and Fleck-Henderson (2010) classified the "theoretical frameworks" of IPV as "Feminist Perspectives" and "Family Violence Perspectives". And Cox (2015) drew a distinction between the "individualised approach, which... tends to understand violence as an individual maladjustment that is expressed and influenced by interpersonal dynamics" and the "societal approach [which] tends to understand violence against women as an issue that, while always occurring in the context of individual choice and action, reflects macro social inequalities" (p. 16).

Many sources identified the need to incorporate understanding of multiple levels of experience of IPV, for example, studies framed explicitly as social ecological theories and others that focused on interconnections between the intimate and

private on the one hand and institutional and societal-level structures (including cultural constructs) on the other (e.g. Willie, Khondkaryan, Callands, & Kershaw, 2018; Guerin & de Oliveira Ortolan, 2017; Crichton-Hill, 2010; Morris 2009; Anderson 2009). Others promoted interdisciplinary approaches (e.g. Dobash & Dobash 2007, 2012). Crichton-Hill (2010) classified approaches to domestic violence as:

- “micro-oriented” (those which attempt to explain domestic violence as the result of individual characteristics);
- “macro-oriented” (those which “examine the social and cultural conditions in society that create and maintain domestic violence”); and
- “multifaceted explanations” (those which recognise that “no theoretical explanation on its own can sufficiently supply us with the answers to the question “What causes domestic violence?”).

We have organised this review in a similar way because the distinctions between “micro” and “macro” approaches, and those that take an intersectional approach, were evident in the literature overall. We look at research relating to:

- understandings of IPV based on individual psychology, inter-personal relations and family dynamics;
- understandings of IPV based on concepts of control and gender;
- severity of IPV; and
- intersectionality and context-specific approaches.

(2) Understandings of IPV based on individual psychology, inter-personal relations and family dynamics.

IPV perpetrators

A number of the studies in this category were designed to test the application of general psychological or criminological theories to the context of IPV. For example, Sween and Reynes (2017) applied Finkelhor and Asdigian’s theory of target congruence to IPV perpetration and victimisation, Hilton, Harris, Rice, Houghton and Eke (2008) applied general criminal risk assessment tools to IPV recidivism and Outlaw (2015) applied the “routine activity” theory in general criminology to IPV.

Research on perpetrators focused on the associations between childhood exposure to IPV, experience as victims/survivors of violence in childhood and the absence of secure attachment to a primary caregiver. Constructions of perpetration of IPV within the framework of psychiatric or psychological disorders was rare. An exception was the study by Hilton et al. (2008) which compared the effectiveness of general criminal risk assessment tools with IPV risk assessment tools, for effectiveness in predicting IPV recidivism. The authors found that the two sets of tools were similarly effective and that a psychopathy measure (the Hare Psychopathy Checklist) was the only tool that increased reliability in both sets of tools for predicting IPV (see also Ali & Naylor, 2013a).

Ruddle, Pina and Vasquez (2017), Brownridge et al. (2017) and several studies that relied on Bowlby’s (1998) attachment theory, are illustrative of the research that focused on individual or inter-relational characteristics of perpetrators. Ruddle et al. (2017) conducted a review of literature including research which shows that aggression in adults is more likely where they have been exposed to violence as children. They considered whether childhood exposure to domestic violence increases domestic violence perpetration in adult life due to the formation of implicit theories which might explain the “distorted beliefs that some individuals have towards their partners” (p. 158). Implicit theories are single statement abstract assumptions that, in this context, are assumptions formed in childhood to make sense of the domestic violence that is witnessed, and which in later life are applied to victims/survivors of IPV. Ruddle et al. (2017) argue that those who witness their mother being abused, for example, may consider women as weak and deserving of such treatment and thus form distorted implicit theories.

Ruddle et al. (2017) also consider whether rumination — that is, “having unwanted intrusive repetitive thoughts revolving on a common theme” (Ruddle et al., 2017, p. x) — is an effect of experiencing domestic violence during childhood. They argue that angry rumination has been linked with interpersonal aggression applicable to domestic violence perpetration because although an episode in which anger is experienced may last only 10-15 minutes, the rumination lasts much longer, inhibiting impulse control. Further, because children exposed to domestic violence are less likely to form

secure attachments to their primary caregivers, they are less likely to be forgiving of incidents that make them angry and angry rumination can culminate in implicit theories becoming stronger and more elaborate, leading to aggression towards partners.

Brownridge et al. (2017) suggest that social learning theory, that childhood exposure to violence denotes violence as an acceptable way to resolve conflict, may play a part in determining IPV risk. However they suggest that the alternative developmental model may be more appropriate. A developmental model suggests that exposure to violence may negatively affect the person's ability to regulate their behaviour. However, Brownridge et al.'s study focused on the correlation between Indigenous Canadians who experienced childhood maltreatment and their experience of IPV compared with non-Indigenous respondents. The study found that Indigenous children exposed to violence were 2-3 times more likely to experience IPV, and the authors conclude that this is consistent with Indigenous peoples' higher risk of IPV being the result of trauma associated with colonisation.

Several articles considered whether Bowlby's attachment theory (1998) accounted for later dysfunctional attachments in intimate relationships (e.g. Ali & Naylor, 2013; Lawson & Brossart, 2013; Park, 2016; Ruddle et al., 2017). Attachment theory posits that an infant/child forms a more or less secure attachment in early life with their primary caregiver, due in part to whether their needs and expectations are met, and that the quality of that attachment affects their development and ability to form functional attachments later on (Ali & Naylor, 2013a; Park, 2016). Researchers considered that similar attachments are present in romantic relationships as well as infant/primary caregiver attachments because common to both is physical intimacy and the response of grief to separation and loss, as well as an ability to affect physical and mental health. Johnson argues that aggressive responses are linked to intense attachment anxiety, an insecurity which is regulated by control and abuse of an intimate partner (Johnson, 2008; Park, 2016).

IPV victims/survivors

Other research constructed IPV in terms of individual experience and family of origin dynamics of victims/survivors of IPV. This was research on risk factors associated with a

person being victimised by IPV. No research interpreted risk factors as causes of IPV. In particular, studies examined the established risk factor of childhood exposure to IPV and childhood experiences of violence, including sexual abuse, for victimisation from IPV in adult life (Brownridge et al., 2017; Park, 2016; Ruddle et al., 2017; Vatmar & Bjorkly, 2008). For example, in Vatmar and Bjorkly's (2008) sample women who experienced sexual abuse as children by either parent or a parent's intimate partner were 25 times more likely to have been a victim/survivor of IPV in more than one relationship. In a review of literature on re-victimisation and co-occurrence of IPV and intimate partner sexual violence (IPSV), Cox (2015) found the research indicated a "moderate to strong" relationship between child sexual assault and IPV victimisation, and that the strength of the relationship "may be mediated by the extent of abuse experienced as a child" (p. 32), including the period of abuse, its frequency, nature and severity and if the perpetrator was known to the child.

Current research has moved away from understanding IPV in terms of the individual psychology of the victim/survivor, which constructs victims/survivors as responsible for their victimisation. However, there was critical research in the retrieved literature that reflected a concern that IPV is still sometimes implicitly understood in this way. For example, Lin-Roark, Church and McCubbin (2015) conducted an empirical study with 196 women living in domestic violence refuges, which tested theories that propose processes by which IPV can lead to a woman idealising or forming a "bond" with her abuser. The study results contradicted the hypothesis implicated by those theories that victims/survivors of IPV would hold a more positive view of their abusers than they held of themselves. The researchers concluded that the findings provide empirical evidence against theoretical proposals about women's idealisation of their abusive partners.

Sweet (2014) theorises, that the ways in which domestic violence is currently diagnosed within a biomedical frame continues to permit victim-blaming. In a review of medical literature she identified a "logic of injury" underpinning domestic violence diagnoses in the 1970s-1980s and a "logic of health" underpinning such diagnoses in the late 1980s-present. The "logic of injury" means a construction of domestic violence as physical harm that can be located in particular parts of a victim's/survivor's body. This approach permits victim-blaming

by linking injury to passivity. “[P]sychological passivity is clearly linked to acute injury: women allow themselves to be injured because of their pathological passivity” (p. 46). Sweet theorises that, although it is “no longer acceptable to pathologise abused women based on claims of “passivity”, the “logic of health”, which constructs the consequences of domestic violence as temporally extended and less physically definable, also permits victim-blaming.

This newer logic also compels a new style of victim-blaming that is based on “health” as a moral mandate to take care of oneself in a biomedically defined way. (2014, p. 48)

As noted, the database searches retrieved, overwhelmingly, studies relating to non-Indigenous experiences of IPV. Research on Aboriginal experiences of family violence generally does not focus on the individual psychology or interpersonal relations of perpetrators or victims/survivors, or on family dynamics (in the sense that non-Indigenous research focuses on the nuclear family of origin). Violence affecting Aboriginal families is studied within a broader family and community context and in association with wider issues of colonisation, poverty, health and social issues (Olsen & Lovett 2016).

(3) Understanding of IPV based on concepts of control and gender.

IPV understood as control by one person of another is prominent in the literature. This provided the theoretical framework or was the object of research in many sources. The concept of coercive control, developed by Stark (2007, 2009) and Johnson (2008b) and colleagues, was often relied on (e.g. Anderson, 2009; Eckstein, 2017; Hamberger, Larsen, & Lehrner, 2017; Lehmann, Simmons & Pillai, 2012; Thomas, Joshi, & Sorenson, 2013) but similar concepts such as “power relations” (Mazibuko 2017), “power and control” (Heward-Belle, 2017; Straka & Montminy 2008), or “domination” (Victorian Royal Commission, 2016) were also used. Related concepts of “jealousy” and “possessiveness” are used in earlier literature (e.g. Dobash & Dobash, 2007). Constructions of IPV as control or coercive control were closely concerned with the “gendered” nature of IPV (though not all questions concerning the “gendered” nature of IPV were concerned with control). Whether IPV is gendered means different things in the research literature. One question raised in

some studies was whether the prevalence of IPV is gendered. The prevalence of IPV involving severe and extreme injury or death is gendered (Ansara & Hindin, 2010a; Bryant & Cussen, 2015; Bouffard, Wright, Muftic & Bouffard, 2008; Johnson, 2008b). A small number of studies suggested IPV against men may be underreported, however, overwhelmingly research proceeded on the basis that the prevalence of IPV is gendered, relying on statistical data showing that most victims/survivors of IPV are women (e.g. Victorian Royal Commission, 2016), or by assuming the significance of gender by addressing issues relating to women’s experiences of IPV victimisation or men’s experiences of perpetration of IPV.

Another set of questions raised in the literature relating to the gendered nature of IPV however addressed the nature of the violence received and perpetrated by women and men. This includes the subjective experience of violence, its forms and severity and sexual violence and coercion. Some research explained IPV to be gendered in the sense that women more often feel frightened of their partner’s violence than men feel frightened of their partner’s violence (Ansara & Hindin, 2015; Dobash & Dobash, 2004) or that women experience more intense fear because violence perpetrated against them is more dangerous (see Thomas et al., 2013).

What is now a foundational distinction between “typologies” of IPV hypothesised by Johnson and colleagues (2008b, 2011), between situational couple violence and coercive controlling violence, underpinned many studies. Situational couple violence is said to be characterised by physical violence that arises from particular instances of frustration or anger and which is not part of a pattern of domination. “Coercive controlling violence” is a pattern of coercive control by one partner (usually a man) against the other (usually a woman). Strategies of isolation of the victim/survivor and physical violence are among the ways in which control is effected. Relying on Johnson’s typology a common explanation of survey data that suggest IPV is typically bidirectional, is that data which does not record the context of violence and does not reveal which form of violence is meant by survey respondents (Ansara & Hindin 2010a; Dobash & Dobash, 2007; and see Sween & Reyns, 2017). Whereas situational couple violence may be mutual, there is very strong evidence that patterned violence involving coercive control is perpetrated primarily

by men against women (Ansara & Hindin, 2010a; Dobash & Dobash, 2004; Johnson, 2008b; Stark, 2007). A small number of studies retrieved from the database searches found that women perpetrate controlling violence against men (Allen-Collinson, 2011; Robertson & Murachver, 2011). However, these sources were exceptional and are not inconsistent with coercive controlling abuse being perpetrated predominantly by men against women or predominantly where it occurs within a matrix of other forms of violence. The New Zealand Family Violence Death Review Committee (2016) utilises a classification of “predominant aggressor” and “predominant victim”, recognising that force can be initiated as resistance to IPV perpetuated as a pattern (pp. 112-20). The studies of Gilchrist (2009), Weldon and Gilchrist (2012), Guerin and de Oliveira Ortolan (2017) and Morris (2009) are illustrative of the studies that examined IPV as control, and control as a gendered phenomenon in the context of IPV.

Gilchrist (2009) sought to identify implicit theories that are implicated by a number of general theories of IPV. As noted, implicit theories are underlying, usually unconscious, beliefs held by an individual about “how the world works” which inform explicit beliefs and actions and “shape later accounts of what occurred” (Gilchrist 2009, p. 133). Gilchrist analysed “feminist” and “family violence” theories, the foundational Duluth model for IPV intervention programmes and IPV attitudinal research, and from these approaches, predicted the implicit theories that could underpin IPV offending. These implicit theories included: “entitlement”, “Real man”, “violence is normal”, “women are dangerous”, “women are objects”, “uncontrollability” (outside forces such as alcohol are to blame), “need for control” (within the domestic domain), “sex drive as uncontrollable” (the need to guard partners from other men), “grievance/revenge” and “nature of harm” (minimising harm). Subsequently, in an empirical application, Weldon and Gilchrist (2012) identified implicit theories consistent with those found by Gilchrist, in an analysis of transcripts from interviews with IPV offenders.

Guerin and de Oliveira Ortolan (2017) analysed a series of typical behaviours recorded in IPV literature in the context of heterosexual partnerships and subjected them to a functional analysis in which the behaviours were grouped according to the kind of strategy that needed to be employed to effect an

outcome. The recorded behaviours were grouped according to:

- economic abuse (for example, “making her ask for money”);
- using coercion or threats (for example “making or carrying out threats to hurt her”);
- using intimidation (for example, “making her afraid by using looks or gestures”);
- emotional abuse (for example, putting her down);
- using isolation (for example, controlling what she does and who she sees and talks to);
- using societal male privilege (for example, making all the big decisions); and
- selecting partners as being suitable for abuse.

Several forms of behavioural outcomes (or consequences) are identified that are commonly gained by an IPV offender from the victim/survivor of IPV including:

- gaining resources, including money and sex;
- attention;
- verbal compliance; and
- avoidance of control from others.

The authors theorise that these gendered behaviours and outcomes of domestic violence are “extensions of ordinary behaviours and strategies” (p. 22).

Morris (2009) constructs a model of IPV as a gendered form of control that encompasses behaviours beyond those directed at a woman partner herself. Drawing on scholarship that problematizes the segmentation of IPV and child abuse in both discourse and practice interventions, she develops the construct of an “abusive household gender regime” (AHGR) in which child abuse is often intertwined with and itself a form of IPV against a mother. Women and children “experience a fusion of violence which permeates their everyday lives, through regimes of systematic coercion and control within households”, entrapping victims/survivors in a “web of interlocking practices” (p. 147; See also Heward-Belle, 2017; Thomas et al., 2013).

Another stream of research examined concepts of control and the gendered nature of IPV in a different way. Abundant

research identifies individual and wider cultural or societal expectations associated with masculine identity as significant contributing factors in IPV perpetration. Both experiences or unconscious assumptions of privilege, and also conditions perceived as threats to masculine roles were identified as causes of, or influences on, controlling and violent behaviours (Thomas, 2013) across cultures (Hoan & Morash, 2008; Mazibuko, 2017; Smith, 2008; Kalunta-Crumpton, 2015; Taft, Bryant-Davis, Woodward, Tillman & Torres, 2009; Victorian Royal Commission, 2016, Ch 2 citing UN Women 2015). Research on immigrant women and men's experiences of IPV also identifies an amplification of the relevance of constructions of masculinity where the culture of origin has stronger or different prescriptive gender roles than the new society (Kalunta-Crumpton, 2015; Tonsing & Barn, 2017; Yeon-Shim & Hadeed, 2009; White, Yuan, Cook & Abbey, 2013; cf Ghafournia, 2011), or because of the economic conditions of immigrant status resulting in women earning more than their male partner in a context where gender-role expectations prescribe the reverse, or more generally because of economic stresses leading to expressions of violence (Yeon-shim & Hadeed, 2009).

Studies by Aboriginal researchers conceptualise IPV within a broader context than coercive control and the gender dynamics of couples. Aboriginal women experience domestic violence at higher rates than non-Aboriginal Australian women (Olsen & Lovett, 2016), and IPV experienced by Aboriginal women is understood within systems of racial oppression and colonisation, rather than gender and intra-couple control in isolation (Behrendt, 1993; Nancarrow, 2006). In a study of Indigenous and non-Indigenous women's perspectives on how family and domestic violence should be addressed, Nancarrow found that Indigenous women favoured the collective, inclusive approaches of restorative justice, whereas non-Indigenous women generally favoured criminal justice approaches and placed a higher priority on "holding men accountable". In a state of knowledge report on violence against women in Australian Indigenous communities, Olsen and Lovett (2016, p. 18) report that the term "family violence" is generally the most appropriate term for violence in Aboriginal communities, stressing the connections of wider family and community, rather than only couple relationships. They write that the use of the term:

...does not necessarily detract from the particular damage of violence against women, rather such violence is seen to be influenced by and influencing of broader community conflict and affecting a wider range of kin and community members beyond the perpetrator and victim. (Olsen & Lovett, 2016, p. 18)

(4) Severity of IPV.

Most of the IPV research retrieved from the database searches examined IPV generally, including prevalence and risk factors for its occurrence, its nature and causes and victims' responses. Fewer studies considered the relative severity of IPV, a question of particular relevance to this project. This may be because of an assumption that IPV that causes severe or extreme harm is simply an extension of less serious IPV (cf Dobash & Dobash, 2007; 2012) or because non-lethal IPV is far more common and the aims of research were early intervention and prevention. It might also be a reflection of the fact that IPV research and homicide research tend to be siloed. Once a killing occurs IPV that preceded it is often considered mainly within the context of the criminal justice system or homicide scholarship. The creation of formal family violence death review procedures in a growing number of jurisdictions in the past two decades (in Australia since 2009 (Butler et al., 2017)) provide the means to link these fields of research and gain a greater understanding of IPV that led to death, either by homicide or suicide (see Dawson, 2017).

Understanding the severity of IPV is central to the current project because the use of lethal force in self-defence by a victim/survivor of IPV requires a finding that they believed on reasonable grounds that they were at risk of very serious harm or death. A few studies looked directly at assessment of risk of very serious harm from IPV. IPV that involves control, or coercive control, is also concerned with severity of violence, as are intimate partner sexual violence (IPSV) and strangulation, which a number of studies addressed. More generally, research focused on domestic violence refuges or shelters will tend to capture serious IPV because those accessing help from shelters are likely to have done so in very serious or extreme circumstances, usually motivated by fear (Ansara & Hindin, 2010b; Johnson, 2008b). Research based on general survey data is likely to capture experiences of less

serious IPV because of under-reporting of serious forms of IPV in current relationships (Johnson et al., 2011).

Severe and extreme IPV comprises different forms of violence that can create entire contexts within a relationship. There is wide acceptance among non-Indigenous researchers of the typologies of IPV developed by Johnson (2008). Following Johnson, there is acceptance that the severity of abuse and seriousness of harm suffered is one of the primary distinctions between IPV that can be characterised as situational couple violence and IPV that can be characterised as coercive control. Coercive controlling violence has the potential to involve more extreme abuse, based on prolonged patterns of coercive control, and it carries greater risks of physical and psychological harm, including death. Applying a latent class analysis to Canadian General Social Survey data from 2004, Ansara and Hindin (2010a) found that women and men were equally likely to experience less severe acts of physical aggression that were not embedded in a pattern of control. However, only women “experienced a severe and chronic pattern of violence and control involving high levels of fear and injury” (pp. 849, 853). Homicide statistics also show that women are more extremely injured from IPV and that Aboriginal women are disproportionately represented. Approximately 76% of intimate partner homicides are committed against women by men (Bryant & Cussen, 2015). Moreover, in light of evidence that very serious, non-lethal IPV is committed disproportionately against women and that women sometimes resist with violence (Bouffard et al., 2008; Johnson, 2008b) the gender disproportion in who are victims/survivors of very severe IPV can be predicted to be greater than the gender disproportion between the killings; that is, at least some of the killings will be acts of resistance to violence.

Outlaw (2015) extends the ‘routine activity’ theory from general criminology to IPV. Routine activity theory is the idea that there are situational factors that increase (or decrease) risk of victimisation/offending. According to this theory, one factor that will reduce the risk of victimisation is the presence of a “guardian” which deters offending. Outlaw (2015) applied the concept of “guardianship” to other adults or adult children within an intimate partnership household. This showed that the presence of such “guardians” can limit violence of the

kind classified by Johnson as situational violence but *increases* the frequency and severity of violence significantly where coercive controlling violence is occurring.

The disproportionate severity of IPV perpetrated by men, in the sense that more severe injuries and death are suffered by women, is associated not only with “more” IPV being perpetrated against women. It is also associated with certain forms of IPV that are perpetrated overwhelmingly against women, within a constellation of other forms of IPV, some of which are in themselves very dangerous. As noted, patterns of coercive control, perpetrated through a matrix of different forms of abuse, are directed disproportionately at women and are associated with severe and extreme outcomes. IPSV is distinctly gendered in the sense that it is perpetrated overwhelmingly against women by men, and it is associated with both multiple forms of co-occurring abuse (Cox, 2015; Messing, Thaller & Bagwell, 2014; Bledsoe & Sar, 2011), including coercion and control, and severe or extreme outcomes (Dobash & Dobash, 2007; Braaf & University of New South Wales (UNSW), 2011; Cox, 2015). Yet concepts of “IPV” and “sexual assault” are often treated as distinct phenomena, and support services for each are often organised separately (Cox, 2015; Woodin, Sotskova & O’Leary, 2013). Women who experience IPSV are more likely to suffer depression and suicidal thoughts (Braaf & UNSW, 2011) and to feel shame (Messing et al., 2014) than those who experience other forms of physical abuse. IPSV is an especially “invisible” form of abuse. The Victorian Royal Commission into Family Violence (2016, Ch 12) reported that even where other forms of IPV are inquired about by GPs and other professionals, IPSV is rarely discussed with clients or patients, and victims/survivors of IPSV are less likely than victims/survivors of other forms of IPV to reveal their experience (Cox, 2015).

Strangulation is also associated with severe and lethal IPV (Thomas, et al., 2013; Ansara & Hindin, 2010a; Vatnar & Bjørkly, 2008; Dobash & Dobash, 2007; Campbell, 2003; Douglas & Fitzgerald, 2014). Thomas et al. conducted a qualitative study of 17 women’s experiences of being strangled by their partner. The women were all residing at a domestic violence shelter. Sixteen of the women thought they were going to die, and one woman believed she was protected by her God; all reported that it was an extremely frightening

experience. Most men only stopped strangling when their partner passed out and the women reported having no physical control that could stop the attack. They resisted by placating their partner and/or presenting as submissive in order to survive. The women and the researchers concluded strangulation was motivated by a desire for control of the immediate situation and of the future insofar as it instilled fear and led to modified behaviour that was more overtly compliant with the male partner's demands. Strangulation was a particularly "effective" form of control because it is often undetectable — if bruising occurs it commonly does so only days later (and is less obvious on darker skin) — and because it is potentially, quickly lethal, resulting in extreme fear.

Homicide studies have sought to identify high-risk factors indicating the potential for lethal IPV. Campbell (2003) conducted a study of risk factors for intimate partner homicide which compared 343 women currently experiencing IPV with 220 cases in which women had been killed by their male partner. In addition to a history of violence and the perpetrator's unemployment, the highest risk factors were highly controlling behaviour on the part of the perpetrator, especially when combined with separation or a declared intention on the part of the woman to separate, and the presence of the woman's child from a previous relationship being present in the household. Threats with a weapon, threats to kill and forced sex were all risk factors on a multivariate analysis and stalking, strangulations, abuse during pregnancy, a pattern of escalating severity and frequency of physical violence, perpetrator suicidal ideation, perceptions of danger on the part of the victim/support and child abuse were all associated with lethality on a bivariate analysis.

Dobash and Dobash (2007) conducted a study comparing nonlethal IPV perpetrated against women which resulted in serious injury, with lethal IPV perpetrated against women. Data were collected through in-depth interviews with 122 men who had been convicted of serious nonfatal IPV and case files of 106 men who were convicted of the murder of their intimate partner. The study affirmed the importance of separation or an intention to separate on the part of the woman, as a risk factor for lethal violence and separation was associated with "possessiveness and jealousy" on the part of the perpetrator, compared with those who perpetrated serious

nonfatal violence. Men who murdered their partner were more likely to have been violent to previous partners and were more likely to have been sexually violent, to have strangled their partner and to have used a weapon. Sexual violence did not occur in the nonfatal incidences studied but occurred in 16 percent of the murders. Strangulation was more than three times more likely in the cases involving lethal violence. The researchers hypothesised that sexual violence, strangulation and the use of weapons may indicate increased risk of lethality not only because they are in themselves dangerous behaviours but because they may indicate an increased objectification by the perpetrator of his partner and alienation from her and the relationship. They suggest there is a consistency between IPV and other forms of violence such as war or genocide in which "objectification of the 'other' places them outside the universe of moral obligation and is often a precursor to killing or inflicting violence on them" (Dobash & Dobash, p. 346).

Dawson and Piscetelli (2017) conducted an analysis of 183 intimate partner homicides (including killings of a child of an intimate partner) documented by the Ontario Domestic Violence Death Review Committee in which 10 risk factors for lethality were affirmed.

[A]most three quarters (73%) of the perpetrators had a history of domestic violence, making it the most common risk factor, followed by actual/pending separation (70%). Other common risk factors were perpetrator's obsessive behaviour (54%), perpetrator depression (50%), prior threats/attempts to commit suicide (49%), escalation of violence (48%), victim's/survivor's intuitive sense of fear (45%), prior threats to kill the victim/survivor (43%), perpetrator unemployed (40%), and perpetrator attempts to isolate the victim/survivor (39%). These risk factors have consistently remained among the top risk factors for domestic violence-related homicides in Ontario. (Dawson & Piscetelli, p. 5)

(5) Intersectionality and context-specific approaches

A strong theme in IPV research is the idea that IPV can only be understood by considering intersecting social disadvantages experienced by different victims/survivors which impact on the prevalence, nature and severity of IPV, and on the

provision of services and other assistance in escaping from or ending the violence. Within the limitations of this database review studies examined IPV within contexts of different ethnicities and immigration status (Yeon-shim & Hadeed, 2009; Tonsing & Barn, 2017; White et al., 2013; Ghafournia, 2011), race (Waller, 2016; Blumenstein & Jasinski, 2015; . et al, 2009; Smith, 2008), colonisation (Brownridge et al., 2017; Yeon-shim & Hadeed, 2009; Victorian Royal Commission, 2016, Ch 26.) and class or socio-economic positioning (Blumenstein & Jasinski, 2015; Brownridge et al., 2017).

Intersectionality is central to Aboriginal and other Indigenous research on family violence (Behrendt, 1993; Nancarrow, 2006; Olsen & Lovett, 2016; Victorian Royal Commission, 2016, Ch 26; Brownridge et al., 2017). For example, Olsen and Lovett (p. 15-16) write:

In an attempt to explain the complex context of Indigenous violence, Cripps (2010) [Cripps, K. (2010). Chapter 11: Indigenous family violence: Pathways forward. In P. Dudgeon, & R. Walker (Ed.). Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice. Camberwell: Australian Council for Education Research] clustered common interconnected factors associated with violence in Indigenous communities into two groups... broadly, Group 1 factors relate to colonisation and the continuing effects of historical and contemporary degradation of culture and family. Group 2 factors are commonly found in marginalised and impoverished communities and, in the case of Indigenous Australians, can be caused or compounded by Group 1 factors.

In addition to the need to understand the nature of IPV within intersectional societal contexts such as these, there is a theme in the research that identifies the need to understand the particular narratives of each individual's experience of IPV, such that the specific ways in which various common factors or strategies of IPV are manifested for each individual can be understood. For example, the New Zealand Family Violence Death Review Committee (2016) relies on Ptacek's (1999) construct of IPV as social entrapment. Within this framework to understand a woman's experience of IPV it is necessary to consider the details of her experience in three strata of her circumstances: (i) her experiences directly related

to the perpetrator's abuse and her resulting fear, coercion and social isolation; (ii) her experiences of inaccessibility to assistance from powerful social institutions; and (iii) the exacerbating effects of the structural inequities of gender, class and racism. This line of research proposes that not only does research about the general nature of IPV need to incorporate personal, interactional and societal or structural levels of influence, but that each expression of IPV needs to be understood through the particular vulnerabilities of each victim/survivor in her or his particular circumstances. Approaches that examine IPV as complex and contextualised conduct that is particular to each perpetrator and directed at a *particular* victim, while at the same time manifesting common features (see e.g. Breckenridge, 2015, cited in Victorian Royal Commission, 2016, Ch 12), has the effect of recasting some evidence of the experiences of IPV (when compared to other research approaches). For example, within the studies of Brownridge et al. (2017) and Guerin and de Oliveira Ortolan (2017) child sexual abuse experienced by victims of IPV is identified as a targeting strategy by perpetrators of IPV of *particular victims* (and see Sween & Reyns, 2017). And Tonsing and Barn (2017) identify subjective feelings of shame experienced by victims/survivors of IPV as both an instrument of control used by perpetrators and a mechanism of social control, through cultural constructions of marriage (see also, Barnett, Maticka-Tynedale & Kenya, 2016).

Group 1 factors are colonisation: policies and practices; dispossession and cultural dislocation; dislocation of families through removal; and marginalisation as a minority. Group 2 factors are unemployment; welfare dependency; past history of abuse (child and/or adult); destructive coping behaviours/addictions; health and mental health issues; low self-esteem and sense of powerlessness.

Immigrant status impacts on the nature and severity of IPV. Many immigrant women are further isolated by language barriers, lack of economic independence and social dislocation, in particular from extended family and other social supports. "Immigration intensifies domestic violence and causes vulnerabilities via social and cultural dislocation that impair women's management of domestic violence" (Ghafournia, 2011, p. 208). The lack of appropriate services as well as the lack of knowledge of services that do exist contribute to further

isolation and can be used as instruments of power and control to effect the social entrapment by a perpetrator that is often part of IPV (Ghafournia, 2011; Victorian Royal Commission, 2016, Ch 28). Barriers to accessing support can arise from acculturative stressors of migration and also from cultural constraints. For example, Western cultural constructs of marriage and the “failed marriage” create barriers for women in mainstream society but stronger adherence to collective identities in Asian cultures (Yeon-Shim & Hadeed, 2009). In particular, South Asian cultures (Tonsing & Barn, 2017) may increase difficulties for women in removing themselves from a perpetrator of violence, including by being urged by her community to remain married and the prospect of further isolation if she does not. These cultural constraints may intensify the controlling effect of shame (Tonsing & Barn, 2017). Pre-migration and migration trauma may intersect with experiences of IPV (Yeon-shim & Hadeed, 2009). Immigrant women, women from ethnic minorities and Indigenous women are also disproportionately represented as victims/survivors of IPV and severe IPV, including as victims of homicide (Victorian Royal Commission, 2016, Chs 25 and 26).

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