Women who kill abusive partners:
Understandings of intimate partner violence in the context of self-defence.

Key findings and future directions

ANROWS

AUSTRALIA'S NATIONAL RESEARCH ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

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Acknowledgement of lived experiences of violence
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.

ANROWS Research to policy and practice papers are concise papers that summarise key findings of research on violence against women and their children, including research produced under ANROWS's research program, and provide advice on the implications for policy and practice.

This is an edited summary of key findings from ANROWS research RP.17.10 *Transforming Legal Understandings of Intimate Partner Violence*. Please consult the ANROWS website for more information on this project and the full project report: Tarrant, S., Tolmie, J., & Giudice, G. (2019). *Transforming legal understandings of intimate partner violence* (Research report 03/2019). Sydney, NSW: ANROW.

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ANROWS research contributes to the six national outcomes of the *National Plan to Reduce Violence against Women and their Children 2010-2022*. This research addresses national plan outcome 5 – Justice responses are effective.

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 future, and we value Aboriginal and Torres Strait Islander history, culture and knowledge.

Women who kill abusive partners:
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In brief:

- The use of outdated understandings of intimate partner violence within the legal system automatically renders the use of defensive force against an abusive partner "unreasonable".
- Despite attempts to reform self-defence laws, in practice self-defence is not easily raised by women who kill abusive partners.
- A proposed way to address this issue is to use a "social entrapment" framework to understand intimate partner violence. Key to this framework is a recognition, in line with current research, that the primary victim's/survivor's ability to resist abuse is constrained by the abuser's behaviour, the safety options available and broader structural inequities in the victim's/survivor's life.

Key recommendations:

- All those involved in investigating, charging, prosecuting, defending or trying a woman who has killed her violent/abusive intimate partner should be using a social entrapment framework (including consideration of sexual violence) to understand the facts.
- Evidence of the availability of alternative avenues to safety should be considered by all those involved in the justice process. This should occur before charges are laid, in advance of a trial, during a trial, and at the end of a trial.
- Education on the social entrapment framework should be provided to all those involved in the criminal justice process.

THE ANROWS RESEARCH PROJECT

Transforming legal understandings of intimate partner violence by Stella Tarrant, Julia Tolmie and George Giudice

The ANROWS research project *Transforming legal understandings of intimate partner violence* examines homicide trials in which self-defence is raised by women who have killed an abusive intimate partner. It explores how legal professionals and experts understand intimate partner violence (IPV), including which facts are selected and presented as relevant to understanding the homicide, the language used to frame those facts and the conclusions drawn from them.

The project involved a close analysis of the case of *The State of Western Australia v. Liyanage* [2016] WASC 12 ("*Western Australia v. Liyanage*" SCWA, No. 27 of 2015), a case that demonstrates the way in which women's claims to have acted in self-defence against an abusive partner have been systematically rejected. Dr Liyanage (referred to in the report and related resources by her first name, Chamari[1]) killed her husband (referred to by his first name, Dinendra) in June 2014 after he had subjected her to years of physical, sexual, emotional, and financial abuse. She was charged with his murder in 2014 and convicted of his manslaughter in 2016 after a trial by 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 was withdrawn because the pressure on Chamari resulting from another court process would have been too high.

This research project applied a "social entrapment" analysis to the case of *Western Australia v. Liyanage*. A social entrapment framework recognises, in line with current research, that the victim's/survivor's ability to resist abuse is constrained by the abuser's behaviour, her available safety options and broader structural inequities in her life.

Using a social entrapment framework requires analysis at three levels:

1. documenting the full suite of coercive and controlling behaviours employed by the abuser, including the strategic and responsive dimensions of this behaviour (and the isolation and fear that this creates for the victim/survivor);
2. examining the responses of family, community and agencies to the abuse; and
3. examining the manner in which any structural inequities experienced by the victim/survivor supported the abuser's use of violence (including thwarting her attempts to resist the abuse) (New Zealand Family Violence Death Review Committee, 2016; Tolmie, Smith, Short, Wilson & Sach, 2018).

1 Chamari's first name is used with her permission.

A social entrapment analysis

A social entrapment analysis of intimate partner violence involves analysis at three levels:

1. documenting the full suite of coercive and controlling behaviours;
2. examining the responses of family, community and agencies; and
3. examining structural inequities.

When the defence of self-defence is raised, the court must assess:

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

For a woman who has killed an abusive partner, the abuse that she experienced from him is central to both these considerations and therefore central to her self-defence case. The way that IPV is conceptualised within the criminal justice system is thus fundamental to whether women who kill abusive partners are able to successfully raise self-defence.

Using a social entrapment framework in the legal process would allow the court to make an adequate assessment of whether a victim/survivor had access to services or other means that would have realistically provided enduring safety from very serious harm or death.

This research project included a comprehensive analysis of *Western Australia v. Liyanage* using a social entrapment framework and this analysis is presented in the full research report, available at https://www.anrows.org.au/project/transforming-legal-understandings-of-intimate-partner-violence/.

This Research to Policy and Practice paper highlights the key findings of the *Transforming Legal Understandings of Intimate Partner Violence* research project and recommendations for policy and practice. The paper will be relevant to law students, police, prosecution and defence lawyers, expert witnesses and judges, as well as the broad range of practitioners and policy-makers whose work involves domestic and family violence. For guidance on applying a social entrapment framework in your own work, see pages 9-10 of this paper.

Key findings

The enduring influence of old laws precludes the legal possibility of self-defence for women who use lethal defensive force

Law reform in Australia has ensured that rape and other violence in marriage are now recognised as such. Similarly, reforms around self-defence mean that the law now recognises that self-defence includes defence against both *imminent* and *non-imminent* harm (i.e., one does not have to be engaged in a "fight" to be acting in self-defence). However, despite these reforms, conceptualisations of violence, self-defence and marriage that underpinned old laws continue to operate today. Law reform has therefore had little impact on practice, as Chamari's trial demonstrates.

Despite law reform, self-defence is understood as something that occurs only in response to an immediate threat

Chamari raised self-defence in the context of the *non-imminent* harm her husband perpetrated. The State's case in refuting Chamari's self-defence argument was unclear, but appeared to be shaped by assumptions about *imminent* harm self-defence, as if she had been in a "fight" with her husband.

The State's case against *non-imminent* harm was not argued by reference to either of the legal questions required by self-defence: did the person believe they needed to defend themselves as they did, and was their response reasonable? Rather, it would appear that so-called "common sense" assumptions about a response to *imminent* harm — that a person might simply have been able to "run away" to safety — were improperly assumed to be relevant to *non-imminent* harm self-defence.

Despite law reform, sexual violence by intimate partners is rendered invisible

Sexual violence formed a major part of Chamari's non–imminent harm self-defence argument. Yet, despite its presence in the trial as fact (through testimony, and image and video evidence), Dinendra's sexually abusive behaviours played little or no legal part in the case against Chamari as *violence*.

The State characterised Dinendra's sexually abusive behaviours (through use of language such as "sexual practices she did not like" or conduct that "may be regarded as unusual" and "unpleasant") in a way that sidestepped the need to register and contest Chamari's claim of sexual violence. This mirrors old laws, in that the claim to an experience of sexual violence by a wife went unregistered as it was not recognised in law.

Outdated understandings of IPV, despite strong critique, still frame legal cases

In *Western Australia v. Liyanage*, two psychiatrists testified at Chamari's trial relying upon outdated understandings of IPV, and this was accepted by the trial and court of appeal judges. Chamari was depicted as having a "cult-like mentality" as a result of cycles of violence which caused her to "lose the ability to do *logical things like leave*" [emphasis added]. Chamari's "failure" to utilise her safety options was explained by her psychological response to Dinendra's violence.

The psychiatrists' testimony lacked the necessary detail to apply a social entrapment analysis, for example:

- Dinendra's violence and abuse were minimised through references to it only in generic terms. His *actual* abusive behaviours and their strategic effect in closing down Chamari's options for action were not described.
- Both experts assumed that Chamari had effective safety options in between episodes of violence. Both assumed that what needed explanation was why Chamari personally failed to take advantage of these.
- Chamari's resistance to the abuse was concealed in both experts' accounts. The violence was assumed to have operated *independently* of what Chamari did or didn't do. This, in turn, concealed the way Dinendra used violence strategically in response to Chamari's actions.
- Chamari was the focus of the inquiry — she was pathologised and in the end held almost entirely responsible for Dinendra's abuse of her.

Further, the prosecution's story in *Western Australia v. Liyanage* was that this homicide was about a relationship in crisis. The prosecution referred to a "very troubled marriage" and an "unhappy relationship". They suggested that Chamari successfully left Dinendra — and could have left him on multiple other occasions — but chose to reconcile/stay because of love. The prosecution suggested that Chamari's central motive for killing Dinendra was jealousy because he might leave her for a young girl.

As a result of using this framing:

- The prosecution presented the case as though Chamari's love for Dinendra made her "choose" to be in a relationship with him and therefore to tolerate behaviour that she found painful and terrifying.
- Acts of resistance by Chamari at different points were used by the prosecution as evidence of her negotiating power in the relationship. These were interpreted as meaning 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.
- The night of the homicide was presented by the prosecution as a decontextualised and discrete incident. 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". The impact that Dinendra's anger had on Chamari that night was not analysed in the context of his long history of abusive behaviour against her.

Outdated understandings of IPV fail to recognise the risks and complexities of leaving a violent relationship

Outdated understandings of IPV are built on an assumption that there are effective and lawful options for achieving safety that the victim/survivor could have *chosen*. They don't take account of the way a perpetrator's abuse strategically closes down the victim's/survivor's capacity for action over time.

In expert testimony in *Western Australia v. Liyanage*, it was assumed, contrary to what she explicitly said in her testimony, that Chamari had effective safety responses available to her and that it was illogical for her not to call the police and/or leave the relationship. The experts did not explore the potential reaction from Dinendra should Chamari attempt to take steps toward safety, even though Dinendra had a history of responding violently if Chamari did not comply with his instructions and had threatened Chamari and her family with extreme violence should she disclose what he was doing to her. The only discussion of her safety options came from Chamari herself, who had been labelled by the experts in this case as "illogical" in her assessments. The prosecution simply asserted, without providing proof, that leaving the relationship or calling the police were reasonable ways Chamari could have kept herself safe in the circumstances.

Current expectations around "logical" responses to IPV — for example, 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. These are not strategies that necessarily manage the ongoing threat that victims/survivors of IPV may be living with. Additionally, assuming that these responses are effective ignores a large body of evidence that critiques systemic responses to IPV.[2] When a victim/survivor is dealing with a highly dangerous IPV offender, ineffective or inadequate responses by a public agency, such as the police or the courts, do not simply fail to provide safety — such responses can significantly *escalate* the danger that the victim/survivor is in.

2 For example, police responses to IPV have been criticised (such as a failure to record incidents, neglecting to provide information on legal or support options, failing to provide any safety response, not taking breaches of restraining orders seriously, or incorrectly identifying the perpetrator) (Law Reform Commission of Western Australia, 2014; Western Australia. Parliamentary Commissioner for Administrative Investigations, 2015; Westen Australia. Community Development and Justice Standing Committee, 2015; Toivonen & Backhouse, 2018), as have court responses to IPV and IPSV (Australian Institute of Criminology, 2007a, 2007b; Lievore, 2005; Millstead & McDonald, 2017).

Recommendations for policy-makers, practitioners and service providers

The justice system should utilise a social entrapment framework

All those who are involved in investigating, charging, prosecuting, defending or trying a woman who has killed her intimate partner should develop an understanding of IPV as a form of social entrapment. That is, they should apply the three levels of analysis outlined in the social entrapment framework above.

Particular focus should be given to the role of intimate partner sexual violence (IPSV) in IPV

Sexual violence is often a significant but unseen and misunderstood aspect of IPV.[3] Therefore, particular focus should be given to the role of IPSV in IPV at all levels of analysis in the social entrapment framework, including the ways in which the perpetration of IPSV may affect community or institutional responses to the victim's/survivor's help-seeking.

Training on the social entrapment framework is necessary

In order to implement the above, 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.

In cases of IPV, there must be consideration of evidence of avenues to safety

In the law of self-defence, the question of whether or not a person's defensive response to the violence they faced was "reasonable" requires a particular conceptual framing and particular kinds of evidence if the person was defending themselves against IPV. In considering whether the State has sufficient evidence to prove beyond a reasonable doubt that a women'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. In other words, this must be proven on the facts and not simply assumed.

3 Intimate partner sexual violence is also an important indicator of severity of violence, with survivors who are being sexually abused by their partners being at a much higher risk of being killed, particularly if they are also being physically assaulted (Toivonen & Backhouse, 2018).

The State must make its case clear with regard to each legal element of a claim of self-defence

Where a case proceeds to trial, the prosecutor, on behalf of the State, must make their case clear to the jury with respect to each legal element of a woman's claim of self-defence, on the evidence and using accurate understandings of IPV. Using a social entrapment framework means that the State will have to account for a woman's experience of IPV (including the social response) and the courses of action realistically available to her when arguing that the use of defensive force was not "reasonable".

Trial judges must ensure the State's position is made clear to the jury

Where a case proceeds to trial, the trial judge should ensure 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. As with the recommendation above, applying a social entrapment framework will provide a realistic assessment of the nature and level of threat from the abuser (that accounts for the cumulative nature of abuse), and the realistically available options for safety.

The State's position on both of these points should be reflected in the trial judge's summing up to the jury.

How can I use this in my work?

Use a social entrapment framework to show how the coercive power of the abuser extends *beyond* the incidents during which they are acting violently, and to show how the *social response* to IPV worsens a victim's/survivor's entrapment.

Step One: Document the full suite of coercive and controlling actions by the predominant abuser

This is not simply an itemised list of actions, which will not capture the chronology, cumulative intensity, and compounding effects of the abuse. Documentation requires thinking through, for example:

- How has the primary abuser, over time, undermined the victim's/survivor's independence and fostered a dependence on him? How has he isolated, deprived, exploited and micro-regulated her?
- How has the primary abuser, over time, used violence, threats and surveillance to force her to comply with his wishes and/or punish her for failing to do so?
- Has he degraded her by sexually abusing her and/or forcing her to engage in behaviours that are in opposition to her values?
- How are tactics employed by the abuser constraining the victim's/survivor's behaviour even when not in the presence of the abuser?
- What has the abuser said that he will do to her if she resists the abuse and/or seeks help? How has the abuser also practically limited the victim's/survivor's ability to seek help (e.g. smashing her phone)?

Note that some of these behaviours may be subtle and only have meaning to the particular victim/survivor. The primary abuser develops tactics of abuse over time through trial and error — the tactics are uniquely tailored to the specific victim/survivor and should not be treated as possible to understand "objectively".

Step Two: Examine the responses and potential responses of family, community and agencies to the abuse

Examination of institutional, community and familial responses to IPV should be accompanied by a realistic assessment of the limitations of the responses that are available, and an understanding of what is reasonable to expect of someone in the victim's/survivor's position. It requires thinking through:

- How have informal networks responded to the primary victim's/survivor's disclosures or to their realisation that something was wrong? Were others in the community afraid of the abuser? Did they support (either actively or passively) his abuse of her?

- How have agencies responded to the primary victim's/survivor's disclosures? How are they likely to respond? What are they realistically able to offer the victim/survivor and her family members in the particular circumstances she is in (which include any potential retaliation and future threats presented to her by the primary abuser and his associates)?
- Was seeking help from mainstream support services an option for her in her circumstances? What barriers to doing so did she experience?
- Did agencies and members of her community expect her to take action when her ability to do so was non-existent or severely compromised?

Step Three: Examine the way in which any structural inequities experienced by the primary victim/survivor facilitate the abuser's use of violence and undermine the safety responses from those who are in a position to help

This requires consideration of how the intersection of inequities that a victim/survivor experiences increases the ability of the abuser to control and coerce her and undermines any safety responses that she receives from those who are in a position to help. It requires thinking through:

- How have any experiences of inequity — for example, poverty, past trauma, colonisation, racism, disability, mental health issues, addiction and/or immigration issues — exacerbated the first two dimensions of entrapment?

The New Zealand Family Violence Death Review Committee has prepared a list of questions for practitioners designed to assist in understanding and documenting a particular client's experience of entrapment. This can be accessed at: https://www.hqsc.govt.nz/our-programmes/mrc/fvdrc/publications-and-resources/publication/3444/

Further resources

Australia's National Research Organisation for Women's Safety. (forthcoming). *Domestic and family violence lethality: The facts about intimate partner homicide*. Sydney, NSW: ANROWS.

Australia's National Research Organisation for Women's Safety. (2019). *Submission to the NSW Sentencing Council's Review of sentencing for murder and manslaughter.* 8 March 2019. Available at https://www.anrows.org.au/resources/

Australia's National Research Organisation for Women's Safety. (2019). Intimate partner sexual violence: Research synthesis (ANROWS Insights, 05/2019). Sydney, NSW: ANROWS.

Dawson, M. (2017). *Domestic Homicides and Death Reviews: An International Perspective.* London. Palgrave Macmillan UK.

Australian Domestic and Family Violence Death Review Network. (2018). *Australian Domestic and Family Violence Death Review Network 2018 Data report*. Sydney, NSW: Domestic Violence Death Review Team.

Family Violence Death Review Committee. (2017). *Fifth Report Data: January 2009 to December 2015*. Wellington: HQSC.

New Zealand Family Violence Death Review Committee (2018). *Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence*. New Zealand Government. Available at https://www.hqsc.govt.nz/our-programmes/mrc/fvdrc/publications-and-resources/publication/3444/

Tolmie, J. R. (2018). Coercive control: To criminalize or not to criminalize?. *Criminology & Criminal Justice*, *18*(1), 50-66.

References

Australian Institute of Criminology. (2007a). *Acquittals in higher courts*: *Crime facts info* (No 159). Canberra: AIRC.

Australian Institute of Criminology. (2007b). *Guilty outcomes in reported sexual assault and related incidents*: *Crime facts info* (No 162). Canberra: AIRC.

Law Reform Commission of Western Australia. (2014). *Enhancing family and domestic violence laws*. Final Report, (Project No 104). Perth: LRCWA.

Lievore, D. (2005). *Prosecutorial decisions in adult sexual assault cases: Trends and issues in crime and criminal justice*, (No 291). Canberra, Australia: Australian Institute of Criminology.

Millsteed, M., & McDonald, C. (2017). *Attrition of sexual offence incidents across the Victorian criminal justice system*. Melbourne: Crime Statistics Agency.

New Zealand Family Violence Death Review Committee. (2016). *Fifth report: January 2014 to December 2015*. Wellington: FVDRC.

Toivonen, C., & Backhouse, C. (2018). *National Risk Assessment Principles for domestic and family violence* (ANROWS Insights, 07/2018). Sydney, NSW: ANROWS.

Tolmie, J., Smith, R., Short, J., Wilson, D., & Sach, J. (2018). Social entrapment: a realistic understanding of the criminal offending of primary victims of intimate partner violence. *New Zealand Law Review*, *2*, 181-217.

Western Australia. Parliament. Legislative Assembly. Community Development and Justice Standing Committee (2015). *A measure of trust: How WA Police evaluates the effectiveness of its response to family and domestic violence* (Report No. 10). Perth, WA: Parliament of Western Australia.

Western Australia. Parliamentary Commissioner for Administrative Investigations. (2015). *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities*. Perth, WA: Ombudsman Western Australia.

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