

YZA V WESTERN AUSTRALIA POLICE AND THE POTENTIAL OF LEGISLATED FAMILY VIOLENCE JURY DIRECTIONS TO SHIFT JUDICIAL REASONING IN FAMILY VIOLENCE CASES

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In 2020, reforms to the Evidence Act 1906 (WA) defined evidence of family violence, permitting its introduction where relevant in all criminal proceedings, and providing for judicial jury directions on family violence. The new provisions (re-enacted in the Evidence Act 2025 (WA)) are the first in Australia to be based on an understanding of family violence as a form of social and systemic entrapment. The case of YZA v Western Australia Police demonstrates that judicial reasoning on the facts in the lower courts can now be appealed when it does not conform to accurate understandings of family violence as set out in the legislation. The appellate courts have also used the reforms to require a shift away from credibility reasoning – reasoning which can unfairly undermine the defence of a person who has responded to ongoing intimate partner violence. It is concluded, however, that more can be done with the provisions.

I INTRODUCTION

In 2020, reforms to the *Evidence Act 1906 (WA)* (*‘Evidence Act 1906’*) introduced provisions dealing with evidence of family violence in criminal proceedings. The reforms were re-enacted, with no changes relevant to the discussion in this article, in the *Evidence Act 2025 (WA)* (*‘Evidence Act 2025’*) which is yet to commence. Whilst the reforms apply to all criminal proceedings, they arose from recognition that women’s claims that they defended themselves against intimate partner violence were not being assessed according to law, because rejection of self-defence was commonly based on factual determinations about the violence a defendant faced that did not accord with reality. Whatever the context, the question of whether a person acted in self-defence (or under provocation or duress) can only be lawfully assessed after determining accurately whether the defendant was confronted by danger (or incitement or coercion) and, if so, its magnitude and the defendant’s realistic options for having acted differently. Therefore, when the context of the offending involves family violence, accurately understanding how

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family violence manifested for the particular defendant is central to the proper application of the law.

That family violence has not been understood accurately when applying criminal defences to victims who are responding to family violence is well-documented across Australia and internationally,¹ including, and especially, for Indigenous women.² Indigenous women have long experienced racial profiling and punitive treatment by the Australian legal system,³ and violence against Indigenous women has been ignored and under-researched.⁴ Criticisms of how criminal defences were operating in the context of intimate partner violence resulted in statutory reforms to defence laws in a number of jurisdictions. For example, in 2008, aiming to recognise the ongoing nature of family violence, the *Criminal Code Act 1913* (WA) (*'Criminal Code'*) was amended to make explicit that a person could act in self-defence against 'non-imminent' harm.⁵ A reform to that same effect was made in Victoria.⁶ However, these reforms have not changed the application of

- 1 See, eg, Patricia Weiser Eastael, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993); Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (Final Report No 69, 1994) pt 1 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC69_Pt1.pdf>; Rebecca Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-Defence Appropriate for the Battered Woman?' (1998) 5(1) *Psychiatry, Psychology and Law* 71 <<https://doi.org/10.1080/13218719809524921>>; Victorian Law Reform Commission, *Defences to Homicide* (Final Report, October 2004); Kate Fitz-Gibbon and Julie Stubbs, 'Divergent Directions in Reforming Legal Responses to Lethal Violence' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 318 <<https://doi.org/10.1177/0004865812456853>>; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34(3) *Sydney Law Review* 467; Danielle Tyson and Thomas Crofts, 'Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill Their Abusers' (2013) 39(3) *Monash University Law Review* 864 <<https://doi.org/10.26180/10065122>>; Vanessa Bettinson and Nicola Wake, 'A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response' (2024) 87(1) *Modern Law Review* 141 <<https://doi.org/10.1111/1468-2230.12837>>.
- 2 In this article we use 'Indigenous' when referring to First Nations women from Australia and across the world. We use 'Indigenous' and 'Aboriginal' interchangeably when referring to First Nations women from Australia.
- 3 Hannah McGlade and Stella Tarrant, "'Say Her Name': Naming Aboriginal Women in the Justice System" in Suvendrini Perera and Joseph Pugliese (eds), *Mapping Deathscapes: Digital Geographies and Racial and Border Violence* (Routledge, 1st ed, 2021) 106–26 <<https://doi.org/10.4324/9781003200611-10>>; Megan Beatrice, 'The Incarceration of First Nations Women: Theories of Violence' (2025) 38(3) *International Journal for the Semiotics of Law* 1033 <<https://doi.org/10.1007/s11196-024-10219-y>>.
- 4 Claire Bevan, Jane Lloyd and Hannah McGlade, Australia's National Research Organisation for Women's Safety, *Missing, Murdered and Incarcerated Indigenous Women: A Literature Review* (Report, 2024) <<https://www.anrows.org.au/publication/missing-murdered-and-incarcerated-indigenous-women-in-australia-a-literature-review/>>; Michelle Lokot et al, 'Decolonising the Field of Violence against Women and Girls: A Scoping Review and Recommendations for Research and Programming' (2024) 357 *Social Science and Medicine* 117168 <<https://doi.org/10.1016/j.socscimed.2024.117168>>; Victoria Hovane, 'Our Story to Tell: Aboriginal Perspectives on Domestic and Family Violence' [2015] (1) *ANROWS Footprints* 13.
- 5 *Criminal Code Act 1913* (WA) s 248 (*'Criminal Code'*), as amended by *Criminal Law Amendment (Homicide) Act 2008* (WA) s 8. For further discussion, see Law Reform Commission of Western Australia, *Review of the Law of Homicide* (Final Report No 97, 2007).
- 6 *Crimes Act 1958* (Vic) s 322M(1)(a) (*'Victorian Crimes Act'*), as amended by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 4 (*'Abolition of Defensive Homicide Amendment'*). In the context of family violence, a person may rely on self-defence even if 'the person is responding to a harm that is not immediate'.

the defences as intended, evidenced by continuing prosecution and conviction trends.⁷ Victim-survivors have continued to be convicted of violent offences where they were responding to ongoing, often extreme, intimate partner violence irrespective of these legislative reforms.⁸ Julia Quilter has explained in the sexual violence context how reforms to the law frequently do not change the practices of the law because lawyers and judges apply the new laws to social phenomena that they are not understanding differently at a factual level.⁹ The recent evidence law reforms in Western Australia ('WA') and elsewhere are attempts to encourage a shift in lawyers' and judges', as well as juries', conceptual understandings of family violence in ways that are transformative at this deeper factual level.¹⁰ The reforms in WA built on earlier reforms in Victoria but went further.¹¹ They are the first criminal law evidence provisions in Australia and internationally to reflect an understanding of intimate partner violence as a form of social and systemic entrapment, and they have now been replicated in Queensland.¹²

The impetus for the reforms in WA was the homicide trials of Jody Gore, a Gidga Jaru woman from the Kimberley, and Chamari Liyanage, a Sri Lankan Australian living in regional WA. Called 'Jody's law',¹³ the provisions were enacted after a public campaign against Jody Gore's murder conviction and life sentence,¹⁴

- 7 Danielle Tyson, Deborah Kirkwood and Mandy McKenzie, 'Family Violence in Domestic Homicides: A Case Study of Women Who Killed Intimate Partners Post-Legislative Reform in Victoria, Australia' (2017) 23(5) *Violence Against Women* 559 <<https://doi.org/10.1177/1077801216647796>>; Stella Tarrant, Julia Tolmie and George Giudice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 3, Australia's National Research Organisation for Women's Safety, June 2019).
- 8 Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) *Violence Against Women* 2275 <<https://doi.org/10.1177/10778012231156154>>.
- 9 Julia Quilter, 'Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23 <<https://doi.org/10.1080/13200968.2011.10854458>>.
- 10 Victoria and Queensland have enacted similar provisions. See discussion below in this Part.
- 11 *Abolition of Defensive Homicide Amendment* (n 6) s 4, amending *Victorian Crimes Act* (n 6) ss 322J, 322M, 322P; *Jury Directions Act 2015* (Vic) pt 6, as enacted.
- 12 *Evidence Act 1977* (Qld) pt 6A, as amended by *Evidence and Other Legislation Amendment Act 2022* (Qld) s 37 and *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) pt 5.
- 13 Annabel Hennessy, 'Making a Case for Change: Attorney General Admits Self-Defence Laws May Not Be Working Properly', *The West Australian* (Perth, 11 September 2019) 10–11.
- 14 Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 7466–7 (John Quigley, Attorney-General) ('*Jody Gore Royal Prerogative of Mercy: Statement by Attorney General*'). See, eg, Hannah McGlade, 'Australia Is Turning a Blind Eye to Violence against Indigenous Women, but We Will Not Stay Silent: Our Lives Matter', *ABC News* (online, 6 October 2019) <<https://www.abc.net.au/news/2019-10-06/jody-gore-release-domestic-violence-indigenous-aboriginal-women/11570042>>; Hayley Gleeson, 'When Women Strike Back, Courts Can't Always See Their History of Abuse', *ABC News* (online, 9 October 2019) <<https://www.abc.net.au/news/2019-10-09/not-just-murder-but-assault-courts-family-violence/11566320>>; Bridget Fitzgerald, 'Jody Gore Hopes Surprise Prison Release Brings "Epidemic" of Domestic Violence into the Open', *ABC News* (online, 28 September 2019) <<https://www.abc.net.au/news/2019-09-27/jody-gore-who-killed-abusive-partner-speaks-after-prison-release/11555756>>; Annabel Hennessy, 'Kill or Be Killed? Chapter Three', *The West Australian* (online, 3 September 2019) <<https://thewest.com.au/news/court-justice/kill-or-be-killed-chapter-three-did-health-system-failings-cost-two-lives-ng-b881309844z>>.

in a case that highlighted the systemic discrimination against Indigenous women.¹⁵ Jody killed her former partner after many years of, and in response to, his extreme abuse.¹⁶ Despite the fact that no one had been able to protect her from this abuse and, in fact, the actions of state agencies knowingly exposed her further to it, her defence of self-defence was rejected.¹⁷ After serving four years, she was released by the WA Attorney-General's exercise of the prerogative of mercy. This means that although Jody was released from prison, her murder conviction still stands. Chamari Liyanage killed her husband after many years of intimate partner abuse characterised by coercive control involving prolonged sexual and physical torture. She was charged with murder and raised self-defence, which was rejected by the jury. She was convicted of manslaughter and sentenced to four years in prison. In 2018, Chamari's trial was the subject of research funded by Australia's National Research Organisation for Women's Safety, which found that the 2008 reforms to self-defence law were not operating as intended.¹⁸ Whilst the 2020 evidence reforms discussed in this article were enacted in response to criticisms of the application of the law on self-defence in these homicide trials, they apply to all defences and offences where family violence is relevant, including the significant numbers of prosecutions of summary offences in magistrates' courts.

In Part II of this article, we introduce the reforms and outline the conceptualisation of family violence as 'social and systemic entrapment', the model of violence on which the reforms are based. We then look at the provisions in more detail, showing how some of the provisions discourage reliance on common but inaccurate assumptions ('myths') about family violence, whilst others reflect understandings of family violence as coercive control or require consideration of the safety options and resources available to the victim (as informed by community and agency responses to individuals' behaviours and wider inequities).

In Part III of this article, we examine how the reforms have been applied. We show they have been effective in supporting defences raised by victims of intimate partner violence in some respects, but suggest they need to be utilised more fully and systematically in order to realise their potential. We summarise *Kritskikh v Director of Public Prosecutions* ('*Kritskikh*'),¹⁹ and *YZA v Western Australia Police* ('*YZA*'),²⁰ the two appellate decisions of the WA Supreme Court where the reforms were used in overturning magistrates' factual decisions. We then discuss an important effect of the reforms demonstrated in these cases. That is, the reforms require a move away from credibility reasoning in family violence cases to reasoning about directly relevant evidence about family violence, requiring

15 See McGlade and Tarrant (n 3).

16 *Jody Gore Royal Prerogative of Mercy: Statement by Attorney General* (n 14); McGlade and Tarrant (n 3) 107–15.

17 See Heather Douglas et al, 'Facts Seen and Unseen: Improving Justice Responses by Using a Social Entrapment Lens for Cases Involving Abused Women (as Offenders or Victims)' (2020) 32(4) *Current Issues in Criminal Justice* 488, 498–501 <<https://doi.org/10.1080/10345329.2020.1829779>>; McGlade and Tarrant (n 3).

18 Tarrant, Tolmie and Giudice (n 7).

19 [2022] WASC 130 ('*Kritskikh*').

20 [2024] WASC 187 ('*YZA*').

consideration of a wider range of directly relevant facts. Next, we make a detailed analysis of *YZA*, in which an Aboriginal woman was the appellant. We show how the directly relevant facts about family violence in that case could be conceptualised through an understanding of family violence as a form of entrapment. We suggest that the Court did not employ an analysis of intimate partner violence that accords with the social entrapment model underpinning the provisions, instead separating ‘types’ of behaviours from the overall abuse and power dynamics that characterise an accurate understanding of intimate partner violence. This creates the potential for the appellate judgments to be translated into factual contexts that have very different overall abuse and power dynamics, with potentially extremely detrimental effects for women and children. Finally, we make brief observations about the implications of our analysis: that the provisions have relevance not only for fact-finding by juries or magistrates at trial, but should be employed in prosecutorial decisions about commencing, continuing or discontinuing a prosecution and in judicial decisions on the outcome of appeals.

Our analysis suggests there is an urgent need for training on the nature of intimate partner violence as understood within the framework of these provisions and the research it is based on, for all decision-makers. This includes not only judicial officers but also prosecutors and defence lawyers who are arguing these cases. Further, we consider that in view of the very high victimisation of Aboriginal women, and the ongoing problem of systemic discrimination, there is a need for Aboriginal family violence experts to assist courts by providing expert evidence on the nature and extent of the violence experienced in cases involving Aboriginal defendants and complainants.²¹ We also note that there may be value in explicitly embedding reference to these provisions in prosecutorial guidelines.

II THE FAMILY VIOLENCE *EVIDENCE ACT* PROVISIONS

A The Legislative Reforms

The reforms in 2020 inserted sections 37–39G into the *Evidence Act 1906*.²² These sections have been re-enacted as sections 136–47 of the *Evidence Act 2025*,

21 Marlene Longbottom, Hannah McGlade and Kyllie Cripps, ‘Indigenous Women Are Most Affected by Domestic Violence but Have Struggled to Be Heard. It’s Time We Listened’, *The Conversation* (online, 11 May 2024) <<https://theconversation.com/indigenous-women-are-most-affected-by-domestic-violence-but-have-struggled-to-be-heard-its-time-we-listened-229720>>; Rachel Smith et al, ‘Advancing Socially Just Intimate Partner Violence Expert Testimony for Victim-Survivors Charged with Homicide: Critiquing the Old Bones in New Knowledge’ (2024) 13(4) *International Journal for Crime, Justice and Social Democracy* 76 <<https://doi.org/10.5204/ijcsd.3749>>; Pat Dudgeon and Roz Walker, ‘Decolonising Australian Psychology: Discourses, Strategies, and Practice’ (2015) 3(1) *Journal of Social and Political Psychology* 276 <<https://doi.org/10.5964/jssp.v3i1.126>>; Committee on the Elimination of Discrimination against Women, *General Recommendation No 39 on the Rights of Indigenous Women and Girls*, UN Doc CEDAW/C/GC/39 (31 October 2022). The Committee recognises that disciplinary expertise, including health and scientific expertise such as psychiatry, have ‘shaped and continue to shape the social experience of Indigenous women and girls and to promote discrimination against them’: at 3 [5].

22 *Family Violence Legislation Reform Act 2020* (WA) pt 10. The reforms have been re-enacted in the *Evidence Act 2025* (WA) ss 136–47 (*‘Evidence Act 2025’*), but they are not yet in operation. The new Act

which are soon to become operational. Where sections of the *Evidence Act 1906* are referred to we have included the corresponding section of the *Evidence Act 2025*. Three key aspects of the reforms are as follows: first, they set out a non-exhaustive definition of ‘evidence of family violence’ for all criminal proceedings and declare the admissibility of that evidence where it is relevant to a fact in issue. The effect of this aspect of the reforms is that the substantive provisions setting out the meaning of ‘evidence of family violence’ (primarily sections 38 and 39F [*Evidence Act 2025* sections 137, 144]) provide a framework that applies to decisions made about family violence at all points in a criminal process. Second, section 39 of the *Evidence Act 1906* [*Evidence Act 2025* section 138] deals with expert evidence. It puts beyond doubt that admissible expertise about family violence is not limited to expertise from the disciplines of psychology or psychiatry. The third key aspect of the reforms is the provision for jury directions on family violence in accordance with the guidance given in section 39F [*Evidence Act 2025* section 144].²³ Reflecting the legislative history of the reforms, self-defence is treated separately. Directions can be requested by defence counsel (or an unrepresented defendant) in ‘criminal proceedings in which self-defence in response to family violence is an issue’ (section 39C [*Evidence Act 2025* section 141]), or by either party in ‘criminal proceedings in which family violence is an issue’ (section 39D [*Evidence Act 2025* section 142]). If the request is made, the trial judge is mandated to give the direction unless there are good reasons not to.²⁴ The judge is also able to give directions without such a request if ‘it is in the interests of justice to do so’.²⁵ Section 39G [*Evidence Act 2025* section 145] provides that, where there is no jury, a judge’s reasoning must be consistent with directions that would have been given to a jury.

B Family Violence as a Form of Social and Systemic Entrapment

The reforms are based on an understanding of intimate partner violence as a form of social and systemic entrapment. Approaching intimate partner violence in this way represents a more accurate understanding of what we now know about this form of violence. The model incorporates concepts of coercive control to ensure that an individual’s behaviours are understood in the context of the abuse dynamics of the relationship, but also requires understanding the wider social conditions in which the individuals involved lived.²⁶ To gain a comprehensive understanding

extends the reforms to civil proceedings, allowing courts to take judicial notice of the meaning of family violence contained in what is now section 39F of the *Evidence Act 1906* (WA) (*‘Evidence Act 1906’*).

23 *Evidence Act 1906* (n 22) s 39E has some additional matters relevant to self-defence.

24 *Ibid* ss 39C(2), 39D(2).

25 *Ibid* ss 39C(3), 39D(3).

26 See Julia Tolmie, Rachel Smith and Denise Wilson, ‘Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework’ (2024) 30(1) *Violence Against Women* 54 <<https://doi.org/10.1177/10778012231205585>>; Julia Tolmie et al, ‘Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence’ [2018] (2) *New Zealand Law Review* 181 <<https://doi.org/10.2139/ssrn.4950453>>; Denise Wilson et al, *Wāhine Māori: Keeping Safe in Unsafe Relationships* (Report, 28 November 2019); Marlene Longbottom, ‘Systemic Entrapment and First Nations People in Australia’ (Webinar Presentation, Melbourne School of Population and Global Health, 22 October 2020) <<https://mspgh.unimelb.edu.au/centres-institutes/centre-for-health-equity/vault-old/systemic-entrapment-and-first-nations-people-in-australia2>>; Tarrant, Tolmie

of the violence, attention must be given to community and agency responses or potential responses to individual behaviours, the availability of safety options for a victim-survivor and the wider societal contexts that affect the meaning and effects of individuals' conduct. Understanding intimate partner violence as a form of entrapment requires careful investigation into, first, '[t]he abusive partner's coercive and controlling behaviour and the impact of that behaviour in closing down the victim-survivor's space for action ...'.²⁷ Second,

[t]he realities of the family violence safety responses available to the victim-survivor – this includes the responses of the immediate community surrounding the victim-survivor and their abusive partner and of those agencies charged with assisting them. The question here is whether the victim-survivor and those who matter to them have access to equitable and dignifying systemic safety responses that are effective in addressing the coercive controlling behaviours of their abusive partner.²⁸

Third,

[t]he operation of intersectional inequities and state-sanctioned violence in the victim-survivor's and their relational support network's lives ... [including] whether and how these exacerbate their abusive partner's ability to coercively control them and impact the safety responses available to them.²⁹

This framing of intimate partner violence draws on decades of research.³⁰ It is a framework that can be contrasted with older understandings of intimate partner violence as a series of incidents of physical violence, in between which the victim-survivor is assumed to have access to effective safety options – sometimes called the 'bad relationship with incidents of violence' model.³¹

Coercive control is 'a course of conduct: a repeated pattern of behaviour designed to undermine the autonomy of another individual'.³² As explained by Professor Evan Stark, coercive control consists of indirect tactics of control (isolation, deprivation, exploitation and micro-regulation), which are designed

and Giudice (n 7) 17–22; Heather Douglas, Stella Tarrant and Julia Tolmie, 'Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence' (2021) 44(1) *University of New South Wales Law Journal* 326 <<https://doi.org/10.53637/VJII7190>>; Douglas et al (n 17).

27 See Tolmie, Smith and Wilson (n 26) 62.

28 Ibid.

29 Ibid 61–2.

30 See James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 10.

31 Julia Tolmie, 'Thinking Differently in Order to See Accurately: Explaining Why We Are Convicting Women We Might Otherwise Be Burying: Inaugural Professorial Address' [2020] (4) *New Zealand Women's Law Journal* 8, 9; Emma Katz, *Coercive Control in Children's and Mothers' Lives* (Oxford University Press, 2022) 2 <<https://doi.org/10.1093/oso/9780190922214.001.0001>>.

32 Charlotte Barlow and Sandra Walklate, *Coercive Control* (Routledge, 1st ed, 2022) 1–2. Charlotte Barlow and Sandra Walklate note that the term was first used by Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (South End Press, 1982) 3. Note that in L Kevin Hamberger, Sadie E Larsen and Amy Lehrner, 'Coercive Control in Intimate Partner Violence' (2017) 37 *Aggression and Violent Behavior* 1 <<https://doi.org/10.1016/j.avb.2017.08.003>>, the authors explore inconsistencies in the literature as to how the concept has been defined and interpreted, suggesting that three facets of coercive control have been identified in the literature: motivation or intentionality of the behaviors, perception of the behavior as negative by the target, and the ability of the perpetrator to obtain control by the employment of a credible threat.

to undermine the victim's independence and foster a dependence on the abuser.³³ It also consists of direct tactics of coercion (violence and threats which create fear, surveillance and degradation), which are designed to close down the victim-survivor's resistance and punish non-compliance. The perpetrator implements a web of abuse strategies, developed through trial and error over time, with the aim of closing down and containing the victim's personhood. This is why Stark describes intimate partner violence as a 'liberty crime'.³⁴

The second dimension of entrapment acknowledges the fact that victims are not simply responding to the violence of their partner; they are also responding to what they think those around them are likely to do in response to their help-seeking. The reality at this point is that no jurisdiction in Australia has safety systems designed to effectively address ongoing patterns of coercive control. The repertoire of interventions to address family violence – calling the police, getting a protection order, going into a refuge or leaving the relationship – does not offer long-term safety for victim-survivors who are dealing with dangerous and determined abusers and may, in fact, exacerbate the danger that they are living under. Victims can employ all of these strategies and find themselves in situations of ongoing and heightened danger.³⁵ And for some women, the response they receive from the state agencies charged with protecting them is significantly worse. For example, Indigenous women belong to communities dealing with sustained and intergenerational experiences of state violence and neglect, including the removal of their children from their care, and may prefer to deal with the violence of their partner than risk the violence of state agencies.³⁶

33 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) <<https://doi.org/10.1093/oso/9780197639986.001.0001>>.

34 Ibid 13. This does not necessarily mean that this is conscious on the part of the person using violence: Hamberger, Larsen and Lehrner (n 32).

35 See the analysis by the Domestic and Family Violence Death Review Unit included in *Inquest into the Death of Hannah Ashlie Clarke, Aaliyah Anne Baxter, Laianah Grace Baxter, Trey Rowan Charles Baxter, and Rowan Charles Baxter* (Coroners Court of Queensland, Deputy State Coroner Bentley, 29 June 2022) 66–135 [393]–[438]. In this case the victim-survivor had left the relationship with an extremely dangerous family violence perpetrator and was in the high-risk period post-separation. She had done everything it was possible for her to do to keep herself and her children safe – obtaining a protection order and working with the police and other agencies. Whilst the perpetrator could have been prevented from accessing her and the children on the day that he murdered them all and committed suicide, the systemic safety response is not currently designed to function effectively in these circumstances. For example, agencies were working with her to develop plans involving things that she could do to keep safe, but there was no coordinated multi-agency safety plan directed at determining what agencies could do to contain his abusive behaviours towards his family during this high-risk period.

36 Wilson et al (n 26). Aboriginal academic Marlene Longbottom speaks about long-term community patterns of 'containment and condemnation' across a range of different government systems and carceral institutions: Longbottom (n 26). Kristin Bumiller describes how the state violence and neglect that some women experience after leaving their partners replicates the intimate partner violence they were attempting to escape: Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Duke University Press, 2008) 97.

C Family Violence as Social and Systemic Entrapment Reflected in the Reforms

In this section, we examine the family violence provisions in more detail. The analysis shows how research about family violence is reflected in the legislation, and we make reference to the research where relevant. We examine section 39F [*Evidence Act 2025* section 144], which sets out guidance on the content of family violence jury directions.³⁷ Some of the provisions in section 39F discourage reliance on common but inaccurate assumptions ('myths') about family violence that undermine a witness' credibility. Other provisions positively reflect understandings of family violence as coercive control and social and systemic entrapment.

1 Discouraging Reliance on Inaccurate Assumptions ('Myths') about Family Violence: The Credibility Provisions

A judge may direct, under section 39F(1)(b) [*Evidence Act 2025* section 144(1)(b)], that 'experience shows that':

- (i) people may react differently to family violence and there is no typical, proper or normal response to family violence;
- (ii) it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
- (iii) it is not uncommon for a person who has been subjected to family violence not to report family violence to police or seek assistance to stop family violence;
- (iv) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by a variety of factors;
- (v) it is not uncommon for a decision to leave an abusive partner, or to seek assistance, to increase apprehension about, or the actual risk of, harm.

Sub-paragraphs (i) and (iv) warn decision-makers not to make assumptions about how a person may respond to family violence. Sub-paragraphs (ii)–(iii), and (v) address specific assumptions that research shows are false – that a victim-survivor would always tell someone or report family violence, or that they are free to leave an abusive partner and would never return³⁸ – so that if the facts in a criminal proceeding contradict these assumptions, a victim-survivor's credibility is undermined. Misconceptions 'distort perceptions and result in decisions based on preconceived beliefs and myths rather than relevant facts'.³⁹ Indigenous women are subjected to particular racialised assumptions and myths

37 *Evidence Act 1906* (n 22) s 38 [*Evidence Act 2025* (n 22) s 137], which provides a definition of 'evidence of family violence', contains similar guidance.

38 Attorney General's Department, 'National Principles to Address Coercive Control in Family and Domestic Violence' (22 September 2023) 2–3 ('National Principles'), discussing National Principle 2. See also above nn 1, 26 and 30.

39 Committee on the Elimination of Discrimination against Women, *General Recommendation No 33 on Women's Access to Justice*, UN Doc CEDAW/C/GC/33 (3 August 2015) para 26; Committee on the Elimination of Discrimination against Women, *Views Adopted by the Committee under Article 7(3) of the Optional Protocol, Concerning Communication No 148/2019*, 82nd sess, UN Doc CEDAW/C/82/D/148/2019 (20 June 2022) 15–16 [7.5].

and have their credibility consistently undermined in legal systems as a result of the ongoing processes of colonisation.⁴⁰

These credibility provisions perform a negative function in the sense that they are concerned with minimising illegitimate attacks on a witness's credibility. They are replicated from the Victorian *Jury Directions Act 2015* (Vic) section 60(b) and, to date, they are the reform provisions most relied on.⁴¹

2 Family Violence as Social and Systemic Entrapment: Coercive Control

Most of the provisions in section 39F [*Evidence Act 2025* section 144] go further than addressing tendencies that undermine witnesses' credit, to set out positively how family violence should be conceptualised. Sections 39F(1) and (2) set out potential directions that reflect family violence as a web of coercive and controlling behaviours. Section 39F(1) [*Evidence Act 2025* section 144(1)] provides that the trial judge 'may include any of the following matters in the direction':

- (a) that family violence –
 - (i) is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse;
 - (ii) may amount to violence against a person even though it is immediately directed at another person;
 - (iii) may consist of a single act;
 - (iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.

Section 39F(2) [*Evidence Act 2025* section 144(2)] sets out further directions on coercive and controlling behaviour. Drawn from the *Domestic Abuse (Scotland) Act 2018* (Scot),⁴² section 39F(2) provides that when the judge is making a direction under sub-section (1), they:

may also indicate that behaviour, or patterns of behaviour, that may constitute family violence may include (but are not limited to) –

- (a) placing or keeping a person in a dependent or subordinate relationship;
- (b) isolating a person from family, friends or other sources of support;
- (c) controlling, regulating or monitoring a person's day-to-day activities;
- (d) depriving or restricting a person's freedom of movement or action;
- (e) restricting a person's ability to resist violence;
- (f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence;
- (g) compelling a person to engage in unlawful or harmful conduct.

These provisions reflect family violence as 'a course of conduct' comprising coercive control. They do not emphasise physical violence, although physical

40 Longbottom, McGlade and Cripps (n 21); Tess Allas et al, 'Indigenous Femicide and the Killing State', *Deathscapes: Mapping Race and Violence in Settler States* (Web Page, 2018) <<https://web.archive.org/web/20230102173536/https://www.deathscapes.org/case-studies/indigenous-femicide-and-the-killing-state-in-progress/>> ('Indigenous Femicide'), quoting Hannah McGlade; Larissa Behrendt, 'Law Stories and Life Stories: Aboriginal Women, the Law and Australian Society' (2005) 20(47) *Australian Feminist Studies* 245 <<https://doi.org/10.1080/08164640500090434>>; Lokot et al (n 4).

41 In addition to the two cases we analyse below, prosecutors have relied on the provisions to request jury directions, for example, in intra-family sexual offence trials: see *CDO v Western Australia* [2022] WASCA 58.

42 *Domestic Abuse (Scotland) Act 2018* (Scot) s 2.

violence is also commonly part of this pattern of behaviour.⁴³ What is, of course, not captured by lists like those in sections 39F(1) and (2) is that the tactics are likely to unfold and have a cumulative and compounding effect over time. It is not so much the particular behaviours used in any instance or case that is significant, as their effect in combination and repetition over time.⁴⁴ Relatedly, as Kevin Hamberger, Sadie E Larsen and Amy Lehrner point out, it is not just the presence but the ‘chronicity and pervasiveness’ of coercive control that is relevant to understanding in any particular case.⁴⁵ Charlotte Barlow and Sandra Walklate say that Stark’s ‘version of coercive control attempts to capture the “cage” of intimidating, degrading and regulatory practices engineered by abusers to inculcate fear and threat in victims’ everyday lives’.⁴⁶ To understand how the abuse tactics have impacted the victim, it is necessary to conduct a timeline analysis that captures the abuse strategies as they develop and take effect in the micro-details of everyday intimacy,⁴⁷ and draw their meaning and effect from the overall social context and history of abuse.⁴⁸ This holistic assessment is necessary because, as Lisa Goodman and Deborah Epstein explain, ‘even nonviolent control tactics take on a violent meaning through their implicit connection with potential physical harm’.⁴⁹ The Australian Government’s ‘National Principles to Address Coercive Control in Family and Domestic Violence’ (‘National Principles’) recognise the need to understand the overall pattern of harm in cases involving intimate partner violence by stating at the beginning of Principle 1 that ‘[p]erpetrators exert power and dominance over victim-survivors using *patterns of abusive behaviours over time* that create fear and deny liberty and autonomy’.⁵⁰

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- 43 Hayley Boxall and Anthony Morgan, ‘Experiences of Coercive Control among Australian Women’ (Statistical Bulletin No 30, Australian Institute of Criminology, 11 March 2021). The Institute surveyed 1,023 Australian women who had recently experienced coercive control by their current or former partner, finding that 54% had also experienced physical forms of abuse, whilst one-third experienced sexual violence. The Australian Domestic Violence Death Review Team found that there was evidence of physical violence before the fatal assault in a little under half of all domestic violence murder-suicides in an 18-year period: see Joint Select Committee on Coercive Control, Parliament of New South Wales, *Coercive Control in Domestic Relationships* (Report No 1/57, 30 June 2021) 3. See also Katz (n 31) 22; Charlotte Barlow et al, ‘Police Responses to Coercive Control’ (Research Paper, N8 Policing Research Partnership, June 2018) 3 <<https://documents.manchester.ac.uk/display.aspx?DocID=56477>>, which found 63% of cases involving coercive control in their sample featured reports of physical violence.
- 44 For example, Stark (n 33) points out that the use of *retaliatory* physical violence can be low-level repetitive violence that wears the victim down – she is bearing ‘the weight of multiple harms’ and can become so exhausted and overwhelmed that she starts containing herself in order to manage her partner’s transgressive behaviour: at 94.
- 45 Hamberger, Larsen and Lehrner (n 32) 10.
- 46 Barlow and Walklate (n 32) 4.
- 47 Stark (n 33). Stark is also clear that because coercive control utilises heterosexual gendered norms, it can be ‘invisible in plain sight’. The person using violence can simply look like a man with old-fashioned expectations of his partner – that she keep the house correctly, allow him to control finances, present herself in a certain way, and respect his role as the head of the household: at 14.
- 48 See, eg, Tarrant, Tolmie and Giudice (n 7).
- 49 Lisa A Goodman and Deborah Epstein, *Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health, and Justice* (American Psychological Association, 2008) 9.
- 50 ‘National Principles’ (n 38) 1 (emphasis added).

This overall pattern of abuse is also key to determining who in the history of the relationship over time is the predominant aggressor and who is the primary victim. Victim-survivors always resist abuse – either overtly or covertly – and sometimes that resistance can involve the use of physical violence.⁵¹ If the predominant aggressor in the relationship is not identified by looking at these broader patterns of harm over time, then: ‘abusive (ex-) partners can successfully manipulate the system, primary victims will not be protected and they may not contact support services the next time violence occurs’.⁵²

Without determining who is the predominant aggressor in the history of the relationship, when the victim uses violent resistance in one particular instance, they may be wrongly identified as the aggressor, or the abuse may be constructed as ‘mutual’. Accordingly, the ‘National Principles’ make it clear that behaviours that do not exert power and dominance over time to create fear and deny liberty, ‘such as a victim-survivor’s use of retaliatory violence or self-defence against a perpetrator, are not coercive control’.⁵³

3 Family Violence as Social and Systemic Entrapment: Community and Agency Responses and Wider Inequities

Section 39F(3) [*Evidence Act 2025* section 144(3)] goes on to provide that if:

the trial judge makes a direction that relates to subsection (1)(b)(iv), the trial judge may also indicate that decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by such things as the following –

- (a) the family violence itself;
- (b) social, cultural, economic or personal factors, or inequities experienced by the person, including inequities associated with (but not limited to) race, poverty, gender, disability or age;
- (c) responses by family, community or agencies to the family violence or to any help-seeking behaviour or use of safety options by the person;
- (d) the provision of, or failure in the provision of, safety options that might realistically have provided ongoing safety to the person, and the person’s perceptions of how effective those safety options might have been to prevent further harm;
- (e) further violence, or the threat of further violence, used by a family member to prevent, or in retaliation to, any help-seeking behaviour or use of safety options by the person.

These provisions add to the Victorian and Scottish legislation, in that the matters set out in section 39F(3)(c)–(e) capture the strategic and retaliatory nature of intimate partner violence, as well as the potential inadequacy (and even capacity

51 See Catherine Richardson/Kinewesquao, ‘Creating Islands of Safety for Victims of Violence: A Critical Systems Approach’ in Imelda McCarthy and Gail Simon (eds), *Systemic Therapy as Transformative Practice* (Everything is Connected Press, 2016) 250, 253; Valli Rajah and Max Osborn, ‘Understanding Women’s Resistance to Intimate Partner Violence: A Scoping Review’ (2022) 23(5) *Trauma, Violence, and Abuse* 1373 <<https://doi.org/10.1177/1524838019897345>>; Melissa Dichter et al, ‘Coercive Control in Intimate Partner Violence: Relationship with Women’s Experience of Violence, Use of Violence, and Danger’ (2018) 8(5) *Psychology of Violence* 596 <<https://doi.org/10.1037/vio0000158>>.

52 Family Violence Death Review Committee, Health Quality & Safety Commission New Zealand, *Fourth Annual Report: January 2013 to December 2013* (Report, June 2014) 75.

53 ‘National Principles’ (n 38) 8.

to exacerbate dangerousness) of family violence safety options and community responses. Moreover, inequities associated with race, poverty, gender, disability or age are expressly listed as factors that may influence decisions by victim-survivors.⁵⁴ Section 39F(3)(b) specifically acknowledges that the subject positioning of the victim-survivor may affect the quality of the safety options available to her. The exceptionally poor quality of the safety responses provided to Indigenous women have, for example, been well documented.⁵⁵ The ‘National Principles’ recognise that ‘[s]tructural forms of discrimination and inequality increase the risk that services and legal systems will minimise, doubt or ignore a victim-survivor’s experiences, or misidentify victim-survivors as perpetrators of coercive control’.⁵⁶

Aboriginal and Torres Strait Islander women are specifically named as being ‘at particular risk of the justice sector, services and the broader community either misidentifying them as the perpetrator, or not holding the perpetrator accountable’.⁵⁷ It is also recognised that ‘[p]erpetrators can manipulate or exploit structural discrimination and inequality to exercise power and dominance over victim-survivors’.⁵⁸

In summary, the provisions discourage reliance on ‘myths’ about family violence that impede reasoning about the facts of family violence (section 39F(1)(b) [*Evidence Act 2025* section 144(1)(b)]). Beyond this, most of the provisions reflect an understanding of family violence as: (1) *patterns* of abusive behaviours *over time* (section 39F(2) [*Evidence Act 2025* section 144(2)]); which are (2) affected and understood only in the context of the availability of safety options and community and agency responses to the victim-survivor and predominant aggressor (sections 39F(3)(c)–(e) [*Evidence Act 2025* section 144(3)(c)–(e)]); and within (3) the intersecting inequities related to race, gender and other social conditions that facilitate abuse or influence responses to those subjected to it (section 39F(3)(b) [*Evidence Act 2025* section 144(3)(b)]).

III APPLYING THE FAMILY VIOLENCE PROVISIONS

In this Part, we look at how the reforms have been applied. We show that there is a welcome consequence of the new provisions, which is that judicial reasoning on the facts can be appealed when it does not conform to the meaning of family violence in those provisions. However, we argue that more needs to be done. There have been two appeals against convictions where the appellant sought to rely on the reforms as a victim-survivor of family violence: *Kritskikh* and *YZA*. After briefly outlining *Kritskikh* and *YZA*, we show that the provisions required a shift

⁵⁴ *Evidence Act 1906* (n 22) s 39F(3)(b).

⁵⁵ Wilson et al (n 26); Kyllie Cripps, ‘Indigenous Women and Intimate Partner Homicide in Australia: Confronting the Impunity of Policing Failures’ (2023) 35(3) *Current Issues in Criminal Justice* 293 <<https://doi.org/10.1080/10345329.2023.2205625>>; McGlade and Tarrant (n 3) 106–26.

⁵⁶ ‘National Principles’ (n 38) 3.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

away from credibility reasoning to reasoning about the facts in issue that constitute family violence, and that the scope of that directly relevant evidence is significantly broadened. This shift and its significant effect are recognised by the appeal court in *Kritskikh*. Next, we argue that reasoning on the facts about family violence requires an understanding of intimate partner violence as social and systemic entrapment, without which the value of the reforms cannot be realised. This argument is made through a detailed analysis of *YZA* to explain what was missing in the factual analysis undertaken by the prosecution and the appellate court, even as the latter highlighted limitations in the Magistrate's factual reasoning. This is troubling because it has implications for how the provisions may be applied in other contexts. Finally, we make brief observations about the implications of our analysis: that the provisions necessarily have relevance not only for fact-finding by juries or magistrates at trial, but should be employed in prosecutorial decisions about commencing, continuing or discontinuing prosecutions, and in judicial decisions on the outcome of appeals.

A *Kritskikh* and *YZA*

In *Kritskikh*, the Supreme Court of WA allowed an appeal from conviction of a non-Indigenous woman for assault occasioning bodily harm of her partner under section 317 of the *Criminal Code*.⁵⁹ The appeal was allowed on the grounds that the Magistrate had not reasoned consistently with the family violence provisions relating to the question of self-defence.⁶⁰ The charges arose out of an altercation between Ms Kritskikh and her de facto husband while they were driving home from a work function.⁶¹ Ms Kritskikh said her partner stopped the car, and she told him she wanted to leave him.⁶² Her partner asked if she was interested in another man, and when Ms Kritskikh said yes, he punched her in the face and hit her with an object. Her partner claimed that while driving home, Ms Kritskikh became agitated, grabbed the steering wheel, and punched and kicked him.⁶³ He pushed her away, making contact with her face four or five times. Her partner called the police.⁶⁴

Kritskikh was the first appellate case to interpret section 39G [*Evidence Act 2025* section 145] in relation to a court sitting without a jury. It determined that Magistrates' reasons must be 'compatible' with the directions that would be given to a jury in the particular case.⁶⁵ It would be an

error for a magistrate to reason in a way that is inconsistent with [section 39F]. For example, if a magistrate was to make an adverse finding as to credibility on

59 *Kritskikh* (n 19) [1] (Hall J).

60 *Ibid* [2]–[3].

61 *Ibid* [4]–[8].

62 *Ibid* [11].

63 *Ibid* [7].

64 Without saying that this is what happened here, we note research shows that coercive and controlling abusers can engage in legal systems abuse, including manipulating responding police officers to see themselves as the victim by being the first party to call the police: see Ellen Reeves et al, 'Incredible Women: Legal Systems Abuse, Coercive Control and the Credibility of Victim-Survivors' (2025) 31(3–4) *Violence Against Women* 767, 771 <<https://doi.org/10.1177/10778012231220370>>.

65 *Kritskikh* (n 19) [111] (Hall J).

the basis that the person claiming self-defence had not complained of past family violence, without taking into account that it is not uncommon for a person who has been subjected to family violence not to report it to the police, that would arguably be inconsistent with s 39F(1)(b)(iii). This, of course, does not necessarily mean that a failure to complain, or a delay in complaining, is irrelevant. It simply means that in assessing the significance of any failure or delay it is important to take into account that there may be explanations for it that do not detract from the credibility of the witness.⁶⁶

Magistrates only need to ‘take into account such of the principles in their reasoning process as are relevant and raised by the evidence in the particular matter. However, if a principle is relevant on the evidence raised in trial it is not open to a judge or magistrate to reason in a way that is plainly inconsistent with that principle’.⁶⁷ The Court upheld the appeal, finding that the Magistrate’s reasoning was inconsistent with section 39F(1)(b)(iii) [*Evidence Act 2025* section 144(1)(b)(iii)].⁶⁸

In *YZA*, the Supreme Court of WA allowed an appeal from the conviction of an Aboriginal woman for assaulting her partner under section 313 of the *Criminal Code*, on the grounds that the Magistrate had not reasoned consistently with the family violence provisions relating to the defence of provocation.⁶⁹ *YZA* and her ex-partner were co-parenting two children from the relationship (at the time, eight and four years old).⁷⁰ Charges arose after *YZA* assaulted the complainant when he was picking up their children from her home after being called by their son with a request to do so.⁷¹ The Magistrate did not allow the defence of provocation to *YZA* on the basis that there was a parenting agreement that allowed the complainant to go to her house, where he had once lived, and pick up the children if they wanted it.⁷² In this context, the Magistrate found that the complainant’s series of acts, which included calling *YZA* a ‘whore’ and using a loud voice that he knew triggered childhood trauma, were not such as to cause a person to act in the way she did; she ‘simply kept on attacking’.⁷³ The Court upheld the appeal, finding that the Magistrate’s reasoning was inconsistent with sections 39F(1)(b)(i) [*Evidence Act 2025* section 144(1)(b)(i)], 39F(1)(a)(i) [*Evidence Act 2025* section 144(1)(a)(i)] and 39F(3) [*Evidence Act 2025* section 144(3)].⁷⁴

66 Ibid [108].

67 Ibid [110].

68 Ibid [125]–[126].

69 Note that section 246 of the *Criminal Code* (n 5) contains a defence of provocation to an assault, unlike at common law, in which provocation is a defence only to murder: see *Kaporonovski v The Queen* (1973) 133 CLR 209, 216 (McTiernan ACJ and Menzies J).

70 *YZA* (n 20) [5], [7], [40] (Forrester J).

71 Ibid [5].

72 Ibid [61].

73 Ibid [67].

74 Ibid [110], [121], [132]–[134].

B The Reforms Require a Move from Credibility Reasoning to Reasoning about the Facts in Issue that Constitute Family Violence

One of the purposes of the family violence evidence provisions was to reorient reasoning about family violence so that false but common assumptions about how the violence was experienced, and how a person should respond, do not distort perceptions of a victim-survivor's credibility in the criminal process. As explained above, this purpose is reflected in section 39F(1)(b) [*Evidence Act 2025* section 144(1)(b)].

The trials in both *Kritskikh* and *YZA* turned largely on credibility: the Magistrates' conclusions rested on whose version of events to believe in relation to specific incidents over a short period of time. In *Kritskikh*, the Magistrate found Ms Kritskikh less credible than her partner.⁷⁵ Her credibility was undermined in that she was agitated and erratic when police arrived, and because she alleged she had been assaulted by her partner on a previous occasion, but had not called the police.⁷⁶ She had only raised that incident after the current charges against her were laid, the suggestion being that she had fabricated the early abuse or that it was of no concern.⁷⁷ Ms Kritskikh's partner's credibility was enhanced because he had called '000' at the time of the incident and spoke calmly to the police and, similarly, had called the police about a previous incident.⁷⁸ The Court of Appeal found that the Magistrate had not taken into account that 'it is not uncommon for a person who has been subjected to family violence not to report family violence to police or seek assistance to stop family violence' (section 39F(1)(b)(iii) [*Evidence Act 2025* section 144(1)(b)(iii)]).⁷⁹

In *YZA*, the Magistrate found that YZA was less credible than her ex-partner in her account of what happened in the immediate lead-up to her assaulting him on the night. The Magistrate found they had engaged in mutual unpleasantness,⁸⁰ both 'behav[ed] badly' and 'no one behaved better than the other'.⁸¹ However, YZA was less believable in reference to video footage of the moments immediately surrounding the assault. Her 'account of the events of the night ... was markedly different to what was actually shown on the recordings'.⁸² The Magistrate found that the appellant's lack of credibility and reliability was 'probably due to the amount of alcohol she had drunk'.⁸³ She 'became very quickly aggressive primarily due to the impact of the alcohol',⁸⁴ and 'the presence of the children should have been

75 *Kritskikh* (n 19) [122]–[124] (Hall J).

76 *Ibid* [72], [122]–[124].

77 *Ibid* [122]–[124].

78 *Ibid* [69]–[72], [122].

79 *Ibid* [125]–[126].

80 There was a "history of unpleasantness" between them': *YZA* (n 20) [66] (Forrester J).

81 *Ibid* [119].

82 *Ibid* [97]. The Magistrate in *YZA* found that the appellant's credibility as to what occurred was affected by the fact that she claimed to have been choked by the complainant, which was not evidenced by the video footage: at [119], [128].

83 *Ibid* [97].

84 *Ibid* [67].

enough to constrain her'.⁸⁵ The Court of Appeal held that these assumptions, that intoxication caused her to act and about how she should have behaved, led to the Magistrate failing to take into account that 'people may react differently to family violence and there is no typical, proper or normal response' (section 39F(1)(b)(i) [*Evidence Act 2025* section 144(1)(b)(i)]).⁸⁶ Moreover, this credibility reasoning obscured the Magistrate's consideration of evidence of family violence that had been given at trial.⁸⁷ YZA's 'response to the complainant's conduct might instead have been a reaction to the imminent removal of her children from her care and the prospect of future denial of access, in the context of the appellant's background of having been previously denied access' by her ex-partner to the children.⁸⁸

The appeal courts in *Kritskikh* and *YZA* relied on the provisions that reflect established research about women's decisions to report or not to report family violence and that women respond within their specific circumstances and not stereotypically. The reasoning of the appeal court in *YZA* implicitly recognises the gendered stereotype of the 'good mother' who is expected to maintain composure in front of her children, whatever is happening to her as a mother,⁸⁹ as a source of the faulty reasoning about YZA's credibility. The Court also identified that the Magistrate's assumption that 'intoxication' explained YZA's actions led to his unsubstantiated conclusions.⁹⁰ However, there is no indication that the Court observed the racialised dimensions of this assumption. Literature shows that stereotypes of a 'drunken or substance-affected Aboriginal woman' commonly animate these credibility findings, leading to faulty and unjust conclusions about the violence an Aboriginal woman was being subjected to.⁹¹ We discuss the need for understanding Aboriginal women's experiences of violence as Aboriginal women under section 39F [*Evidence Act 2025* section 144] in the next section of this article.

Another observation can be made about how the appeal courts in *Kritskikh* and *YZA* dealt with the reforms relating to credibility. Significantly, the Court in *Kritskikh* recognised the seriousness of the effect of the credibility reasoning

85 Ibid.

86 Ibid [125]–[126].

87 Ibid [122]–[124].

88 Ibid [121].

89 Susan Goodwin and Kate Huppertz, 'The Good Mother in Theory and Research' in Susan Goodwin and Kate Huppertz (eds), *The Good Mother: Contemporary Motherhoods in Australia* (Sydney University Press, 2010) 1 <<https://doi.org/10.2307/j.ctv1sr6kgj.5>>.

90 *YZA* (n 20) [98], [119]–[121] (Forrester J).

91 Pat Dudgeon, quoted in Carly Williams, 'When Chrystalle Asked Her Local Hospital for Help, She Was Offered Tea and Left Alone to Die. Her Family Is Demanding Change', *ABC News* (online, 24 July 2024) <<https://www.abc.net.au/news/2024-07-24/indigenous-suicide-closing-the-gap-wa-hospital/104132088>>; *Inquest into the Death of Julieka Ivanna Dhu* (Coroners Court of Western Australia, State Coroner Fogliani, 15 December 2016); Western Australian Corruption and Crime Commission, *Response of WA Police to a Particular Incident of Domestic Violence on 19–20 March 2013* (Report, 21 April 2016); McGlade and Tarrant (n 3); Toby Freeman et al, 'Case Study of a Decolonising Aboriginal Community Controlled Comprehensive Primary Health Care Response to Alcohol-Related Harm' (2019) 43(6) *Australian and New Zealand Journal of Public Health* 532 <<https://doi.org/10.1111/1753-6405.12938>>. Toby Freeman et al argue that 'both Aboriginal and Torres Strait Islander peoples' use of alcohol and policy responses to address it are linked to Australia's history of colonisation': at 532.

employed by the Magistrate; that it effectively precluded the defendant's defence before it was considered.⁹² The Court found that the evidence before the Magistrate raised self-defence – that the evidentiary onus on the defendant had been met.⁹³ In fact, this was the 'central plank' of the defendant's case at trial.⁹⁴ The 'issue of self-defence was raised on the evidence and was critical in determining whether the appellant was guilty of the offences charged'.⁹⁵ Yet the Magistrate *did not even mention* self-defence. This was because, the Court held, '[i]t was implicit in [the Magistrate's] reasoning that, if he rejected the appellant's evidence and accepted that of [the complainant], any issue of self-defence fell away'.⁹⁶ This shows that reliance on credibility reasoning – to assess 'who is telling the truth' about a specific incident – directly undermines the defence of a person who has responded to ongoing family violence. The same applies to provocation (the defence relied on in *YZA*). Once the defendant is not to be believed about specific incidents, the other legal determinations required by the defences (such as any danger they actually faced and proportionality of response) are rendered moot.⁹⁷ It is clear, therefore, that the provisions require (and facilitate) a major shift away from a simple focus on who was most credible (in relation to what occurred within a short window of time) to consideration of a much wider scope of directly relevant evidence about family violence.

Thus, the appeal courts in *Kritskikh* and *YZA* demonstrate how the reforms can be used to peel away automatic assumptions that impede proper examination of, and reasoning about, the family violence a defendant was experiencing. And the Court in *Kritskikh* explained the seriousness of the effect of this flawed credibility reasoning, that it can foreclose a defendant's entire defence before it is even considered. The reforms require a shift to reasoning about a wider scope of substantive evidence about family violence. As we showed in our analysis of the legislation above, most of the reform provisions go beyond the 'credibility provisions' to set out what evidence of family violence is, reflecting a conceptualisation of this violence as a form of social and systemic entrapment. In the next section, we make a detailed analysis of the Court's use of some of these provisions in *YZA*.

C Intimate Partner Violence Entrapment: The Need to Interpret Incidents in the Context of Broader Ongoing Patterns of Harm

In this section, we explain what was missing in the factual analysis undertaken by the prosecution and the appellate court in *YZA*, even as the latter highlighted limitations in the Magistrate's factual reasoning. These gaps represent failures to fully utilise the provisions on intimate partner violence entrapment and therefore to apply them accurately. This is troubling because it has implications for how the

92 *Kritskikh* (n 19) [118]–[126] (Hall J).

93 *Ibid* [118].

94 *Ibid*.

95 *Ibid*.

96 *Ibid* [119].

97 See the same analysis in the context of a homicide trial in *Tarrant, Tolmie and Giudice* (n 7) 78–85.

provisions may be applied in other contexts. Before beginning the analysis, it is useful to provide more details of the appeal court's decision.

1 *YZA: The Appeal Court's Decision*

As noted above, in *YZA*, the appellant, who was an Aboriginal woman, was tried and convicted of unlawful assault under section 313 of the *Criminal Code*. The charge was of aggravated assault in that she was in a family relationship with the complainant. Not in dispute on appeal was the fact that there was an assault or that the defendant and complainant were in a family relationship. At issue was whether the assault was unlawful under sections 245 and 246 of the *Criminal Code*. An assault is unlawful if there was no reasonable possibility that an ordinary person could have lost control in response to the acts or insults of the complainant and do as the defendant did.⁹⁸

The appellant argued two grounds of appeal. The first was that the Magistrate had erred in fact by finding that the couple's parenting agreement contained a provision that 'one parent could remove their child from the other's care when requested by the child'.⁹⁹ The second ground of appeal was that the Magistrate erred in law by reasoning inconsistently with how a jury would have been directed under the family violence provisions in the *Evidence Act 1906*.

With respect to ground one, the Court found that the Magistrate had made an error of fact in finding that there was a term in their agreement that allowed the complainant to pick the children up from the appellant's house when the children requested that.¹⁰⁰ Moreover, the Magistrate had relied on the agreement containing this term despite having been made aware that this was 'seriously in dispute'.¹⁰¹ Therefore, the conclusion that the complainant's conduct was an 'activation' of the agreement had no factual foundation.¹⁰²

With respect to ground two, the appellate court considered whether the Magistrate's reasoning accorded with the jury directions encapsulated in section 39F of the *Evidence Act 1906*. In two respects, the Court held that it did, and in two respects, it was thought not to be inconsistent. First, the Court held that the Magistrate thought the complainant taking the children on the night in question was little more than a 'day-to-day aspect of the matter'.¹⁰³ He failed to recognise that the complainant's evidence that the collection of the children in circumstances where he had previously denied *YZA* access to her children, where she perceived an imbalance of control in access and thought the complainant might prevent her from seeing them again, constituted evidence of family violence. The Court said taking the children in these circumstances could constitute 'psychological

98 *R v Stingel* (1990) 171 CLR 312; *Evans v Western Australia* [2011] WASCA 182.

99 *YZA* (n 20) [69] (Forrester J).

100 The only suggestion that the parenting agreement contained such a term was heard on voir dire; there was no evidence in the course of the trial to that effect.

101 *YZA* (n 20) [85] (Forrester J).

102 *Ibid* [84]. Not discussed on appeal was the significance that should be accorded to an agreement that the appellant did not play a role in drafting, was not equitable, and which she felt she had no choice other than to sign if she wanted to see her children again.

103 *Ibid* [109].

abuse’ (making the Magistrate’s reasoning inconsistent with section 39F(1)(a)(i) [*Evidence Act 2025* section 144(1)(a)(i)]) or ‘isolating a person from family’ (making his reasoning inconsistent with section 39F(2)(b) [*Evidence Act 2025* section 144(2)(b)]):¹⁰⁴

Primarily his Honour failed to identify the aspects of [YZA’s] account as to the relationship background which raised an issue as to whether she was a victim of family violence, namely psychological abuse. Had his Honour done so, he would then have been prompted to examine more closely the impact of the particular conduct of the complainant not only on the night in question but also in the preceding months, when considering whether the conduct constituted sufficient provocation to [YZA] for her assault upon the complainant.¹⁰⁵

Secondly, the Magistrate implied that YZA ‘should have been constrained by the presence of her children’,¹⁰⁶ implying that she was expected to act in a certain way. As discussed, the Magistrate’s assumption about why YZA acted as she did (her intoxication) and his failure to relate her reaction to the imminent removal of the children and the prospect of future denial of access, was inconsistent with section 39F(1)(b)(i) [*Evidence Act 2025* section 144(1)(b)(i)]. This flowed on from the first failure identified above.

The appellate court was not satisfied that the Magistrate’s reasoning was inconsistent with section 39F(1)(a)(iii)–(iv) [*Evidence Act 2025* section 144(1)(a)(iii)–(iv)]. It was not obvious that his reasoning failed to appreciate that a single act can be family violence or that family violence can consist of a pattern of behaviour, including acts that might appear minor or trivial if viewed in isolation.¹⁰⁷ Finally, the Court held the Magistrate’s reasoning was not inconsistent with section 39F(1)(b)(iii) [*Evidence Act 2025* section 144(1)(b)(iii)], relating to evidence the appellant had declined to have photos taken of bruises she had sustained on the night in question. In the Court’s view, the Magistrate had not made any credibility findings about this refusal.¹⁰⁸

2 Analysis of the Facts in YZA: Intimate Partner Violence Entrapment

In the prosecution’s original narration of the factual basis for the charges against YZA, the complainant went to her home address in December 2022 because their son had texted him to say that YZA was drunk and he did not feel safe.¹⁰⁹ This caused the complainant ‘to be concerned for the welfare of the children’.¹¹⁰ He went to the house, accompanied by his brother for his own safety,¹¹¹ and entered through the back door to find the children with their suitcases packed to go. The appellant exited the house after them and bailed the complainant up against the fence whilst he was holding their daughter, assaulting him by punching, scratching

¹⁰⁴ Ibid [132].

¹⁰⁵ Ibid.

¹⁰⁶ Ibid [121].

¹⁰⁷ Ibid [118].

¹⁰⁸ Ibid [127], [131].

¹⁰⁹ Ibid [8].

¹¹⁰ Ibid [5].

¹¹¹ Ibid [12].

and slapping him.¹¹² He was trying to get the children and their property into his car in order to leave.¹¹³ As a result, he had scratches on his body and face, and his t-shirt was ripped. At one point, he ‘threw’ her in order to prevent her hitting him, and at another point, he put her in a ‘bearhug’ for similar reasons.¹¹⁴ He had started filming these events, but once she knocked the phone out of his hand, he handed the child he was holding and the phone to his brother who continued to film.¹¹⁵ Once the complainant, his brother and the children had managed to get away from the house, he pulled over at the end of the street and called the police, providing them with the video footage.¹¹⁶

This is a narration of the facts based entirely on one incident, viewed in isolation from the wider context of the relationship. The picture that it paints is of an Aboriginal woman who is violent and volatile when she has been drinking. It also points to a protective father who needed to rescue his children but who, knowing what he was in for, called the police in advance and took a family member with him in order to document proceedings and contain the fallout. It was this account of the ‘facts’ that resulted in the prosecution.

This account does not interpret the incident that occurred in the context of the history of the relationship, which included the complainant’s use of violence against YZA. The complainant admitted to using violence ‘towards the appellant on more than one occasion’ and had been convicted of physically assaulting YZA and breaching a police order taken out for her protection, both offences occurring 10 years previously.¹¹⁷ When confronted with this history in court by the defence, the complainant minimised his use of violence, characterising it as mutual ‘fights’ that took place on ‘many occasions’¹¹⁸ and blaming YZA for causing his physical violence against her: ‘[y]ou poke a tiger in a cage for a long time, the tiger is going to get shitty’.¹¹⁹ He said he was ‘made to be aggressive’.¹²⁰ This contradicted a message he sent YZA in July 2022 in which he acknowledged what he had ‘done to you and to us’ and stated ‘I’m going to change it so I never hurt anyone I love again’.¹²¹ He also acknowledged that she had trauma from the past as a result of what her father and brother had done to her. When he collected the children on this occasion against her wishes, he used a deep voice that he knew would trigger this trauma – as the Magistrate noted, it was meant to ‘annoy’ and ‘upset’ her, and it did.¹²²

When they separated, after YZA said she didn’t want to be a stay-at-home mum, the complainant denied her access to their children for one month.¹²³ He

112 Ibid [5]–[6], [11].

113 Ibid [5].

114 Ibid [6].

115 Ibid [11]–[12].

116 Ibid [19].

117 Ibid [21].

118 Ibid [22]. Although note that the appellant agreed that when she drinks ‘she and the complainant both get violent and they both get “mouthy”’: at [47].

119 Ibid [24].

120 Ibid.

121 Ibid [23].

122 Ibid [67].

123 Ibid [26].

drafted an agreement with care arrangements weighted in his favour for her to sign. He declined to participate in mediation with her even though the agreement provided for this.¹²⁴ She said:

he lets me see them whenever *he* wants. I have no say. He just comes and takes them, lets me have them whenever, does whatever, lets me talk to them whenever he lets me talk to them... he's drilled into the kids heads that if they want to come home, they can come home, he will come and get them anytime ...¹²⁵

On the first occasion after separation, when he allowed her to have the children, her daughter asked for her dad at bedtime, and he insisted on taking their son as well, who was in tears.¹²⁶ The appellant said that he had threatened to prevent her from seeing her children and that she had no say in when she saw or spoke to her children or how long she would have them when they visited.¹²⁷ She said the children will say they want to go home when they are bored because the complainant will let them have their tablets (electronic devices).¹²⁸ She also said that she 'could not cope' with going to the Family Court, although she had tried.¹²⁹

On the night in question, the complainant entered her house through the back door without knocking or asking for permission to take her children, filming YZA as he did so without her consent. He stated: 'I've always got permission.'¹³⁰ The children were crying because they thought their mum would 'be going to gaol'.¹³¹ He took the children even though they had no physical injuries, and he refused to talk to YZA, even though he was in her home and she was trying to engage with him in order to explain that nothing had happened.¹³² He said 'no' and left the house with the children.¹³³ She said, when getting the children's things, he threw his stepson's tablet off the bench and smashed it.¹³⁴ When she came towards him, he said '[n]o, don't come fucking near me. No. No. Go away'.¹³⁵ He twice told her 'hit me', taunting her.¹³⁶ He said to her, '[y]ou hit me one more fucking time, it will be the last thing you ever fucking do'.¹³⁷ He also said, '[f]uck off, you fucking whore'.¹³⁸ He told her she would never see the children again.¹³⁹ He told her to get back inside the house as the police were on their way. In the ensuing altercation, she was under

124 Ibid [27].

125 Ibid [41] (emphasis in original).

126 Ibid [42].

127 Ibid [41]–[42].

128 Ibid [43].

129 Ibid [45].

130 Ibid [29].

131 Ibid [38].

132 Ibid [29].

133 Ibid.

134 Ibid [48].

135 Ibid [29].

136 Ibid.

137 Ibid [34].

138 Ibid [35].

139 Ibid [47].

the impression that he choked her,¹⁴⁰ but there was no evidence of that on the video footage,¹⁴¹ although he admitted twice to physically overpowering her.¹⁴²

In stepping back to see this larger history and context, a very different picture emerges from that initially painted by the prosecution and the complainant. There is a history of physical violence and controlling behaviour by the complainant towards YZA, although we do not know the specific details of this history. YZA does not want to discuss it, and the complainant engages in gaslighting around that history – mutualising the abuse in order to present her as at fault – he is a ‘tiger’ that she has ‘poked’.¹⁴³ The fact that his violence resulted in a criminal justice process, given her apparent reluctance to be involved with the police, is an indication of the potential seriousness of the underlying pattern of harm that we do not have access to. Since their separation, the complainant had withheld YZA’s access to her children, forced her into an imbalanced caring arrangement in respect of those children, played their kids off against her (setting them up to report on her and to prefer to be at his house), threatened to withhold the children from her permanently, and refused to engage with her as the adult and the other parent – instead, directly engaging with the children as to their care arrangements. The result is that he felt entitled to enter her house at any point without knocking and remove the kids against her wishes. There is no evidence she had ever acted in a similar manner. Section 39F(2) clearly makes this overall pattern of coercive and controlling behaviour by the complainant relevant to understanding the family violence in any particular case. This is particularly so when these provisions are interpreted in light of the guidance provided by the ‘National Principles’.¹⁴⁴

But the use by the complainant of state agencies and those agencies’ responses are also relevant to understanding the violence. The complainant used the police against YZA to exacerbate his aggressive conduct, by calling them before he came to her property, letting her know that he called them, and video recording their exchange in order to share with the police. Although we cannot know, there may be a history to this, reflected in the children’s tears, because they think she is going to prison. Certainly, the children’s tears reflect an understanding of their mother’s vulnerability to being taken into custody when the police are called, as an Aboriginal woman who has been drinking.

Further, it is factually significant that YZA was an Aboriginal woman and mother. There is voluminous literature documenting the damaging and destructive behaviour of the state and state agencies, such as the police and courts, towards the Aboriginal community, which continues today.¹⁴⁵ It follows that what it meant for YZA as an Aboriginal woman in terms of being able to rely on state agencies to protect herself and her relationship with her children, and to enforce her rights, or for the complainant in being able to deploy those state agencies against her,

140 Ibid [39], [49], [51].

141 Ibid [62].

142 Ibid [6].

143 Ibid [24].

144 ‘National Principles’ (n 38).

145 See, eg, Cripps (n 55); McGlade and Tarrant (n 3).

needs to be understood as part of the context in which the parties were interacting and in which the complainant's behaviours and their effect on YZA were to be understood. As noted by Stella Tarrant, Hannah McGlade and Carol Bahemia:

Indigenous women's research and advocacy centralises Indigenous women's relationship with the state when conceptualising the interpersonal violence to which they are subjected. The research shows that individualised violence against Aboriginal women by their partners can only be understood through colonial relations, which continue to impact women today.¹⁴⁶

Amy McQuire and colleagues point out that 'police and state agencies are on the frontline' of the violence experienced by Indigenous women.¹⁴⁷ Understanding the history of colonisation and the collective dimensions of violence against Indigenous women, including as it affects their children, is therefore essential in making sense of an Aboriginal victim-survivor's experiences of intimate partner violence.¹⁴⁸ Paige L Sweet points out that the individual abuse dynamics used by an intimate partner violence perpetrator only have an effect because of power relations in the social context in which they take place.¹⁴⁹

We do not know if the complainant in YZA is white, as his ethnicity is not mentioned. However, his willingness and capacity to use the police to support his coercive and controlling behaviour may reflect his white privilege, his male privilege and/or other factors – for example, that he may be better resourced financially and culturally to use public or private state processes (like the Family Court). Heather Douglas refers to the strategic use of state agencies and the legal system to perpetuate patterns of coercion and control against victim-survivors post separation as 'legal systems abuse'.¹⁵⁰ This is a strategy that is clearly more readily available to family violence perpetrators who are constructed as credible by, and culturally comfortable within, state processes. This will be particularly so when they are in a relationship with victim-survivors who are not so situated. Obviously,

146 Stella Tarrant, Hannah McGlade and Carol Bahemia, 'Promoting Aboriginal Women's Human Rights: Understanding When Not to Prosecute Aboriginal Women' (2024) 13(4) *International Journal for Crime, Justice and Social Democracy* 28, 30 <<https://doi.org/10.5204/ijcjsd.3529>>.

147 Amy McQuire, Submission No 54 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (16 December 2022) 8, quoted in Tarrant, McGlade and Bahemia (n 146) 30.

148 'Indigenous Femicide' (n 40); Bevan, Lloyd and McGlade (n 4); Longbottom (n 26); McQuire (n 147); Jocelyn Jones et al, 'Wangkiny Yirra "Speaking Up" Project: First Nations Women and Children with Disability and Their Experiences of Family and Domestic Violence' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 6 June 2023) <<https://disability.royalcommission.gov.au/publications/wangkiny-yirra-speaking-project-first-nations-women-and-children-disability-and-their-experiences-family-and-domestic-violence>>.

149 Paige L Sweet, 'The Sociology of Gaslighting' (2019) 84(5) *American Sociological Review* 851 <<https://doi.org/10.1177/0003122419874843>>.

150 Heather Douglas, *Women, Intimate Partner Violence, and the Law* (Oxford University Press, 2021) 7, 88 ('*Women, Intimate Partner Violence, and the Law*'). See also Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84 <<https://doi.org/10.1177/1748895817728380>>; Vivienne Elizabeth, 'Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation' (2017) 25(2) *Feminist Legal Studies* 185 <<https://doi.org/10.1007/s10691-017-9349-9>>; Allison E Monterrosa and Angela J Hattery, 'Mapping Coercive Violence' (2023) 29(9) *Violence Against Women* 1743 <<https://doi.org/10.1177/10778012221125499>>; Reeves et al (n 64).

legal systems abuse can be facilitated by deeper and enduring power structures around race and gender, put in place by the ongoing process of colonisation.

In *YZA*, this broader context was legally relevant under section 39F(3)(b) [*Evidence Act 2025* section 144(3)(b)], which provides that a victim-survivor's responses to violence may be influenced by 'inequities associated with (but not limited to) race, poverty, gender', responses by 'agencies to the family violence' and the 'threat of further violence' used 'in retaliation'. The inequities associated with race and gender – particularly the violence and neglect state agencies demonstrate towards Aboriginal women – are also relevant in this case under section 39F(2) [*Evidence Act 2025* section 144(2)] to the complainant's ability to coercively control *YZA*, potentially lending state authority to his domination of her by the deployment of state agencies such as the courts and the police in his interactions with her. *YZA*, on the other hand, expressed being unable to 'cope' with engaging with state agencies such as the Family Court and was clearly, at least in her children's minds, the one who is likely to be criminalised if the police were engaged (her children were weeping because they thought she was going to 'gaol').

Placing the behaviour that *YZA* was prosecuted for within this wider history and context gives it a very different complexion. On the night in question, the complainant essentially orchestrated a confrontational scene with the children at the centre of that confrontation, even though there was no evidence that the children had been harmed or were in danger. His behaviour was dominating and degrading towards *YZA* – entering her house without permission, videoing her without her consent, refusing to discuss with her why he was taking the children against her wishes, using degrading and taunting language towards her in front of the children, and physically overpowering her several times. As noted above, he also informed her that he was using state agencies against her – a threat that he followed through on, resulting in the prosecution. The events of the night take place against a history in which he has used physical violence against her, decided the terms of her engagement with her children, undermined her relationship with her children, refused to negotiate with her as the other parent, and threatened that he would permanently withhold access to her children – a threat he repeated on the night in question.

We have documented above the positive manner in which the inequitable care arrangements and the complainant's control over and denial of *YZA*'s access to and relationship with her children were rendered visible in the appellate court as the context that potentially made the complainant's uplifting of the children an act of family violence, rather than an everyday matter. However, the appellate court characterised this as 'psychological abuse' – which strips these behaviours from the power relations embedded in the larger social context and suggests that they are simply individual abuse strategies within the relationship between the couple, what Sweet has called 'an isolated dyad'.¹⁵¹ It also decontextualises these individual strategies from any larger patterns of coercively controlling behaviour by the complainant.

151 Sweet (n 149) 856.

The implications of the Court's approach are concerning. For example, the judgment may create a precedent that will permit non-resident parents to argue that resident parents who deny them access to their children are psychologically abusing them in doing so and that this constitutes sufficient provocation to justify the assault of their ex-partners. It has been a long-standing strategy of fathers' rights groups to claim that mothers denying them access to their children is a form of coercive control.¹⁵²

Mothers may, depending on the circumstances, be acting protectively in not wanting to force formal arrangements onto children that children do not want or are extremely distressed about. If non-resident parents are using the children to access and control their ex-partners, then putting barriers in place to prevent their children from being used in that manner or to protect themselves or their children from confrontation that will potentially escalate to violence should not be characterised as 'psychological abuse' of that parent. However:

Mothers' attempts to build the contact parent's access around the child's breast-feeding schedule, for example, or to address neglectful parenting, or insist on access arrangements that reflect the child's developmental phase or to protect their child and themselves from abuse can be interpreted by fathers and family law professionals as 'controlling' and 'alienating' and responded to punitively ... It is not surprising then that there are already calls within England for repeated denial of contact by one parent, usually understood to be the mother, to be treated as coercive or controlling behaviour in relation to the other parent.¹⁵³

The problem here is taking an approach to intimate partner violence that looks at types of behaviours (whether these are characterised as 'denial of access' or 'psychological abuse') stripped of the larger social dynamics that the couple are located within, as well as of the ongoing abuse dynamics in the relationship between the two over time. The danger of this approach is that the principles laid down ostensibly in relation to one 'type of behaviour' could be translated into another case involving a very different social context and ongoing abuse dynamics. This is particularly important because many of the behaviours that could form part of a strategy of coercive control in one context are on a continuum with 'normal' and may not constitute coercive control in a different relationship and/or social context.¹⁵⁴

152 See, eg, Karen Woodall, 'Squaring the Circle: Contact Denial as Coercive Control', *Karen Woodall* (Blog Post, 13 December 2014) <<https://karenwoodall.blog/2014/12/13/squaring-the-circle-contact-denial-as-coercive-control/>>. Most claims that contact denial by mothers is an abuse of the child and the father has played out in the Family Court in the context of the controversial use of 'parental alienation syndrome'. For a selection of recent literature: see Elizabeth Sheehy and Susan B Boyd, 'Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases' (2020) 42(1) *Journal of Social Welfare and Family Law* 80 <<https://doi.org/10.1080/09649069.2020.1701940>>; Joan S Meier, 'US Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?' (2020) 42(1) *Journal of Social Welfare and Family Law* 92 <<https://doi.org/10.1080/09649069.2020.1701941>>; Carrie Leonetti, 'Sub Silentio Alienation: Deceptive Language, Implicit Associations, Cognitive Biases, and Barriers to Reform' (2023) 62(2) *Washburn Law Journal* 285 <<https://doi.org/10.2139/ssrn.5338327>>; Carrie Leonetti, 'Parental Alienation, Gender Bias, and Hypocrisy in the California Family Law Courts' (2023) 32(2) *Public Interest Law Journal* 155 <<https://doi.org/10.2139/ssrn.5338311>>.

153 Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) *Criminology and Criminal Justice* 50, 61 <<https://doi.org/10.1177/1748895817746712>>.

154 Tamara Kuennen, 'Analysing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?' (2007) 22(1) *Berkeley Journal of Gender, Law and Justice* 2, 14–17 <<https://doi.org/10.15779/>>

Related to this, the appellate court relied on section 39F(2) [*Evidence Act 2025* section 144(2)], which provides a list of behaviours that can constitute coercive control, including (sub-section (b)) ‘isolating a person from family, friends or other sources of support’. Isolation is an indirect abuse strategy in the overall context of a pattern of coercive control where the perpetrator removes from the victim’s life anyone who could provide her with an alternative reality check, or with practical support or who could challenge his behaviour. The aim of isolating her is to make her significantly more vulnerable to his control because her reality becomes increasingly mediated through him.¹⁵⁵ However, contrary to what the appellate court suggested, that is not what was happening when the complainant prevented YZA from accessing her children; he was not isolating her from sources of support. Rather, he was assuming control over when she could and could not access her own children. In other words, he was undermining her autonomy as a person and using the threat of not seeing her children to control and punish her. Provisions in section 39F(2) [*Evidence Act 2025* section 144(2)] that might have been more appropriate to rely on are: (c) controlling a person’s day-to-day activities, (d) depriving or restricting a person’s freedom of movement or action, or (f) frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence.¹⁵⁶

The facts of YZA illustrate why intimate partner violence needs to be understood as a form of entrapment in which the cumulative and compounding effect of the abuse, as well as the broader social context, including the power relations implicit in that context, need to be examined if we are to understand what the victim-survivor is responding to. The point should not be to focus on the individual types of abuse that might be used in a pattern of coercive and controlling behaviour in any case but instead to focus on the area of violation – the ability to be self-determining – examining how, together, a range of coercive and controlling tactics might operate in a particular set of circumstances to restrict the life space a victim-survivor has to be themselves.

Z38CR5NB8Q>.

155 Stark (n 33); Tarrant, Tolmie and Giudice (n 7).

156 Abusive men can use the children to exert ‘power and control over their former wives post-separation’ – ‘in effect, going after what means most to these mothers’: Michelle L Toews and Autumn M Bermea, ‘I Was Naïve in Thinking, “I Divorced This Man, He Is Out of My Life”’: A Qualitative Exploration of Post-Separation Power and Control Tactics Experienced by Women’ (2017) 32(14) *Journal of Interpersonal Violence* 2166, 2169–70 <<https://doi.org/10.1177/0886260515591278>>; Douglas, *Women, Intimate Partner Violence, and the Law* (n 150).

3 Implications of Understanding the Facts of Intimate Partner Violence Entrapment as Reflected in the Family Violence Provisions

We have argued that the operation of the family violence evidence provisions makes it clear that they require a shift away from credibility reasoning based on inaccurate assumptions about family violence, and a reorientation to considering directly relevant facts about family violence. The provisions indicate a much broader scope of facts to be considered than is traditionally assumed. Moreover, we have shown that when considering if and how facts are relevant, an understanding of family violence as a form of entrapment is necessary to evaluate what it was a person was actually subjected to.

It follows from this analysis that the provisions – applied with an understanding of social and systemic entrapment – are relevant to all decision-making through the criminal process, not only (as has been considered so far in the provisions’ applications) to juries and magistrates as fact-finders. This is because no legal decisions about a defendant’s defence in these contexts can be made in the absence of an accurate understanding of the family violence the defendant faced.¹⁵⁷ Given that the reforms make these broader factual considerations relevant to the decision-making process, arguably, it should not have been for the *defence* to raise the past history of abuse by the complainant towards Ms Kritskikh or YZA in court. Rather, the full suite of coercive and controlling behaviours used by the predominant aggressor in the relationship was legally required to be part of the matrix of facts that the prosecution considered when interpreting what occurred on these occasions and deciding how to proceed.¹⁵⁸

This is not a matter of prosecutorial discretion. Prosecutors have a legal obligation to apply the law lawfully, on the basis of fully considered evidence.¹⁵⁹ If facts that raise self-defence against ongoing family violence – or facts that reasonably suggest the existence of such facts and therefore warrant inquiry – are not given full consideration, prosecutors are not in a position to fulfil that obligation. Moreover, the fact that the reforms, fully understood, are applied at this point in the criminal process, *before* the trial phase, is especially important

157 Stella Tarrant, ‘Making No-Case Submissions in Self-Defence Claims for Primary Victims of Intimate Partner Violence Charged with Criminal Offending’ (2023) 35(1) *Current Issues in Criminal Justice* 48 <<https://doi.org/10.1080/10345329.2022.2109247>>.

158 Tarrant, McGlade and Bahemia (n 146).

159 There are two different kinds of determinations a prosecutor must make in deciding to commence or continue a prosecution. The first is whether there is evidence capable of proving an offence beyond reasonable doubt. This is a question of law and evidence which involves legal judgment. It is only if there is sufficient evidence that the second, discretionary determination is made, whether it is in the public interest to prosecute. See, eg, Director of Public Prosecutions for Western Australia, ‘Statement of Prosecution Policy and Guidelines 2022’ (1 July 2022) 6–7; Director of Public Prosecutions South Australia, ‘Statement of Prosecution Policy and Guidelines 2014’ (October 2014) 5; Office of the Director of Public Prosecutions New South Wales, ‘Prosecution Guidelines’ (March 2021) ch 1; Director of Public Prosecutions Victoria, ‘Policy of the Director of Public Prosecutions for Victoria’ 3 <<https://www.opp.vic.gov.au/wp-content/uploads/2026/04/DPP-Policy.pdf>>.

in light of the fact that women, disproportionately Indigenous women, routinely plead guilty when they are charged with violent offences.¹⁶⁰

The equivalent implication applies to courts of appeal. Broader factual considerations of the evidence at trial – through the perspectives required by the reforms – should be undertaken. If, when this is done, the evidentiary burden is met with respect to a defence of self-defence or provocation (or other defence), consideration needs to be given to whether the prosecution produced sufficient evidence at trial to disprove the defence that the evidence gives rise to.¹⁶¹ Credibility evidence based on false assumptions and other evidence not consistent with the reforms will be irrelevant. It becomes clear that if a defence was raised on the evidence, but the prosecution failed to disprove it, the appropriate outcome of an appeal is an acquittal, not a re-trial by which the prosecution receives a second chance to make a different case, having failed on the first.

IV CONCLUSION

When a person charged with a criminal offence claims they were responding to intimate partner violence – or evidence suggests they might have been – their legal claim to one of the criminal defences cannot be assessed without an accurate comprehension of what they were experiencing. How intimate partner violence is understood on the facts is therefore essential to the application of the law to those facts. The reforms to the *Evidence Act 1906*, which built on earlier reforms in Victoria, are aimed at providing a framework for criminal law decision-makers to accurately understand facts involving family violence, on the basis of which conclusions of law can be drawn. Most obviously, these decision-makers will be jury members, but they might also include magistrates and judges, prosecutors and defence counsel, and investigators.

In this article, we have shown that on one level, these evidence provisions are designed to dispel misconceptions about family violence that undermine the credibility of Indigenous and non-Indigenous victim-survivors of family violence. The WA Court of Appeal has used the reforms to correct magistrates' decisions, demonstrating how 'myths' about family violence can result in inappropriate reliance on credibility reasoning and determine outcomes of cases without a defendant's defence even being considered on the facts. However, the provisions go further than this, creating a framework for conceptualising family violence

160 Rachel Dioso-Villa and Caitlin Nash, 'Identifying Evidentiary Checkpoints and Strategies to Support Successful Acquittals for Women Who Kill an Abusive Partner during a Violent Confrontation' (2024) 13(4) *International Journal for Crime, Justice and Social Democracy* 44 <<https://doi.org/10.5204/ijcsd.3538>>.

161 A defence arises on evidence and does not depend on a defendant 'raising' the defence: *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161–2 [7] (Gibbs CJ, Wilson, Brennan and Deane JJ); *Steel v Western Australia* [2010] WASCA 118, [2]–[3] (McLure P), [43]–[45] (Buss JA). See *Silva v The Queen* [2016] NSWCCA 284, in which the appellant was acquitted of the homicide of her partner after being convicted of manslaughter at trial. The prosecution had produced insufficient evidence that the appellant had not acted in self-defence: see Tarrant (n 157).

as a form of social and systemic entrapment. We have demonstrated through an analysis of *YZA* that an understanding of intimate partner violence as entrapment would produce a different kind of factual analysis – one that understands individual types of behaviours within the context of overall patterns of coercively controlling behaviours in the relationship, as well as past, present and future community and agency responses to these behaviours. This analysis would make a larger range of facts relevant to legal decision-making, whilst also allowing the provisions to be utilised to their full potential and avoiding inappropriate and decontextualised reasoning that might produce potentially harmful applications if translated to other contexts. We have also observed how the move from credibility reasoning to consideration of a broader range of directly relevant facts in issue about family violence has implications for prosecutorial decisions about how to proceed (or discontinue) a prosecution and for judges in determining whether the prosecution case at trial proved the offence.

We note the special importance of accurately comprehending the experiences of Indigenous women, who are vastly overrepresented as victims of family violence and whose experiences have been consistently ignored and misconstrued in the criminal justice context. The case of *YZA* illustrates in stark terms what Aboriginal scholars, as well as organisations acting for or representing Aboriginal people, have said.¹⁶² That is, a response to family violence that relies on criminalisation will be used to criminalise Aboriginal women victim-survivors in consequence of their mis-identification as primary perpetrators.¹⁶³ Aboriginal women's contemporary experiences of the criminal justice system continue to reflect Australia's history of settler relations, with systemic discrimination and state violence towards Indigenous women ongoing. None of this is missed by Aboriginal women. As McGlade argues, 'Black women know the Australian state was built on such violence and that the instruments of law, the police and courts, can never really be trusted to protect black women's bodies.'¹⁶⁴ If Aboriginal women victim-survivors are not to be 'collateral damage'¹⁶⁵ in the ongoing drive to criminalise our way out of family violence, for example, with the introduction of coercive control laws,

162 Longbottom, McGlade and Cripps (n 21); Heather Nancarrow et al, 'Accurately Identifying the "Person Most in Need of Protection" in Domestic and Family Violence Law' (Research Report, Australia's National Research Organisation for Women's Safety, November 2020); McGlade and Tarrant (n 3).

163 See also Jane Wangmann, 'Law Reform Processes and Criminalising Coercive Control' (2022) 48(1) *Australian Feminist Law Journal* 57, 84 <<https://doi.org/10.1080/13200968.2022.2138186>>, citing Office of the Family Violence Reform Implementation Monitor, *Monitoring Victoria's Family Violence Reforms: Accurate Identification of the Predominant Aggressor* (Report, December 2021). Ellen Reeves, "'I'm Not at All Protected and I Think Other Women Should Know That, That They're Not Protected Either': Victim-Survivors' Experiences of "Misidentification" in Victoria's Family Violence System' (2021) 10(2) *International Journal for Crime, Justice and Social Democracy* 39 <<https://doi.org/10.5204/ijcsd.1992>>; Reeves et al (n 64).

164 'Indigenous Femicide' (n 40), quoting Hannah McGlade.

165 Balawyn Jones and Akuch Kuol Anyieth, 'CALD Communities as "Collateral Damage" in the Criminalization of Coercive Control: An Argument for Prioritizing Civil System Reform over Further Criminalization in Victoria' (2025) 31(2) *Violence Against Women* 598 <<https://doi.org/10.1177/10778012231214775>>.

then it is imperative that their lives are properly understood and that decision-makers take heed of what they have been saying about their justice experiences.

The family violence *Evidence Act 1906* provisions, now replicated in the Queensland *Evidence Act 1977* (Qld), are an attempt to ensure the criminal legal system operates more justly for victim-survivors of family violence who become involved in criminal proceedings. We have made a case for urgent training, not only for magistrates, but for judges, prosecutors, and defence lawyers, in understanding intimate partner violence as a form of social and systemic entrapment, especially in relation to Indigenous women. This may include the need for the introduction of Aboriginal family violence experts in court and the noting or replication of these provisions in prosecutorial guidelines.