WHAT ARE REASONABLE ALTERNATIVES?
Reflections on Ruddelle, Witehira and the application of the self-defence defence

Charlotte Agnew-Harington* **and Benjamin Morgan****

I INTRODUCTION

Aotearoa's approach to self-defence rests on the pillars of imminence and proportionality, both of which are well understood prerequisites to accessing the defence. The question is whether a defendant was justified in using the level of defensive force that they did, given the imminence and seriousness of the threat posed. The recent cases *R v Witehira* and *R v Ruddelle* suggest that women who kill abusive family members are unlikely to succeed with self-defence because, despite the imminence of the threat, the level of force they respond with may be perceived as unreasonable or excessive.[1] But what lens did the jury use to assess reasonableness, and did it factor in the lived experiences of these women, the background to these violent encounters, and the escape mechanisms that were realistically available?

This article assesses *Witehira* and *Ruddelle* and what those cases tell us about how self-defence is operating in Aotearoa. Ultimately, we conclude that for the defence of "self-defence" to serve justice and the rule of law, it needs to be employed in a manner that has regard to the broader experiences of defendants, particularly women who have been long-term victims of violence. We also consider it is imperative that everyone who plays a role in the criminal

* Charlotte Agnew-Harington (BA/LLB(Hons)) is employed as a barrister working for Michael Heron QC at Britomart Chambers.

** Ben Morgan (Aukaha), Ngāti Awa, e whai ana ia i te tohu paetahi ture. Na te tautoko o tana whānau no Motiti kua whai ia i tēnei ara.

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1 *R v Witehira* [2021] NZHC 678 at [18] and [20]; and *R v Ruddelle* [2020] NZHC 1983 at [28(c)].

defensive force was "reasonable to use". The Court of Appeal has split the subjective and objective requirements into three questions:[5]

> i) What were the circumstances as the accused honestly believed them to be?;
>
> ii) In those circumstances, was the accused acting in the defence of himself or another?; and
>
> iii) Was the force used reasonable against the circumstances as the accused believed them to be?

Once a defendant has raised a credible self-defence argument, it is for the Crown to disprove that the defendant acted in self-defence.[6] Self-defence then becomes an issue for determination by the jury. Fran Wright says that s 48 requires a jury to assess a defendant's use of force by considering the defendant's belief about the circumstances they were in, including any "mistake" under which they were labouring, such as assuming that the assailant was armed when they were not.[7] Wright says that any assessment of whether the use of force was reasonable should therefore proceed as though the defendant's mistaken belief was correct (even if the defendant had omitted to consider some alternatives).[8] Like Wright, we think that this "broad" application of the defence is mandated by the mixed subjective-objective test created by s 48.[9]

III R v RUDDELLE

On 14 November 2018, Karen Ruddelle stabbed her partner, Joseph Ngapera, in the course of an argument.[10] Ms Ruddelle had suffered years of abuse at the hands of Mr Ngapera, combined with a life marred by family violence. She was acquitted of murder, but a jury found her guilty of manslaughter by a vote of 11:1.

On the night in question Ms Ruddelle and Mr Ngapera had been drinking together. They returned home in the early morning and sat at the table. An argument developed. Ms Ruddelle said that Mr Ngapera got up

5 *R v Bridger* [2003] NZLR 636 (CA) at [18]. See *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640; and *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 for application of these three questions.

6 *R v Tavete* [1988] 1 NZLR 428 (CA).

7 Wright, above n 4, at 119–120.

8 At 123.

9 At 119.

10 *R v Ruddelle*, above n 1, at [20].

from his chair at the dining table and came towards her; she expected she was about to "get a hiding".[11] After she yelled for the help of her adult son, her 14-year-old son entered the room and pushed Mr Ngapera in the chest. At trial, Ms Ruddelle said no one could push Mr Ngapera like that and get away with it.[12] Ms Ruddelle grabbed a knife from the dining table and stabbed Mr Ngapera, twice, in the chest. In handing Ms Ruddelle an end-sentence of home detention, Palmer J surmised that the jury:[13]

> … found Ms Ruddelle not guilty of murder but they did not acquit Ms Ruddelle on the basis that she acted in self-defence or defence of her son. … But the jury did find Ms Ruddelle guilty of manslaughter. So they were sure she intended to stab Mr Ngapera and they were sure the stabbing was likely to cause more than trivial harm to him.

IV R v WITEHIRA

Ms Witehira stabbed her sister's partner, Mr Anderson.[14] The offending followed a day of drinking and Mr Anderson's aggression towards Ms Witehira's sister, Kuini. Ms Witehira and Mr Anderson got into an argument, which also involved Ms Witehira's mother, Mini. Kuini unsuccessfully tried to stop the fight. Later, Mr Anderson started to strangle Mini. As Peters J recorded at sentencing:[15]

> Your evidence was that, on seeing this, you picked up Mr Anderson's crutch, which was in the living area, and hit him with it to the back of his leg to make him stop attacking your mother. That did make him stop. However, your evidence was that he then grabbed the crutch from you, got to his feet and started coming towards you. Your evidence was you were scared he was going to attack you. By this stage, you were close to the dining table and you reached down, picked up the first thing that came to hand, and stabbed Mr Anderson with it, he being right in front of you. Your evidence was that you thought you had picked up a pencil, but in fact you had picked up one of several knives on the table.

11 At [20].
12 At [28].
13 At [21].
14 *R v Witehira*, above n 1, at [14]—[15].
15 At [14].

Mr Anderson died of his injuries. Ms Witehira "always acknowledged" that she had caused Mr Anderson's death, but said she was acting to defend herself and her mother when she did so.[16]

V SELF DEFENCE AND THE VICTIM-DEFENDANT

Recent data suggests that it is difficult for female victims of violence to succeed with the self-defence defence. The Family Violence Death Review Committee's (FVDRC) *Fifth Report Data* records that over the period from 2009 – 2015 there were 16 cases where the primary victim of intimate partner violence (IPV) killed their aggressor – i.e., there were 16 cases where the victim of violence became the defendant to homicide.[17] All were women and 50 per cent were convicted of manslaughter; only 19 per cent were acquitted.[18] *Ruddelle* and *Witehira* add to these statistics. So why does the self-defence defence continue to fail female defendants?

A Imminency and victim-defendants

Women who have been subjected to violence and subsequently kill their aggressors in circumstances where there has been no imminent threat have infamously been denied the self-defence defence in Aotearoa.[19] In 1990, the defendant in *R v Wang* failed to convince the jury that she had acted in self-defence after she killed her drunk, sleeping husband who had physically, sexually and psychologically abused her and blackmailed her to the point where she claimed she had no escape but a pre-emptive strike.[20] That case illustrated how the requirement for imminence could frustrate the application of the defence to women who pre-emptively killed abusers.

Similarly, in 1995 the defendant in *R v Oakes* was convicted of murdering her former partner while he slept.[21] The defendant failed to establish that there was an imminent threat, so the defence was unsuccessful. *Oakes* confirmed that a pattern of violence and the fear of further violence is not an "imminent" threat that might justify the killing of a violent partner.

16 At [16].
17 Family Violence Death Review Committee (FVDRC) *Fifth Report Data: January 2009 to December 2015* (June 2017) at 27.
18 At 57–58.
19 See for example *R v Wang* [1990] 2 NZLR 529 (CA); and *R v Oakes* [1995] 2 NZLR 673 (CA).
20 *R v Wang*, above n 19.
21 *R v Oakes*, above n 19.

In 2001, the New Zealand Law Commission Te Aka Matua o te Ture said that in *Oakes*:[22]

> … the Crown suggested, incorrectly, that battered women typically do not leave their partners or take active steps to protect themselves and that, therefore, since the accused did take these actions she could not have been in a battering relationship.

After *Oakes*, "battered women syndrome" (now more commonly conceived of as an impact of IPV) was relevant to — but not determinative of — a woman's claim to have acted in self-defence.[23]

Subsequently, there was an expectation that although self-defence failed in *Wang* and *Oakes*, it could succeed in circumstances where a woman killed her aggressor while under attack, and that her lived experience as a victim of IPV would be factored into the analysis of her defence.[24] Indeed, the FVDRC's data indicates that most female defendants (ten of 16) commit violence in response to imminent threats.[25] Given the outcomes in *Ruddelle* and *Witehira*, however, we have to question whether that holds true.

B Reasonableness of force and experiences of defendants

In its 2001 report titled *Some Criminal Defences with Particular Reference to Battered Defendants* the Law Commission examined how Aotearoa's rules on self-defence applied to aggressors who were themselves victims of family violence.[26] It considered the imminence requirement as well as the requirement for proportional use of force. In relation to the second, it said that "the determination of what is reasonable in self-defence calls for the application of community values".[27] The Law Commission identified two areas of reform for the defence (neither would be implemented) and noted that "[e]xpert evidence

22 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at [9].

23 Law Commission *Understanding Family Violence: Reforming the Criminal Law relating to Homicide* (NZLC R139, 2016) at [6.61]. In this report, the Law Commission considered how the defence was being applied to victims of family violence. It took the preliminary view that the requirements of imminence, proportionality and lack of alternatives had the potential to unfairly exclude victim-defendants from successfully relying on self-defence, at [5.22]. See also *R v Oakes*, above n 19, at 675—676.

24 Law Commission NZLC R139, above n 23, at [6.31].

25 FVDRC *Fifth Report Data*, above n 17, at 55.

26 Law Commission NZLC R73, above n 22.

27 At [39].

on the social context, nature and dynamics of family violence is vital to ensure that the law on self-defence is applied flexibly and fairly".[28]

But *Ruddelle* and *Witehira* suggest that social contexts and the realities of IPV are, instead, being overlooked in favour of abstract and "best case" assumptions about what a defendant ought to have done to escape from an aggressor (both pre and mid-fight). Those assumptions appear to be based on misunderstandings of IPV, the psychological impacts of abuse over time and for wāhine Māori (like Ms Ruddelle and Ms Witehira), te ao Māori imperatives and contexts. The latter is particularly problematic given that, statistically, wāhine Māori are "twice as likely to experience violence as other New Zealand women".[29] In both *Ruddelle* and *Witehira* the Crown submitted that the defendants ought to have protected themselves by other means and in *Witehira* the sentencing judge expressly recorded that the Crown said the defendant ought to have run away or called the police.[30] The consistent theme is that the force used was excessive because other options were available. But we wonder, how does the jury determine that defensive force was excessive, and how does it approach the task of considering what the reasonable alternatives were?

VI WHY DID THE DEFENCE FAIL?

The offending in both *Witehira* and *Ruddelle* was violent and it resulted in the loss of two lives. Neither our justice system nor our moral code permits the taking of a life in circumstances other than where absolutely necessary for self-preservation. Both Ms Ruddelle and Ms Witehira argued that they had acted in defence of themselves and others, but neither jury accepted that their actions were reasonable. Given the opacity of the jury system in Aotearoa, we will never know precisely what influenced the respective juries in their decisions.[31] However, the sentencing decisions of Palmer J in *Ruddelle*

28 At [43].

29 Ministry for Women *Wāhine Māori, Wāhine Ora, Wāhine Kaha: preventing violence against Māori women* (February 2015) at 4. See also FVDRC *Fifth Report: January 2014 to December 2015* (February 2016) at 48. We acknowledge that the label "Māori" attempts to homogenise diverse groups of people and that greater emphasis ought to be put on iwi, hapū and whānau relationships. See Denise Wilson and others "*Aroha and Manaakitanga* — That's What It Is About: Indigenous Women, 'Love,' and Interpersonal Violence" (2021) 36 Journal of Interpersonal Violence 9808 at 9811-9812.

30 *R v Ruddelle*, above n 1, at [24]; *Witehira*, above n 1, at [18].

31 For discussion about requiring reasons from juries in cases of sexual offending, see Jessica Sutton "Salvaging the Jury in Sexual Violence Trials: A Requirement for Reasoned Verdicts" (2020) 4 NZWLJ 66.

and Peters J in *Witehira* discuss the way each of these cases played out and indicate that the defence *may* have failed, in part, because the jury considered the defensive force excessive *because* of the supposed availability of alternative options.[32] Peters J said, in relation to Ms Witehira, that the Crown submitted Ms Witehira had other options – she could have run away or called the police.[33] Similarly, Palmer J summarised the Crown's argument that Ms Ruddelle may "in theory" have had other options.[34] On that basis, we say "supposed" options because it is not clear how or to what extent the parties at trial or the jury considered the practicality of the alternatives suggested.

As will be evident, we were not present at Ms Ruddelle or Ms Witehira's respective trials, and as such have relied on the sentencing decisions of Palmer and Peters JJ, as well as media reports, as the basis for this article. Both judgments are, we think, unusually reflective in their approach, with Palmer J in particular going into significant detail about the submissions and evidence from the trial.

From those decisions, it is clear that both Ms Ruddelle and Ms Witehira had encountered violence at the hands of various aggressors over many years. In *Ruddelle* the Crown submitted that Ms Ruddelle had not established either of the two limbs of the self-defence defence; she was neither in a situation that justified a defensive attack, nor was the force she used reasonable.[35] The jury clearly accepted that one of those submissions was true. But how does that conclusion reflect Ms Ruddelle's lived experience? To what extent, if at all, did the jury factor in Ms Ruddelle's past, trauma, and actual options? We explore this below.

A Lived experiences, entrapment and the realistic options available

1 R v Ruddelle

In his sentencing decision, Palmer J set out Ms Ruddelle's history as a victim of violence, her obligations in childhood and adulthood to protect others from

32 We note that in the sentencing notes in *Ruddelle*, Palmer J said that "[o]bviously, the jury regarded inflicting the two stab wounds as too excessive to sustain the defence of self-defence or defence of another", see *R v Ruddelle*, above n 1, at [28(c)].

33 *R v Witehira*, above n 1, at [18].

34 *R v Ruddelle*, above n 1, at [28(b)].

35 At [25].

violence,[36] Mr Ngapera's acts of violence against her daughter,[37] a history of more than 80 recorded incidents of family violence,[38] and her attempt to access community support.[39] His Honour recorded how her interactions with the state had led not to a cessation of violence, but rather to her children being taken from her.[40]

His Honour also outlined how, at trial, evidence was tendered in support of Ms Ruddelle's traumatic history and how this might have conditioned her to respond to Mr Ngapera's attack with defensive force. Palmer J's decision refers to the trial evidence of experts Rachel Smith and Dr Alison Towns, including evidence of:[41]

i) patterns of social entrapment and inadequate safety options, as well as coercive control,[42] and the fact that the effects of abuse on women accumulate over time;

ii) the fact that victims of abuse are particularly sensitive to when situations are becoming violent;

iii) the fact that Ms Ruddelle's lifetime of trauma had conditioned her to react irrationally;

iv) how social entrapment drives women to stay in violent relationships that others might leave; and

v) insights into the pressure on wāhine Māori in particular to look after people with whom they have been in relationships.

It appears to us that extensive evidence was put to the jury to suggest that Ms Ruddelle was suffering from entrapment and had a dearth of safety options available to her. Further, the facts of Ms Ruddelle's past – including her extensive history as a victim of violence and the fact that state apparatus had

36 At [6].
37 At [10].
38 At [11].
39 At [13].
40 At [18]. See also FVDRC *Fifth Report*, above n 29, at 58. The FVDRC notes that while victims of IPV are often proactive help-seekers, it is not often that they receive the help required. Further, they note that Māori mothers in particular are keenly aware that they risk losing their children if they cannot keep them safe.
41 *R v Ruddelle*, above n 1, at [16]–[17].
42 See Sami Nevala "Coercive Control and Its Impact on Intimate Partner Violence Through the Lens of an EU-Wide Survey on Violence Against Women" (2017) 32 JIV 1792.

failed to adequately protect her – in combination with the evidence indicate that it was unlikely that she would have perceived herself to have alternative pathways to ensure the safety of herself and her son on the night she killed Mr Ngapera.

Therefore, it is evident that the defence had a clear focus on using Ms Ruddelle's lived experience to contextualise the threat she perceived to herself and her son. However, questions arise regarding whether the jury was equipped to grapple with Ms Ruddelle's lived experiences, in light of how the case was argued by both the prosecution and defence. Palmer J surmised that the jury determined that Ms Ruddelle was responding to an imminent threat but used excessive force in doing so. His Honour said, "I consider the jury did see this as a case of excessive selfdefence [sic]".[43] Assuming that is the case, on what basis did the jury determine that Ms Ruddelle's actions were excessive? Did it accept that Ms Ruddelle had other options available to her, as the Crown suggested?[44] If that is the case, we have to ask what lens the jury used to assess the availability of other options. Did it appreciate, from Ms Ruddelle's perspective, the hopelessness of her situation in light of her experiences? We query whether the jury was in a position to grapple with Ms Ruddelle's lived experiences and, therefore, the options that were subjectively available to her.

Palmer J also recorded that in cross-examination Ms Ruddelle "accepted that it was her choice to stay in the relationship and she was not reliant on Mr Ngapera for money, so she was not trapped".[45] This appears to have been an attempt by the Crown to discredit the evidence that Ms Ruddelle was suffering from social entrapment. We are concerned about how such a line of questioning might have fed into the jury's evaluation of Ms Ruddelle and her defence. The cross-examination, with respect, proceeds on an incorrect understanding of social entrapment, which is not about mere dependency (financial or otherwise). The phenomenon of social entrapment does not mean that women stop assessing their options from all angles; it means that they take all the circumstances of their relationship into account and also have to factor in previous violence or control, and threats of more of the same.[46] Entrapment

43 *R v Ruddelle*, above n 1, at [27].

44 At [28].

45 At [17].

46 FVDRC *Fifth Report*, above n 29, at 39. The FVDRC notes that entrapment encompasses notions of fear, isolation, and coercion, alongside the indifference of institutions to the suffering of victims. It can be exacerbated by structural inequities that arise on account of gender, class and racism.

is not disproved or displaced by the theoretical presence of alternative options; the phenomenon of entrapment is one that keeps victims in place without any real access to so-called "alternatives".[47] We query whether the Crown approach was appropriate, given how entrapment operates in reality, and we suggest that the Crown could not reasonably suggest at trial that a lack of financial dependence disproved Ms Ruddelle's entrapment and, therefore, lack of viable safety options.

The cross-examination also overlooked how entrapment might affect wāhine Māori, and therefore further derailed the jury's ability to assess Ms Ruddelle's defence by considering the circumstances as she believed them to be. Wilson and others' research suggests that wāhine Māori may stay in violent relationships because cultural imperatives linked to aroha and manaakitanga keep them rooted in place,[48] such that wāhine Māori may stay in relationships others would leave.[49] As a consequence:[50]

> *Māori* women's connection to their partner is a commitment to and an investment in someone else, which they did not easily give up on. It involved "fighting" for their partner's attention, love, and respect within contexts of some partners' addiction, and the unpredictability of their abusive and violent behaviors. … For many, they became entrapped not only by their violent partners but also by agencies whose purpose was to help them …

It is unclear what efforts were made at trial to consider Ms Ruddelle's experience as a wāhine Māori. Palmer J acknowledged that Ms Ruddelle, like other Māori, had suffered "social and cultural disadvantage … systematically mandated by the social dynamics of New Zealand society".[51] It may be that relevant considerations include the marginalisation of women through colonisation, the destruction of whānau and hapū structures, and the fact that colonisation continues into the present day.[52] Indeed, the FVDRC says "[g]ender inequity, racism, poverty, social exclusion, disability, heterosexism

47 See Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" (2018) NZ L Rev 181 at 201–202.

48 Wilson and others, above n 29, at 9826. These authors note that simply applying Western notions is inappropriate to explain or conceptualise the experiences of wāhine Māori.

49 At 9823–9824.

50 At 9824–9825.

51 *R v Ruddelle*, above n 1, at [41].

52 Annie Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 Waikato L Rev 125 at 134.

justice system, including jurors, actively and conscientiously asks whether the use of force against an imminent threat was reasonable based on a realistic, holistic view of the circumstances the defendant perceived themselves to be facing. The assessment of whether force was reasonable also needs to be done without recourse to alternatives that were theoretically, rather than actually available to the defendant.[2] That will require a shift in attitudes, and a reframing of our assumptions and the education of stakeholders, including jurors. Our hope is to draw attention to the need for juries and all those in the justice system to look deeper than the assumption that a person could have simply run away from a fight and ask instead what alternative options were *really* available.

In Part II of this article, we set out the legal framework for self-defence in Aotearoa, before providing an overview of the two cases in Parts III and IV. In Part V we ask why the defence may have failed in each case. In Part VI we consider the case of X, where the defence succeeded, and in Part VII we suggest that stakeholders might need to start thinking differently about self-defence.

II THE SELF-DEFENCE DEFENCE

Self-defence is a justification-based defence. A finding that a defendant acted in self-defence provides a legal basis for justifying their behaviour and avoiding conviction. Part 3 of the Crimes Act 1961 (Crimes Act) deals with defences of justification. Where such defences apply, they are a defence for any applicable offence.[3] Self-defence is codified in s 48 of the Crimes Act as follows:

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

Section 48 has remained unchanged since 1981.[4] The provision sets out a two-limb test. Part one requires a subjective analysis of whether an act in self-defence was justified in "the circumstances as [the defendant] believes them to be". The second part mandates an objective assessment of whether the

2 Noting that the criminal justice system is just one part of a broader system that interacts with vulnerable victims.

3 Crimes Act 1961, s 20(2).

4 For a more fulsome analysis of the genesis of s 48, see Fran Wright "The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961" (1998) 6 Waikato L Rev 109 at 115.

and the legacy of colonisation shape people's experiences of abuse".[53] Palmer J appeared to recognise that when he recorded that Ms Ruddelle was disassociated from Māori culture and "dispossessed of critical values and protective factors associated with close connection with [her] whānau and community".[54] He also referred to the trial evidence of "cultural pressure on Māori women, in particular, to nurture and look after people with whom they are or have been in relationships".[55]

Finally, we note that the Crown's case against Ms Ruddelle was that she not only used excessive force, but that she was not facing an imminent threat; rather, there was at most an implied threat to her but not to her son.[56] Given Ms Ruddelle's extensive history of violence and victimisation, like the Judge, we do not accept that the threat was or could have been "implied" or theoretical – Mr Ngapera had a history of being physically abusive to Ms Ruddelle and her children. He had previously inflicted potentially lethal violence on Ms Ruddelle (strangulation).[57] It was reasonable that she would have apprehended that he posed a serious and immediate threat to her and her son. What mother would have left the room?[58] Failing to contextualise Ms Ruddelle's experience set an unrealistic standard for measuring her response in the circumstances as she believed them to be. As M J Willoughby has said:[59]

> … society gains nothing, except perhaps the additional risk that the battered woman will herself be killed, because she must wait until her abusive husband instigates another battering episode before she can justifiably act.

2 *R v Witehira*

Just as in *Ruddelle*, the Crown's approach in *Witehira* undermined the lived reality of the victim-defendant by supposing that she had safety options

53 FVDRC *Fifth Report*, above n 29, at 42.
54 *R v Ruddelle*, above n 1, at [40].
55 At [17].
56 At [25].
57 At [12].
58 At [28]. Palmer J said that it was understandable that Ms Ruddelle, reasonably anticipating violence against her son, stayed in the room.
59 M J Willoughby "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?" (1989) 38 U Kan L Rev 169 at 184.

that ought not have been assumed or inferred given the facts of the case and circumstances of the defendant. In *Witehira* Peters J said:[60]

> … the jury must have accepted you were trying to defend yourself and Mini at the time you stabbed Mr Anderson, but considered that the force you used was excessive. The Crown submitted to the jury you had other options. One was to run away and another was to call the Police. I think the jury must have accepted that those were realistic alternatives in the circumstances.

We do not accept that those alternatives were realistic. The Crown's options were just that; Crown options that fit a Crown case theory. Together with gendered expectations that suggest violent women are inherently unreasonable, the Crown's reliance on theoretical rather than practical (or proven) alternatives made the barrier to the self-defence defence insurmountable.[61] It is by no means clear that the Crown had established that the options asserted were reasonable or perceptible to Ms Witehira in the circumstances as she perceived them. Mr Anderson had strangled Ms Witehira's mother, which brings to the fore an imminent risk of death: it can take as little as four to five minutes to cause brain death via strangulation.[62] In the context of Ms Witehira's experiences of IPV, her consequent conditioning, and the harm already done to her mother, we do not consider it was reasonable to propose that Ms Witehira could or should have distinguished a threat of imminent death due to strangulation from the incoming threat of Mr Anderson wielding a crutch. Was it unreasonable for Ms Witehira to also take up a weapon?[63]

Did Ms Witehira have an *actual* opportunity of running away or making an emergency call? Would the law really require her to act so fast, to produce an outcome so slow (the police's target response time for priority one incidents is 10 minutes),[64] in the face of her own mother being strangled and the aggressor then turning on her? We do not accept that stabbing Mr Anderson was necessarily justified, but we do question how available other interventions were. As the FVDRC says, "[r]eal help for victims of IPV within our current

60 *R v Witehira*, above n 1, at [18].

61 Elizabeth M Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at 114.

62 Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at [2.2].

63 Wright, above n 4, at 112, where she notes that a person facing a knife is not expected to wait until they are attacked before fighting back.

64 Scott Palmer "Police failing to meet emergency time targets" (26 October 2018) Newshub <www.newshub.co.nz>.

system is sporadic, unpredictable and frequently not available".[65] Against that background, the Crown's assertion that Ms Witehira had alternative options in the form of escape or police intervention was incorrect.

B A note on the approach at sentence

The focus of this article is on the self-defence defence and asking whether our juries are appropriately applying the test by considering the circumstances that *victim-defendants believed themselves to be in* given their own particular circumstances.

We note that the sentencing submissions in each case give some cause for concern and perpetuate some of the myths around IPV that we say may have frustrated the juries' attempts to correctly apply the test set out in s 48. For instance, Palmer J said that despite accepting that Mr Ngapera had been violent towards Ms Ruddelle, the Crown submitted at sentencing that:[66]

> i) the last occasion of physical violence was in March 2017;
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> ii) [Ms Ruddelle] applied to discharge a previous protection order [against Mr Ngapera];
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> iii) there was only one Police callout in 2018;
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> iv) Mr Ngapera had never been intentionally violent towards [Ms Ruddelle's] son;
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> v) Mr Ngapera was unarmed, limping and not physically violent towards [Ms Ruddelle] on [the night in question];
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> vi) [Ms Ruddelle] was intoxicated and angry with him; and
>
> vii) [Ms Ruddelle] had other options available to [her].

Most, if not all of these submissions are problematic in that they minimise the effects of IPV and reflect the substitution of assumed "alternatives" that were not realistic for a defendant with a long history of victimisation. The submissions might have been appropriate post-conviction, but they represent a step in the wrong direction if our goal is to ensure our justice system is receptive to our society – particularly in cases like this where victims have become defendants. For instance, the submission that the last occasion of violence was

65 FVDRC *Fifth Report*, above n 29, at 14.
66 *R v Ruddelle*, above n 1, at [24].

historic is incongruous given the events on the night in question, the evidence of a long history of violence between Ms Ruddelle and Mr Ngapera, and the fact that family violence is not a series of isolated incidents but rather a pattern of behaviour leading to entrapment and conditioning.[67] The submission that Ms Ruddelle had applied to discharge a protection order implies that she was somehow complicit in her own mistreatment – either she tolerated it or she was exaggerating it at trial.

Palmer J appears to have understood this. In his sentencing decision, he rejected the submissions on the last occasion of violence and the application to discharge the protection order, neither of which mitigated the threat that Ms Ruddelle "reasonably would have perceived" in the circumstances.[68] He accepted that Ms Ruddelle acted instinctively, having noted the trial evidence of social entrapment and accepting that Ms Ruddelle had "heightened sensitivity to whether and when the situation was becoming dangerous, conditioned by [her] past experiences of Mr Ngapera's actions".[69] He also made the point that although "in theory, there were other options available to you, as … the Crown submitted, I consider it is understandable you stayed in the room, in the circumstances."[70] We think that Palmer J's sentencing notes reflect his Honour's focus on and appreciation for Ms Ruddelle's lived experiences and the circumstances as she believed them to be.

Peters J's sentencing decision presents a similarly balanced and contextualised view of the victim-defendant and her circumstances. In particular, her Honour Peters J used the pre-sentence reports to explain Ms Witehira's background and the reasons why she may have reacted with force against Mr Anderson. Peters J referred particularly to the report of a psychiatrist, Dr Gardiner:[71]

> Dr Gardiner's professional view is that you meet the diagnostic criteria for post-traumatic stress disorder, as a result of the combined effect of the events in your life, and that domestic violence particularly triggers an "adrenaline rush" in you, and that is what happened when you saw your mother being strangled. The sight of Mr Anderson attacking your mother would have

67 Further, victims are unlikely to see "incidents" of violence as one-offs, which the justice system is want to do. See FVDRC *Fifth Report*, above n 29, at 34–36.

68 *R v Ruddelle*, above n 1, at [28].

69 At [28].

70 At [28].

71 *R v Witehira*, above n 1, at [42].

> been intolerable to you. Dr Gardiner also says your background meant that when you perceived Mr Anderson was going to attack you, you opted for the "fight" rather than "flight" response.

Other pre-sentence reports showed that Ms Witehira's life had been "marked by violence", neglect, sexual and physical abuse from multiple parties, personal tragedy, and material deprivation.[72] One of Ms Witehira's previous partners had been convicted of the manslaughter of another man, and of abducting one of Ms Witehira's children and assaulting Ms Witehira.[73] Another partner had slashed her throat with a broken bottle.[74] The reports also said Ms Witehira had been alienated from Te Ao Māori.[75]

In assessing the matters for which Ms Witehira should receive a reduction in sentence, Peters J accepted that Ms Witehira's experiences and observation of her mother being strangled had led her to fight, rather than run away.[76] Her Honour said "[e]xperience has taught you that domestic violence is normal, is to be expected, and it should be met with a like response."[77] Questions arise as to whether or to what extent this same information was presented at trial and factored into the jury's assessment of self-defence, or whether the jury preferred standardised options as a proxy for determining reasonable force.

Given Ms Witehira's personal history with IPV,[78] it is troubling that the Crown would seek to rely on the lack of violent history between Ms Witehira and Mr Anderson to sidestep the fact that Ms Witehira had a history as a victim of violence that, as Peters J suggested, taught her to meet violence with a "like response".[79] These kind of assumptions are harmful and, although this particular submission was made at sentencing, would undermine a jury's ability to properly undertake the assessment required where a victim-defendant has raised a defence under s 48. There is, we suggest, a need for the prosecution to avoid submissions that distort the realities and victimisation of defendants if

72 At [36]–[40].
73 At [37].
74 At [38].
75 At [41].
76 At [64].
77 At [64].
78 At [36]–[37].
79 At [64]. In any event, a lack of previous violence between an offender and a victim ought not be termed an aggravating factor when the offending itself was a response to an immediate threat in a case of self-defence.

we are to ensure our justice system is responsive to victimisation in its many forms.

VII IS THERE ANOTHER WAY?

The approach in both *Ruddelle* and *Witehira* might appear to be a relatively orthodox approach to self-defence; there is a strict focus on the actual threat posed, the presumptive options that the defendant could have employed, and a reluctance to tolerate defensive force. But that is not the only approach to the self-defence defence.

In 2015 the Law Commission delivered its report on "Victims of Family Violence who commit Homicide".[80] The Government of the time asked the Law Commission to conduct the review by reference to the *Fourth Annual Report* by the FVDRC,[81] who considered Aotearoa had adopted a restrictive interpretation of self-defence even though s 48 is capable of being more broadly applied.[82] One of the reasons that the Law Commission's 2001 recommendations on changes to the law of self-defence were not implemented was because the then-Government had expected that the law would develop on a case-by-case basis.[83]

However, in 2021 it is clear that our approach to self-defence has continued to fail women. This is at least in part because the law and government have failed to adopt a nuanced and evidence-based approach to determining the defendant's subjective circumstances and to articulating the "alternative" responses that the law says should have been adopted. In doing so, we have overlooked the fact that most jurors have minimal knowledge of how entrapment, IPV and systemic victimisation contribute to potentially criminal offending. As a consequence, those of us within the justice system must stop proposing that victims of IPV – mainly women – can escape violence because effective support services are available.[84] And we need to stop arguing that victims should merely have run away, without considering what they would be leaving behind, and whether they had anywhere to run.

We see *Ruddelle* and *Witehira* as clear examples of how the self-defence defence can fail women in two ways. First, by eliding their lived experiences

80 Law Commission *Victims of Family Violence who Commit Homicide* (NZLC IP39, 2015).
81 See FVDRC *Fourth Annual Report: January 2013 to December 2013* (June 2014).
82 At 102.
83 Law Commission NZLC IP39, above n 80, at [5.27].
84 They do not. See FVDRC *Fifth Report*, above n 29, at 37–39 and 42.

and overlooking the resultant conditioning and mental health implications. We include in this a tendency to discount the particular perspectives of wāhine Māori (whom may instead be judged by reference to western assumptions). Second, by imposing superficial and unsubstantiated assumptions as to what they could or should have done to achieve safety or avoid violence. These assumptions put an onus on victims that the research indicates is not appropriate, given the cumulative and systemic impacts of IPV and the systematic inadequacy of state support.[85]

A The case of Mr X

However, the law of self-defence does not fail the victim-defendant in all cases. For example, in June 2018, news broke that a young Auckland man, X, had been cleared of murder and manslaughter by a jury, who found that he had been acting in self-defence when he tracked down and stabbed his abusive father.[86] The facts of the case told the story of practiced family violence; on the night in question, the deceased had beaten up the defendant's mother. The mother then escaped and arrived – with her baby – bloodied and bruised at the defendant's home. The father soon arrived at the home, but the family had locked the doors. The deceased was shouting abuse and the family called the police. Sometime later it may have seemed that the father left the property. The defendant went outside with a 14-inch blade and found his father still there. There was an altercation, with the defendant saying that the deceased punched him. The defendant stabbed the deceased multiple times, causing his death. According to media reports, this was the first time the defendant had ever fought back against his father's abuse.

The Crown reportedly referred to the deceased as "[a] bad man", "a wife beater and a drug user".[87] Media reports indicated that the evidence at trial was that the defendant was not injured in the fight, and that the prosecutor made it clear that the deceased "had been nasty and hostile to the defendant and his family", before framing the relevant legal question as whether the defendant's

85 See FVDRC *Fifth Report*, above n 29.

86 Catrin Owen "Son found not guilty of murdering his abusive father" (8 June 2018) Stuff <www.stuff.co.nz>; and Sam Hurley "Son on trial for murdering abusive `Jake the Muss' father, argues self-defence" *The New Zealand Herald* (online ed, Auckland, 14 May 2018).

87 Hurley, above n 86.

use of force was "proportionate and reasonable to the threat".[88] The Crown apparently went on to characterise the defendant's use of force as excessive.[89]

What is striking about the case is that it seems at least arguable that the threat posed to defendant X by the deceased was less immediate, less serious, and more easily avoided than the threats faced by Ms Ruddelle and Ms Witehira. Of course, the threat posed by the deceased and X's response must be assessed immediately prior to the stabbing of the deceased (that is, after the deceased had punched the defendant) but the fact remains that defendant X did not find himself in a fight, he sought one out. He did not indiscriminately grab something he could use to defend himself, he approached his father with a plainly dangerous weapon. We do not know what persuaded the juries in any of these cases to make the findings they did, but it is necessary to point out that defendant X, unlike Ms Ruddelle and Ms Witehira, had *actual* alternative options available, in that he had the capacity to seek police help (evidenced by the fact that the police had already been called) and had a clear alternative pathway that could have avoided violence (staying inside). X's father threw a punch at X, but X was not harmed and so we have to query whether repeatedly stabbing his father was a reasonable use of force in response – particularly if the force used by Ms Ruddelle and Ms Witehira was not.

One could argue that defendant X would have needed a degree of space and time to escape the deceased's violence and so in context his actions were appropriate and proportionate. But if that is the case, why does the same not apply to Ms Ruddelle and Ms Witehira? If we are prepared to tell Ms Ruddelle and Ms Witehira that they ought to have run away or called the police, we are in effect asking them to escape – to find space, time, or respite – that was not available to them, just like (the jury must have accepted) it was not available to Mr X. Why were those alternative avenues expected of Ms Ruddelle and Ms Witehira, but not Mr X?

It is perhaps because society and the law tolerate men who fight back, but not women who do the same.[90] It may be because we presume that women ought to run away, rather than take up arms to defend themselves. But that is incongruous given that women are the primary victims of IPV and family

88 Hurley, above n 86.

89 Tommy Livingston "'I am so sorry Dad': man accused of murdering his father held him while he died" (15 May 2018) Stuff <www.stuff.co.nz>.

90 Lizzie Seal *Women, Murder and Femininity: Gender Representations of Women who Kill* (Palgrave Macmillan, London, 2010) at 1.

violence homicide.[91] However, gendered notions of masculinity may underlie jury conceptions of the legitimate use of violence: as Lizzie Seal said, "[w]hereas '[v]iolence is an accepted attribute of most recognised masculinities'[,] … killing by women violates norms of femininity, such as nurturance, gentleness and social conformity".[92]

The idea of female violence is an affront to gender norms and we may, therefore, more readily accept that violence perpetrated by men is more reasonable than that perpetrated by women. The law demands reasonableness, but what is reasonable may be (improperly) contextualised by gender.[93] If a jury (that is, society) more readily accepts male violence, the reasonableness of a male response is judged from a starting point that accepts that men may be justifiably violent. Conversely, if a jury's conception of gender norms is upset by female violence, then the reasonableness of the female response is judged from a starting point that deems the use of violence by women to be inherently unreasonable.[94]

The effects of these gendered distortions may compound for wāhine Māori and for other women at the intersection of gender, race, and/or deprivation. Western constructs of femininity and gender rules have been applied in Aotearoa across the board, including to wāhine Māori who, prior to colonisation, held mana and equal status with men.[95] As Wilson and others explain, post-colonisation, Māori women were subordinated to men, in accordance with the western worldview and suffered from the loss of their own culture and context.[96] Wilson and others further note that "[s]tandard views held about *Māori* women often disregard the ongoing and harmful effects of colonialism, historical trauma, marginalization, loss of cultural values and practices, and social and political disenfranchisement".[97] Society and juries therefore need to be aware not only of the roles that gender myths may play in conceptualising acts of violence by women, but also how those gender myths

91 FVDRC *Fifth Report*, above n 29, at 20.

92 Seal, above n 90, at 1 (citation omitted).

93 And we do not overlook the fact that what the law now terms "reasonableness" was traditionally measured by reference to "the reasonable man".

94 FVDRC *Fifth Report*, above n 29, at 51. As put by the FVDRC, "[w]omen's use of violence is understood in the wider context of men's violence against women. Women's use of violence is different in intent, meaning and impact, and is often aimed at resisting their partner's violence in order to keep themselves and their children safe".

95 Wilson and others, above n 29, at 9812.

96 At 9828–9830 .

97 At 9813.

may be born from western stereotypes that have the potential to undermine te ao Māori imperatives and marginalise wāhine Māori.[98]

B Applying the test

This brings us back to the need to focus on the circumstances *as the defendant believed them to be.* An objective consideration of the defendant's use of force can only proceed once the jury appreciates the defendant's lived experiences and broader context, while keeping one eye on systematic bias and structural inequities. In the cases of *Ruddelle* and *Witehira*, we do not think the defendants were operating under "mistakes" of the kind Wright discussed,[99] but we do agree with Wright's analysis that courts and juries have not been consistent when faced with decisions around the defendant's subjective view of the circumstances and the force they employed in response.[100] That is to say, we do not necessarily think that Ms Ruddelle or Ms Witehira were "mistaken" if they thought they could not have run away or called the police. Taking into account the immediacy of the threats they faced, their experiences of violence, and the fact that state/NGO apparatus had thus far failed to protect them from violence, we do not think that those alternative options were necessarily available to them – subjectively or objectively. To that extent, we disagree with their respective juries.

The notion that either Ms Ruddelle or Ms Witehira could have run away and left their loved ones to face a threat is not necessarily any more conscionable than their use of force was. How many people would run away from an attacker and leave their son or mother behind? The law does not expect people to abandon their loved ones in the face of an imminent threat; s 48 justifies the use of defensive force in the defence of oneself and in "defence of others". To ask them to do otherwise is an affront to both western and te

98 At 9829–9830, Wilson and others say that "[t]he majority of literature overlooks the ongoing intergenerational effects of colonization, historical and contemporary trauma, and social deprivation that continue affecting colonized Indigenous communities". Mikaere, above n 52, at 125 notes "[t]he roles of men and women in traditional Māori society can be understood only in the context of the Māori world view", and notes that instances of violence or abuse were matters for whānau, not individuals alone.

99 Wright, above n 4, at 112. Wright notes that where submission, flight, or calling for help may have been more appropriate in the circumstances, a use of force will not be reasonable. She says that issues arise where the defendant might be mistaken as to whether those alternatives are possible or effective. While this issue may arise, we do not see mistake as having been the key issue in *Ruddelle* or *Witehira*. We do note, however, that Ms Witehira argued a mistaken belief that she had picked up a pencil rather than a knife.

100 At 112.

ao Māori notions of aroha (love) and whakapapa (kinship), and for Māori defendants it is also an affront to mana.

Whakapapa connects Ms Ruddelle to her son and Ms Witehira to her mother. That whakapapa is a source of strength and interconnectedness, and for Māori women it also creates obligations to ensure safety.[101] We cannot apply western presumptions if those might be inappropriate. We reiterate that both Peters and Palmer JJ acknowledged that each defendant – in staying in the room with their aggressor and their loved one – did what most people would have done.[102]

If, therefore, one accepts that running away and calling the police were not likely to be realistic options for these defendants, the focus shifts to the objective limb of the test in s 48 and asks whether the force used was proportional to the threat, rather than whether the force was proportional because the defendant also had the option of running away or calling the police. These options cannot be presumed, nor are they intended to be the subject of an objective assessment.[103] The FVDRC's *Fifth Report* cautioned all of us who confront IPV against applying standardised, one-size-fits-all safety plans that fail to consider the victim's experiences and vulnerabilities, do not consider what the victim has already tried, what her worst fears are for herself or her children, and that are insufficient.[104]

Applying the framework set out above, a jury may well accept that in each of the cases we have discussed the force was excessive, but the question must be whether the particular use of force was reasonable and *not* whether there were theoretical alternatives available (nor, taking it a step further, whether the force used was reasonable in the face of those theoretical, assumed alternatives). If alternatives are to be weighed, they must be looked at from the point of view of what the defendant saw as available to defend herself and/or her whānau. Wright's methodology then suggests that even if a defendant was mistaken in her belief that she had no alternative to using the force she did, the objective assessment would need to account for a perceived threat to herself or others.

101 Ministry for Women, above n 29, at 19.
102 *R v Witehira*, above n 1, at [24]; and *R v Ruddelle*, above n 1, at [28].
103 Wright, above n 4.
104 FVDRC *Fifth Report*, above n 29, at 27.

VIII MOVING FORWARD

We cannot say for certain whether the self-defence defence is currently operating on a gendered basis – that is, whether it is being inappropriately applied because gender-based assumptions and values distort jury decisions. But what we observe is a failure – gender based or otherwise – on the part of juries and others to accurately and appropriately consider the subjective perceptions of female defendants seeking to rely on self-defence. That encompasses a failure to appreciate their lived experiences, contexts, and their options for responding to threats.[105] It seems likely that the issue is more acute for wāhine Māori.

The time for change has come. We need a more realistic approach to self-defence that actively and appropriately asks what level of risk the victim-defendant considered herself to be facing, and therefore what level of response was appropriate, taking into account lived experience, gender, culture, history, worldview and any other factors that may be relevant to the perception of threat and response.[106] That is particularly so in cases of family harm where the defendant has been a victim of IPV or other violence. That will include a distinct focus on the options available to women, victims, and wāhine Māori subject to different (external and internal) expectations and obligations that may or may not be familiar to the jury.

Our point in this article is to reinforce what the Law Commission said 20 years ago: expert evidence of the victim-defendant's experiences of family violence needs to be factored, and factored appropriately, by juries or judges considering self-defence.[107] That kind of analysis may be assisted by a defendant's own evidence and by ensuring that the jury understands the subjective-objective test mandated by s 48 and what that means for them.[108]

105 Wilson and others, above n 29, at 9813, also argue that care needs to be taken to appreciate the experience of wāhine Māori in their proper context. In the course of discussing their experiences of family violence, they say that "[c]omprehending family violence for *Māori* requires responses that are cognizant of the violence that exists beyond intimate partners and wider family members and is inclusive of their distinct historical, social, and cultural complexities".

106 As Wright, above n 4, puts it, a broader approach to s 48 "could be particularly valuable in cases involving abused women, where their previous experiences of violence and of the assistance available to them might lead to a view of the circumstances which differs from that which a person without those experiences would form", at 125.

107 See Law Commission NZLC R73, above n 22. This solution is a mere stepping stone for the purposes of applying s 48. A broader, integrated approach to meaningfully tacking family violence is imperative and overdue.

108 See *McNaughton v R*, above n 5, at [7] where the Court of Appeal noted "[w]hile it will not be in every case that a credible narrative for self-defence requires the accused to give evidence, it is hard to see how

This approach should also be informed by whether or to what extent the Crown has proved that the defendant had other options available *to her* and that *she* knew those other options were available.[109] The question is not whether the victim-defendant had alternatives or whether *in the mind of the jury* those alternatives were reasonably available. In the mind of a victim-defendant conditioned to expect and proactively react to violent encounters from a place of "fight" rather than "flight" calling the police or running away should not be seen as realistic options and neither the law nor the jury should require such actions simply because they appear to be available. Further, they should not require it of women but not men.

It needs to become standard practice, on the part of lawyers, judges, and juries, to start from a position that acknowledges that choosing flight (that is, running away) is not necessarily an option that is available to a defendant. Nor, necessarily, is calling the police. The presence of and risk to a vulnerable third-party, an imminent attack, a foreseeable continuation of violence, and the defendant's conditioning (whether by lived experience, heritage, or gender) must be weighed before supposed alternative options are asserted. If such alternatives are asserted, they ought to be interrogated by all involved.

IX CONCLUSION

We said at the outset that the offending in *Ruddelle* and *Witehira* was violent. But this type of offending does not occur in a vacuum. It is imperative that we actively and conscientiously ask whether the use of force in the face of an imminent threat was reasonable based on a realistic, holistic view of the circumstances the defendants perceived themselves to be facing. The offending in *Ruddelle* and *Witehira* was a product of circumstances – lives conditioned by violence, a justice and social system that had failed to offer protection, and the lived experiences of two defendant-victims that included trauma, abuse, and a lack of effective state or community protection.

Section 48 offers equal protection to men and to women, Māori and Pākehā, victims of ongoing violence and those who simply find themselves compelled to act against a one-off attack. But if it is to serve justice and the rule of law, it needs to be applied in a broad way that acknowledges the experiences of and the options available to each defendant. The experiences of Ms Ruddelle

the defence could be properly put forward in this case without that occurring".

109 An argument of self-defence will usually necessitate that the defendant gives evidence. See *McNaughton v R*, above n 5, at [52]–[54].

and Ms Witehira, especially when contrasted with the jury's treatment of Mr X, show that we must work the parameters of the self-defence defence harder, and require juries and stakeholders to consider the offending and the defence by asking what the circumstances were in the mind of the defendant and therefore whether the use of force was reasonable, without presupposing that those perceived circumstances would have allowed the defendant to have chosen a different path.