ENGAGING WITH THE SURVIVOR'S REALITY OF DOMESTIC VIOLENCE: A DISCOURSE ANALYSIS OF JUDICIAL UNDERSTANDING IN SURVIVOR-PERPETRATED HOMICIDES

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Domestic violence survivors who kill their abusive partners face significant challenges in claiming self-defence. These challenges centre on the extent to which legal actors are capable of understanding the reality of domestic violence and its effects on survivor-perpetrated homicides. Since 2005, Victoria has introduced changes to the Crimes Act 1958 *(Vic) and the* Jury Directions Act 2015 *(Vic), which aim to facilitate a greater understanding of domestic violence. This article seeks to measure whether these provisions appear to have contributed to a more nuanced understanding of domestic violence among Victorian judges. The authors use discourse analysis to compare survivor-perpetrated homicide judgments in Victoria over the past decade to those in New South Wales, where there is no equivalent legislative guidance. The results of this analysis indicate that the Victorian provisions have contributed to shaping judicial understanding of domestic violence and its role in these killings, thus facilitating more equal justice for survivors. These findings provide support for legislative reform in other states to ensure that the relevant laws in all Australian jurisdictions engage with the survivors' reality of domestic violence.*

I INTRODUCTION

Domestic violence[1] ('DV') homicides by an abusive partner are a frighteningly

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1 DV generally refers to violence between intimate partners, whereas family violence applies to a broader range of familial relationships. This article uses the two terms interchangeably, although the focus on violence between intimate partners means that 'domestic violence' is more commonly used.

common occurrence in Australia.[2] Sometimes, the DV comes to an end with the victim killing their abuser. That scenario is the focus of this article. Specifically, we look at the challenges that arise when a DV survivor seeks to claim that they killed in self-defence.

The lens through which we each understand the world is shaped and constrained by our own experiences. As a result, our viewpoint may be too narrow to appreciate and understand the reality of those with different experiences. This potentially presents barriers to equal consideration for DV survivors if subject to legal decision-makers whose dominant reality is male, privileged, and able-bodied,[3] and uninformed about DV. Although community awareness of DV is improving,[4] 'walk[ing] in the shoes' of survivors is likely beyond the imagination of most people who have no lived experience of DV.[5] Therefore, an understanding of the nature and dynamics of DV is critical to understanding the difficulties faced by survivors attempting to prove that they killed their abuser in self-defence.

Therefore, we argue that many of these challenges manifest in misunderstandings by legal actors as to the nature and dynamics of DV, as well as the barriers that prevent survivors from escaping abuse. This was recognised by Victoria, which in 2005 introduced changes to the *Crimes Act 1958* (Vic) ('*Crimes Act*') and then, in the *Jury Directions Act 2013* (Vic)[6] in an attempt to help to promote equal consideration for survivors.[7] These provisions encourage the use of social framework evidence of DV and jury directions as mechanisms for directing the attention of triers of fact to the reality of DV faced by survivors. They are grounded in a social entrapment model of DV which recognises that DV occurs in both a personal and societal context, which may constrain the actions and choices of survivors.[8]

2 In 2019 there were 125 recorded 'family and domestic violence related homicides' in Australia: Australian Bureau of Statistics, *Recorded Crime: Victims*, *Australia, 2019* (Catalogue No 4510.0, 9 July 2020).

3 Patricia Easteal, Lorana Bartels and Reeva Mittal, 'The Importance of Understanding the Victims' "Reality" of Domestic Violence' (2019) 44(1) *Alternative Law Journal* 11, 11.

4 Kim Webster et al, *Australians' Attitudes to Violence against Women and Gender Equality: Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, March 2018) pt 8.

5 Anthony Hopkins and Patricia Easteal, 'Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland' (2010) 35(3) *Alternative Law Journal* 132, 132–4.

6 The *Jury Directions Act 2013* (Vic) was re-enacted by the *Jury Directions Act 2015* (Vic) ('*Jury Directions Act*'), which incorporated those amendments. Although relevant, the amendments to the *Jury Directions Act* are only discussed briefly as they do not appear to be as influential on judicial officers' attitudes.

7 Anthony Hopkins, Anna Carline and Patricia Easteal, 'Equal Consideration and Informed Imagining: Recognising and Responding to the Lived Experiences of Abused Women Who Kill' (2018) 41(3) *Melbourne University Law Review* 1201, 1227–9.

8 Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (ANROWS Research Report No 3, June 2019) 17–22.

In this article we examine whether the social entrapment model of DV embodied in those statutes appears to have contributed to informed re-created imaginings, which facilitate a more nuanced understanding of DV and allow for a greater capacity to understand and engage with those realities.[9] We do this by comparing, with discourse analysis, a sample of Victorian judgments involving intimate partner homicides by DV survivors over the past decade[10] with sentencing remarks from New South Wales ('NSW'), where there is no equivalent legislative guidance.

We use discourse analysis as it is the study of the use of language within its social context. Its core principle holds that discourse plays an active role in constructing our understandings of identity and social relations. Fundamentally, discourse analysis is a means of interrogating the way in which people use language to ascribe meaning to their own realities.[11] As a methodology, critical discourse analysis imports a normative lens through which the content is analysed.[12] Here we use the social entrapment model as the normative lens through which the language of judges was evaluated. Analysis of the language used by judges to characterise and conceive DV can therefore help to reveal the ideologies and assumptions that shape judicial understanding.[13]

Our purpose is to respond to two questions. First, does the judicial discourse reflect an engagement with survivors' reality of DV? This is assessed by reference to the use of discursive practices that conform with the social entrapment model. And second, does any identified engagement appear to be related to the Victorian family violence evidence provisions? We are neither interpreting the legal provisions nor

9 For instance, an understanding of the survivor's reality is necessary in order to understand why she killed her abuser instead of leaving, particularly if the abuser was not assaulting the survivor at the exact time of the killing.

10 While this research does not analyse the pre-reform Victorian cases, the reforms were implemented in the context of the criminal law's failure to appropriately respond to family violence homicides: Victorian Law Reform Commission, *Defences to Homicide* (Final Report, October 2004) 1–4.

11 Marianne Jørgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (Sage Publications, 2002) 8–12.

12 Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Routledge, 2nd ed, 2010) 7.

13 There is a body of literature involving judicial discourse analysis, including discourse relating to DV. See, eg, Patricia Easteal, Lorana Bartels and Sally Bradford, 'Language, Gender and "Reality": Violence against Women' (2012) 40(4) *International Journal of Law, Crime and Justice* 324; Catherine M Naughton et al, '"Ordinary Decent Domestic Violence": A Discursive Analysis of Family Law Judges' Interviews' (2015) 26(3) *Discourse and Society* 349; Melissa Hamilton, *Expert Testimony on Domestic Violence: A Discourse Analysis* (LFB Scholarly Publishing, 2009). Analyses such as Emma Buxton-Namisnyk and Anna Butler, 'Judicial Discourse versus Domestic Violence Death Review: An Australian Case Study' in Adrian Howe and Daniela Alaattinoğlu (eds), *Contesting Femicide: Feminism and the Power of the Law Revisited* (Routledge, 2019) 95 have largely focused on the normative or legal impact of discourse such as the social impact of judge-perpetuated stereotypes of DV or on how judicial discourse affects sentencing outcomes. Elisabeth C Wells, '"But Most of All, They Fought Together": Judicial Attributions for Sentences in Convicting Battered Women Who Kill' (2012) 36(3) *Psychology of Women Quarterly* 350 is an example of the latter. See also Tarrant, Tolmie and Giudice (n 8) and Rosemary Hunter, 'Narratives of Domestic Violence' (2006) 28(4) *Sydney University Law Review* 733 as another example of a similar type of analysis.

analysing the legal outcomes of the cases. Therefore, the primary value of our research lies in the evidence it may provide of a correlation between the Victorian family violence evidence provisions and understandings of DV by the Victorian judiciary.

We now examine relevant background variables including the survivors' lens and the importance of law to make visible the 'reality' of DV entrapment and its role in this type of homicide looking at relevant legislation in Victoria and NSW. After describing our approach, we see whether any differences between how judges understand DV are evident. We do find higher rates of conforming discourse and a greater volume of discourse overall in Victoria. This positive relationship between reference to the Victorian family violence evidence provisions and higher levels of conforming discourse infers that the provisions have played a role in shaping how judges in that state better understand the reality of DV and its role in cases where a DV survivor kills her batterer, as compared to their NSW counterparts.

II THE SURVIVORS' LENS

The social entrapment model situates DV in both a personal and societal context recognising the environment of isolation, fear and coercion created by the abuser.[14] Women who kill their partners often do so out of fear for their personal safety,[15] as well as the wellbeing of children, pets and other family. This fear may exist absent a history of physical violence in the relationship, or in relationships involving low levels of physical abuse but other highly controlling and coercive behaviours. Indeed, emotional abuse is a slightly greater predictor of intimate partner homicides perpetrated by abusers as compared with physical violence.[16] Although counterintuitive, this reflects the centrality of control to DV.

Indeed, power and control are at the centre of wide-ranging and ongoing forms of abuse, constituting coercive control.[17] This is the key mechanism of domination by DV perpetrators. In addition to physical and sexual violence, common tactics of coercive control include restricting access to money, transportation and communication, isolation from family and friends, physical and technological surveillance, intimidation, degradation and emotional manipulation.[18] While these forms of abuse are often organised into categories, especially in statutory frameworks, they must be understood in their totality, particularly in relation to their cumulative impact on a survivor over time. Essentially, coercive control

14 Tarrant, Tolmie and Giudice (n 8) 17–20.

15 Julie Stubbs, 'Murder, Manslaughter and Domestic Violence' in Kate Fitz-Gibbon and Sandra Walklate (eds), *Homicide, Gender and Responsibility: An International Perspective* (Routledge, 2016) 36, 42.

16 Australian Domestic and Family Violence Death Review Network, *Data Report* (Report, 31 May 2018) 26–7.

17 Easteal, Bartels and Mittal (n 3) 12.

18 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Report, 28 February 2018) 3.

attacks a survivor's autonomy and independence in order to limit their freedom physically and psychologically.[19] What results is an atmosphere of terror, coupled with practical constraints on a survivor's capacity to escape the abuse. Both these practical and psychological effects must be considered when trying to understand the conduct of survivors who kill their abusive partners.

The tactics of coercive control may be employed systematically and slowly over time until a unique 'language' of violence develops within the relationship.[20] Eventually, a particular look, tone or even the silence of a perpetrator may indicate to a survivor the risk of imminent violence.[21] When this occurs, the survivor is responding to the cumulative effect of a history of abuse. The survivor's perception of fear thus includes both the immediate threat, and their past experiences of violence;[22] and, as the violence is usually erratic, the survivor may end up living in a state of terror with a feeling of danger's imminence and not knowing when the abuser will strike. The result is a heightened state of hypervigilance, which is one common effect of coercive control that needs to be understood as a key component of the survivor's reality.[23]

Social entrapment framing then requires us to instead ask a different question: what safety options were available? The myriad of difficulties is well understood. Access to accommodation is limited, and a survivor's capacity to leave may be further restricted by financial resources or caring obligations.[24] These practical difficulties can be compounded by disadvantages arising from the potential intersections of race, class and disability.[25] Further, institutional safety mechanisms such as civil protection orders may be ineffective in protecting women from ongoing violence.[26]

Finally, leaving a relationship does not guarantee the cessation of violence. In fact, separation is a risk factor for intimate partner homicide as the perpetrator's aim can shift from one of control to destruction.[27]

19 Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2007) ch 7.

20 Jess Hill, *See What You Made Me Do: Power, Control and Domestic Abuse* (Black, 2019) 10.

21 Ibid; Tarrant, Tolmie and Giudice (n 8) 18.

22 Tarrant, Tolmie and Giudice (n 8) 19, quoting Stark (n 19) 94.

23 Anna Carline and Patricia Easteal, *Shades of Grey: Domestic and Sexual Violence against Women* (Routledge, 2014) 74–5.

24 Hill (n 20) 40, 46–7, 50.

25 Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 14 ('*Less than Equal*').

26 Tarrant, Tolmie and Giudice (n 8) 20.

27 Ibid 19; Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) found that 43.7% of homicides in which males killed a female partner took place at the time of or during separation: at 86. Alison Wallace, 'Homicide: The Social Reality' (Research Report, NSW Bureau of Crime Statistics and Research, Attorney-General's Department, 1986) identified that 46% of wife killings by men occurred when women had left or were in the process of leaving their partners: at 99.

A *The Legal Need to See the Homicide through the Survivor's Lens*

In both NSW and Victoria, self-defence applies if a person believes their conduct is necessary to defend themselves or another person, and the conduct is a *reasonable* response in the circumstances as they perceive them.[28] As such, the test imports both a subjective and objective element. Whether the person believed it was necessary to do as they did is a wholly subjective question. However, the assessment of the reasonableness of the response is context dependant, requiring consideration of the circumstances as the person perceived them,[29] and an understanding of how, for DV survivors the threat may appear as imminent, and their response as proportional and necessary to protect themselves.[30]

Absent an understanding of DV, there are obstacles to triers of fact engaging in the informed imagining necessary to appreciate a survivor's circumstances. The fact finder's attention may be focused on an isolated, 'one-off' violent event, or may perceive individual instances of violence as the only visible precursor to the survivor-perpetrated homicide.[31] This divorces episodes of violence from the broader context of coercive control, thereby undermining the perceived proportionality of the survivor's conduct and understating the immediacy of the threat faced. Indeed, there may be no such visible event. The unique language of violence in a relationship may engender indicators of violence which are invisible to outsiders.[32]

In turn, judging whether a survivor's response to those circumstances was reasonable is a problematic exercise.[33] For this reason, the capacity of legislation to reveal the reality of DV with expanded definitions and expert evidence recommendations is critical to survivors claiming to have acted in self-defence. The combination of relationship and expert evidence can help triers of fact understand how the experience of DV affects both the subjective *and* objective elements of self-defence.[34] The use of expert evidence is particularly critical to establishing reasonableness of conduct. In the absence of expert evidence of the objective reasonableness of survivor responses to violence, there is a risk that

28 *Crimes Act 1900* (NSW) s 418; *Crimes Act 1958* (Vic) s 322K ('*Crimes Act*').

29 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114 and Report No 128, October 2010) 625–7.

30 Hopkins and Easteal (n 5) 132; 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, 76.

31 Tarrant, Tolmie and Giudice (n 8) 15.

32 Victorian Law Reform Commission (n 10) 77–9.

33 Easteal, *Less than Equal* (n 25) ch 3.

34 Domestic Violence Resource Centre Victoria, 'Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners' (Discussion Paper No 9, 2013) 8.

judicial officers, lawyers and jurors will interpret the survivor's subjective evidence in light of their own expectations of reasonableness.[35]

Therefore, informed imagining and — by extension — equal consideration for survivors is dependent on the capacity of the available evidence to reveal their experiences of DV, or the social entrapment framework in which it occurs.[36] Making this reality visible is central to the ability of courtroom players to imagine the experience of subjugation to ongoing coercive control, and its impact on both survivors' perception of threatened harm and ability to leave the violence.[37]

We now see if and how Victoria and NSW appear to have facilitated such a lens in their relevant legal regimes.

1 *Victoria*

Amendments to the *Crimes Act*[38] can be understood as embodying the social entrapment model of self-defence by a survivor of DV[39] by taking account of both the coercive controlling nature of such violence and its broader social context. For example, a broad definition of family violence in s 322J(2) of the *Crimes Act* highlights the importance of power and control and reinforces the fact that DV is not limited to physical violence but includes sexual and psychological abuse, as well as intimidation, harassment, property damage and threats.[40] Further, sub-s (3) provides that abuse may be constituted by a single act or a pattern of behaviour even though, when viewed in isolation, those behaviours may appear 'minor or trivial'.

Sections 322M(1)(a)–(b) explain that, in the context of family violence as described in s 322J, self-defence is relevant if the person believed that their conduct was necessary and was a reasonable response in the circumstances, even if the harm was not immediate and involved 'the use of force in excess of the force involved in the harm or threatened harm'.

This statute also reflects the relevance of both relationship and expert evidence of family violence.[41] Section 322J(1) of the *Crimes Act* provides a definition of family violence evidence which includes proof of the history of the relationship, the cumulative effect of violence, the intersection of social, cultural and economic factors, the general nature and dynamics of relationships affected by family

35 Hopkins and Easteal (n 5) 132–4, 137.

36 Tarrant, Tolmie and Giudice (n 8) 17–18.

37 Hopkins, Carline and Easteal (n 7) 123–5.

38 The original relevant provision was contained in s 9AH of the *Crimes Act* (n 28). This was reformulated and extended in 2014 and is now represented by ss 322J and 322M.

39 See Tarrant, Tolmie and Giudice (n 8) 5.

40 *Crimes Act* (n 28) s 322J(2) (definition of 'family violence').

41 Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) 4–5 ('Crimes Amendment Bill EM 2014').

violence, the psychological effect of violence and the social and economic impacts of violence on survivors. The recognition of the way in which social and cultural factors may be relevant to a survivor's experience of violence is another example of the provisions' embodiment of the social entrapment model.

The Victorian judiciary's knowledge of the survivors' reality was also added to by pt 6 of the *Jury Directions Act 2015* (Vic) which provides an extended definition of family violence[42] and for additional matters to be optionally included in the directions, such as a description of family violence,[43] and judicial restating of contemporary research conclusions relating to survivor responses to violence.[44] For example, s 60 notes that 'experience shows that' there is no typical response to violence; survivors may stay with an abusive partner, not report violence, or engage in retaliatory violence.[45]

The benefits of these Victorian provisions are twofold. Firstly, they remove unnecessary argument about the relevance and admissibility of evidence of DV. Secondly, by directing attention to evidence of DV — whether adduced via the survivor or in the form of expert evidence — the provisions facilitate consideration of the facts necessary to understand the reality of survivors.

2 *New South Wales*

NSW does not have equivalent legislation. Neither the *Crimes Act 1990* (NSW) nor the *Evidence Act 1995* (NSW) ('*Evidence Act*') provide guidance on the relevance or admissibility of evidence about DV in this type of homicide. The only germane reference in the NSW Criminal Trial Courts Bench Book is that '"[b]attered woman syndrome" may be relevant to a defence of duress'.[46] Not only does this present an inexplicably narrow set of circumstances in which evidence of DV may be relevant, it reveals a reliance on an outdated understanding of DV.

Battered woman syndrome ('BWS') conceives of DV as an escalating cycle, which creates a characteristic psychological state of 'learned helplessness' among survivors.[47] However, the use of BWS evidence is problematic. Such evidence may assist in proving the element of subjective belief; however, it fails to elucidate the objective circumstances of DV that support the reasonableness of a survivor's conduct.[48] Additionally, by pathologizing the survivor, the perceived

42 *Jury Directions Act* (n 6) s 57 (definition of 'family violence').

43 Ibid s 60(a).

44 Crimes Amendment Bill EM 2014 (n 41) 22–3.

45 *Jury Directions Act* (n 6) ss 60(b)–(c).

46 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (rev ed, August 2019) 1244 [6-170], citing *R v Runjanjic* (1991) 56 SASR 114.

47 Lenore E Walker, Terrifying Love: Why Battered Women Kill and How Society Responds (Harper & Row, 1989) 49–53.

48 Tarrant, Tolmie and Giudice (n 8) 16–17, 41–2; Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the

reasonableness of their conduct may be undermined. And, survivors who do not fit the model of passivity and helplessness — for example, those who retaliate, abuse substances or have a criminal record — risk being treated more harshly by the legal system.[49]

As discussed above, social framework evidence (the type of evidence contemplated by the Victorian provisions)[50] is broader and very different to BWS evidence. This can be achieved through the admission of relationship evidence from the survivor in question, as well as expert evidence on the nature and impact of DV generally.[51]

Notwithstanding the lack of legislative guidance in NSW, we note that relationship evidence would likely be admissible in self-defence cases as evidence of survivors' experience of DV is relevant to their perception of threat and the reasonableness of their response.[52] As in other Uniform Evidence Law jurisdictions, s 79 of the *Evidence Act* deals with the admissibility of expert evidence. If the knowledge is based wholly or substantially on the witnesses' training, study or experience, it will fall within the exception to the opinion rule for opinions based on specialised knowledge.[53] The High Court's acceptance of BWS as a recognised field of expertise,[54] and the extensive body of existing DV research suggest that expert social framework evidence would likely constitute an area of specialised knowledge.[55] However, unlike Victoria, NSW law does not facilitate or direct special attention to evidence of DV.

Battered Woman Syndrome' (1999) 23(3) *Melbourne University Law Review* 709, 725, discussing *Osland v The Queen* (1998) 197 CLR 316 ('*Osland*').

49 Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular' in Wendy Chan, Dorothy E Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (Glasshouse Press, 2005) 191, 194–5; Easteal, *Less than Equal* (n 25) 53–4.

50 Victorian Law Reform Commission (n 10) 172–6; Heather Douglas, 'Social Framework Evidence: Its Interpretation and Application in Victoria and Beyond' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 94.

51 Rebecca Bradfield, 'Understanding the Battered Woman Who Kills Her Violent Partner: The Admissibility of Expert Evidence of Domestic Violence in Australia' (2002) 9(2) *Psychiatry, Psychology and Law* 177, 184.

52 *Evidence Act 1995* (NSW) s 56 ('*Evidence Act*'); Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (Report, 23 April 2013) 185–6.

53 *Evidence Act* (n 52) s 79(1).

54 *Osland* (n 48) 336–7 [53]–[57] (Gaudron and Gummow JJ).

55 Victorian Law Reform Commission (n 10) 179–84.

III ABOUT THE CRITICAL DISCOURSE ANALYSIS

The case material for analysis was compiled using Westlaw AU and Lexis Advance to identify criminal law decisions involving murder or manslaughter in the Victorian or NSW Supreme Courts or Courts of Appeal between 31 December 2009 – 31 December 2019.[56] Six keyword combinations relating to DV and homicide returned 635 unique decisions which were read to determine whether they involved an intimate partner homicide committed by a primary victim of DV against an abusive partner.[57] Twenty-six judgments were so identified: 16 in Victoria and 10 from NSW.[58]

The critical discourse analysis involved several stages. First, relevant text was extracted by identifying three key categories of discourse relating to DV: how it was characterised (for example, how a judge characterised the nature, type or severity of DV); language which situated the survivor and their conduct within models or expectations of victimhood; and discourse which drew connections between DV and legal tests and concepts, such as reasonableness and moral culpability. In total, there were 152 relevant extracts of discourse in the Victorian cases, and 78 in the NSW cases with each of the 26 judgments having at least three extracts.

Subsequently, we developed a list of discursive practices which represent conformance with the social entrapment model and, by extension, are represented in the Victorian legislation[59] These include, for example, the following: recognising that DV is broader than physical abuse,[60] acknowledging the cumulative effect of violence,[61] or contextualising incidents of violence within a pattern of ongoing control.[62] These 'discursive practices' can be understood as a way of categorising the choices (whether conscious or unconscious) of judges in using particular language to refer to and contextualise DV, by reference to the social entrapment model of DV.

56 This was cross-referenced against the Australasian Legal Information Institute ('AustLII') database, although it returned no new cases.

57 For the purpose of consistency, the object of the discourse analysis was the language used in the relevant Supreme Court decisions or rulings. The appeal decisions were read only for the purpose of providing additional contextual information about the homicide and the history of DV in the relationship.

58 In *R v Sawyer-Thompson* [2016] VSC 767 ('*Sawyer-Thompson*') a survivor's abusive boyfriend told her he would kill her family unless she killed another man. Although the DV victim killed a third party, rather than her abusive boyfriend, this case was included because the duress elements raised similar issues to intimate partner homicides.

59 See Table 1 below for a full list of the discursive practices developed. Note, these practices were drawn from the Victorian statutory framework and are not intended to represent an exhaustive list of all factors relevant to a social entrapment model of DV.

60 See *Crimes Act* (n 28) s 322J(2) (definition of 'violence' paras (b)–(c)); *Jury Directions Act* (n 6) ss 60(a)(i)–(ii).

61 See *Crimes Act* (n 28) s 322J(1)(b).

62 See ibid ss 322J(1)(d), (3)(b); *Jury Directions Act* (n 6) ss 60(a)(iii)–(iv).

Discursive practices which represented non-conformance with the social entrapment model were also listed. These were generally the inverse of the conforming discursive practices; an undue focus on physical violence or isolating a pattern of abuse into individual incidents of violence are examples. Relevantly, these non-conforming discursive practices evoking mutual participation in the relationship, or discourse which minimised or trivialised violence have also been identified in the academic literature.[63]

The extracts identified at stage one were then each re-analysed and coded on the basis of whether each one accorded with any social entrapment discursive practices. As a number of the extracts contained more than one discursive practice, 222 discursive practices were coded (both conforming and non-conforming) from the 152 Victorian extracts, while the 78 extracted from NSW judgments contained 105 such examples. In addition to recording these in the Table below, we also copied and pasted the relevant text into a Word document for further critical analysis of the language used to discern the (mis)understandings of DV (and its relationship to the homicide) expressed.

In addition, we noted if the judge referred to expert evidence and if so, the type of expert. Each Victorian extract was also coded for whether the family violence provision appeared to be explicitly drawn from, or implicitly considered by, the judicial officer.

A *Limitations*

The majority of published decisions available are sentencing remarks, which were preceded by a guilty plea. Therefore, in most cases, the reality of DV has likely undergone a filtering process, in which the evidence available to a judge about the violence's relevance to the survivor's conduct or its characterisation is affected by details lost or omitted at plea negotiations or within agreed statements of fact.[64]

There are also limits arising from the nature of discourse analysis. Firstly, while a comprehensive coding practice was developed to obtain the results discussed below, there is an inherent element of subjectivity associated with discourse analysis. As noted above, discourse analysis evaluates language through a particular lens, and does not seek to make objective findings about the 'correctness' of language.[65] Secondly, this analysis does not have the capacity to provide a definitive explanation for the differences in judicial understanding of DV. Such understanding could be affected by additional factors, including the nature of judicial education and training, or the lived experiences within the judiciary.

63 Tarrant, Tolmie and Giudice (n 8); Hunter (n 13); Wells (n 13); Emma Buxton-Namisnyk and Anna Butler, 'What's Language Got to Do with It? Learning from Discourse, Language and Stereotyping in Domestic Violence Homicide Cases' (2017) 29(6) *Judicial Officers' Bulletin* 49.

64 Buxton-Namisnyk and Butler (n 63) 52.

65 Fairclough (n 12) 7.

IV JUDGMENT DISCOURSE ANALYSIS RESULTS

Do the different family violence evidence provisions in Victoria and NSW appear to correlate with differences in how the judiciary in the two states understand DV and its role in intimate homicides perpetrated by DV survivors? We now answer that question by reporting the findings of the critical discourse analysis.

A *Frequency of Discursive Practices*

On average, more extracts of discourse were identified in the Victorian cases (8.4%) than the NSW sample (5.2%), indicating that the judges are reflecting about DV more often in Victoria.

The nature of their reflections differed too with Victorian judgments more likely than their NSW counterparts to include discursive practices that conform with the social entrapment model of DV. For example, comments such as '[t]he background to your offending is bound up in your relationship with [the abuser]'[66] and '[t]his occurred in the context of a long history of family violence'[67] recognise that a survivor's conduct should be situated within the history of DV.[68] Similarly, a statement like '[DV] need not find expression in physical violence to be described as grave or create a mindset in its victims of fear and helplessness'[69] demonstrates an understanding of the nature and impact of DV.[70]

Table 1 shows that 86% of the 222 discursive practices identified in Victoria were positive, compared to 63% of the NSW content, meaning that a higher proportion of non-conforming discourse was identified in the NSW judgments. As the Table also illustrates though, there were cases in Victoria in which judges used non-conforming discourse. For instance, although less common than in NSW, some Victorian judges did engage in discursive practices of mutual participation and minimisation. This involved using language such as 'arguments'[71] or 'conflict',[72] to refer to DV or referring to a relationship as 'fractious'[73] or 'volatile'[74] — which suggests a degree of mutuality to the violence — without interrogating the

66 *R v McLaughlin* [2016] VSC 189, [2].

67 *DPP (Vic) v Walker* [2018] VSC 83, [25] ('*Walker*').

68 See Table 1, 'Relevance of the history of the DV relationship'; *Crimes Act* (n 28) s 322J(1)(a).

69 *R v Jones* [2018] VSC 415, [48] ('*Jones*').

70 See Table 1, 'General nature and dynamics of DV', 'Psychological effect of DV' and 'DV includes psychological/emotional abuse'; *Crimes Act* (n 28) ss 322J(1)(d)–(e), (2) (definition of 'violence' para (c)); *Jury Directions Act* (n 6) s 60(a)(i).

71 *Walker* (n 67) [2]; *R v Johnston* [2015] VSC 16, [3] ('*Johnston*'); *R v Kells* [2012] VSC 53, [2] ('*Kells*').

72 *R v Edwards* [2019] VSC 234, [70] ('*Edwards*'); *Kells* (n 71) [11], [13].

73 *Kells* (n 71) [2].

74 *Jones* (n 69) [3]; *Johnston* (n 71) [3].

dynamics of control in the relationship or whether the violence is aggressive or retaliatory.

This occurred, particularly, in cases like *R v Edwards*,[75] where the relationship's power dynamics were not immediately apparent and where the defendant did not conform to the model of an 'ideal' victim. Similarly, in *R v Kells* ('*Kells*')[76] there was a history of violence and aggression on the part of both Jade Kells and her partner Dean Pye. There was further evidence from Kells that Pye had previously threatened to kill her and that she stabbed Pye following a physical assault in which he pushed her against a wall by her throat.[77] Macaulay J described the relationship as 'a fractious one, characterised by frequent arguments and mutual abuse'.[78]

The Table indicates too that, in relation to some specific discursive practices, NSW judges used more conforming or less non-conforming discourse than the Victorian judges.[79] Further, the Victorian and NSW cases presented similar results in using discourse recognising the relevance of the history of the DV relationship. Notwithstanding these exceptions, the findings presented next in the Table do demonstrate a noticeable difference in the overall rate of conforming and non-conforming discourse in Victoria and NSW.

Table 1. Conforming and Non-Conforming Discursive Practices in Victorian and NSW Cases

Conforming Discursive Practices	**VIC (n)**	**VIC (%)**	**NSW (n)**	**NSW (%)**
Relevance of the history of the DV relationship	55	25%	25	24%
Cumulative effect of DV	10	5%	2	2%
Impact of social, cultural or economic factors	5	2%	0	0%
General nature and dynamics of DV	24	11%	13	12%
Psychological effect of DV	25	11%	9	9%
DV includes sexual abuse	14	6%	1	1%
DV includes psychological/emotional abuse	25	11%	3	3%
DV includes intimidation, harassment and threats of abuse	10	5%	8	8%

75 *Edwards* (n 72).

76 *Kells* (n 71).

77 See Domestic Violence Resource Centre Victoria (n 34) 29–33, which refers to evidence from the trial transcript.

78 *Kells* (n 71) [2]. This was stated without consideration of the power dynamics in the relationship (both physically and in the context of coercive control).

79 See, eg, the results in relation to 'DV includes intimidation, harassment and threats of abuse' and 'Questioning a survivor's choice to stay with an abuser'.

DV may be a single incident, or a pattern of abuse that appears minor/trivial in isolation	4	2%	0	0%
People react to DV differently	1	0%	0	0%
It is not uncommon for survivors to stay or return	8	4%	0	0%
It is not uncommon to not report DV	4	2%	1	1%
Decisions made by survivors may be influenced by the DV itself	3	1%	0	0%
Retaliatory violence by survivors does not necessarily negate self-defence	4	2%	4	4%
Non-Conforming Discursive Practices	**VIC (n)**	**VIC (%)**	**NSW (n)**	**NSW (%)**
Rejects relevance of DV to conduct	1	0%	2	2%
Minimises seriousness of DV	5	2%	10	10%
Connects experience of DV to personal dysfunction	7	3%	5	5%
Misunderstanding of the nature/dynamics of DV	1	0%	1	1%
Medicalisation/pathologising of survivors	2	1%	4	4%
Discounting sexual violence in a relationship	0	0%	0	0%
Undue focus on physical violence	1	0%	3	3%
Obscuring of the perpetrator's conduct	4	2%	1	1%
Isolation of a pattern of abuse into individual incidents of violence	0	0%	2	2%
Language of mutual participation in DV	4	2%	10	10%
Questioning a survivor's 'choice' to stay with an abuser	2	1%	0	0%
Language of 'failure' in relation to a survivor not reporting or leaving a DV relationship	0	0%	0	0%
Failure to recognise barriers to reporting/seeking help	3	1%	1	1%
Failure to appropriately identify retaliatory violence	0	0%	0	0%
Total conforming discursive practices:	192	86%	66	63%
Total non-conforming discursive practices:	30	14%	39	37%
Total discursive practices identified:	222	100%	105	100%

Note: A single extract of discourse may contain more than one discursive practice. As a result, the total number of conforming and non-conforming discourse that was extracted (152 in Victoria and 78 in NSW) is lower than the total number of discursive practices identified in each jurisdiction (222 in Victoria and 105 in NSW).

B *Examples of Discursive Practices Concerning DV*

Generally, judicial comprehension in Victoria of what behaviours constitute DV was quite broad, encompassing physical, sexual, verbal, psychological and financial abuse. Judges also recognised 'ongoing harassment and intimidation',[80] 'humiliation',[81] and 'damage to property, and threats of abuse'[82] as constituting DV. This understanding mirrors the broad definition of family violence in the *Crimes Act*.[83]

This compared to some NSW judges who used language which minimised and trivialised histories of DV. For example, an identifiable incident or history of DV in the NSW cases was variously described as an 'argument',[84] 'aggression',[85] 'mistreatment'[86] and 'throwing pots [and] pans'.[87] Such words put a focus on physical violence, disregarding the impact of psychological abuse.

An example of this is presented in *R v Tarrant*.[88] Despite recognising that the offender had been the victim of serious long-term physical and psychological abuse, including emotional manipulation, degradation and threats to kill, in assessing her experience of DV, Fagan J said:

> [N]one of the assaults was prolonged, none of them resulted in any substantial physical injury and, even in combination, taken over the course of an obviously turbulent and unhappy de facto marital relationship of nine years, this was by no means a severe or extreme course of physical abuse.[89]

Here, the language, such as the repeated use of 'none', as well as the adjectives 'turbulent' and 'unhappy' to describe what was a highly abusive relationship, serves to minimise and dismiss the DV experienced by the defendant.

C *(Mis)Understanding the Relevance of DV to the Homicide*

Victorian judges were more likely than those in NSW to recognise the impact of structural or institutional factors on survivors' experience of DV and how that affected their options. For instance, while less common in the earlier cases, seven of the 10 Victorian cases since 2013 included discourse which acknowledged the

80 *R v Black* [2011] VSC 152, [7] ('*Black*').

81 *Sawyer-Thompson* (n 58) [3].

82 *DPP (Vic) v Williams* [2014] VSC 304, [20] ('*Williams*').

83 *Crimes Act* (n 28) s 322J(2) (definition of 'violence').

84 *R v Castaneda* [2015] NSWSC 964, [17], [20].

85 *R v Wilson [No 4]* [2017] NSWSC 1730, [119].

86 *R v Tarrant* [2016] NSWSC 1155, [78] ('*Tarrant*').

87 *R v Doolan* [2010] NSWSC 615, [17] ('*Doolan*').

88 *Tarrant* (n 86).

89 Ibid [9].

barriers to reporting DV or leaving the relationship.[90] *R v Hudson* ('*Hudson*')[91] is such an example. King J noted that 'you returned to him instantly, out of a combination of love, fear, lack of choices and hopelessness'.[92] In that matter, King J also rejected reliance on stereotypes of passive and faultless DV victims and simplistic explanations for the killing by Veronica Hudson, a 43-year-old woman with prior criminal convictions and substance abuse issues:

> This crime would appear to be one motivated by alcohol and anger on first view of it, but what must be understood in dealing with this matter is the long history both relating to your personal history, and the history of the relationship between yourself and Edward Heron.[93]

In addition, when faced with apparently mutual violence, Victorian judges were more likely to engage in consideration of the dynamics of DV. As well as rejecting stereotypes of victimhood, this requires judges to understand the nature of retaliatory violence. Croucher J demonstrated this understanding in *R v Donker*[94] when he explained that

> Ms Donker was no shrinking violet herself … [and] on occasions, she would even respond with her own violence … But she was no match for Mr Powell. Worse than that, her spirited, but comparatively feeble, attempts to defend herself, or to get her own back, would just make him angrier and more violent. Realistically, she could never win.[95]

By contrast, NSW judges had a greater tendency to use discursive practices that emphasised the perceived mutuality of violence, or to minimise its seriousness.[96] They more frequently used or endorsed adjectives such as 'volatile',[97] 'turbulent',[98] 'fractious'[99] or 'dysfunctional'[100] to describe abusive relationships. As explained above, these words obscure the dynamics of control in the relationship, and instead suggest that both parties are equally engaged in violence.

90 *R v Donker* [2018] VSC 210, [5], [65] ('*Donker*'); *Sawyer-Thompson* (n 58) [3]; *Williams* (n 82) [20], [33]; *R v Hudson* [2013] VSC 184, [22] ('*Hudson*'); *R v Bracken [Ruling No 12]* [2014] VSC 351, [11], [17] ('*Bracken [No 12]*'); *Jones* (n 69) [39]; *Walker* (n 67) [5].

91 *Hudson* (n 90).

92 Ibid [22].

93 Ibid [12].

94 *Donker* (n 90).

95 Ibid [6].

96 See above Table 1, 'Minimises seriousness of DV' and 'Language of mutual participation in DV'.

97 *R v Lees* (District Court of New South Wales, Marien SC ADCJ, 18 July 2017) [21] ('*Lees*'), cited in *Lees v The Queen* [2019] NSWCCA 65, [39] ('*Lees Appeal*'); *R v Cahill [No 4]* [2018] NSWSC 1896, [11], [26], [29], [185] ('*Cahill*'); *Doolan* (n 87) [5]; *R v Duncan* [2010] NSWSC 1241, [8].

98 *Tarrant* (n 86) [9].

99 *Cahill* (n 97) [62].

100 *R v Hutchison* [2018] NSWSC 1759, [93].

In four of the 10 NSW cases, discourse of mutual participation by NSW judges was linked to discussion of shared substance abuse or personal dysfunction.[101] For example, in *R v Doolan*, despite identifying Jacqueline Doolan as the primary victim of DV, Grove J stated:

> Whilst, as I have noted, Mr Green may have initiated some violence, the reality is … you and Mr Green lived a life in an alcoholic haze, punctuated by the passage of verbal and physical abuse between you.[102]

Here, Grove J's use of the preposition 'between' in referring to verbal and physical abuse mutualised the violence in the relationship, implying that it was experienced equally by both parties. Additionally, by using the conjunction 'whilst', his Honour contrasted Doolan's experience of violence with the 'reality' of shared substance abuse. In doing so, Grove J minimised the perpetrator's responsibility for DV, instead attributing it to Doolan's personal dysfunction.

We note though that there were examples of sophisticated understanding of these killings' DV antecedents among some NSW judges. In particular, in *R v Cahill [No 4]*,[103] Johnson J went to considerable lengths to reveal the dynamics of DV in the relationship and how that violence impacted on Cathrina Cahill's conduct. In his Honour's sentencing remarks, Johnson J cited leading survivor-perpetrated homicide decisions from Victoria and Canada, as well as academic literature on the topic.[104] In doing so, his Honour demonstrated considerable insight into the limits of his own understanding. He stated that an instinctive response to Cahill returning to her abusive partner may be 'puzzlement'.[105] However, he continued that it is necessary to 'take into account the constellation of factors which affect a [DV survivor]' as such an experience 'may be considered generally to be outside the common understanding of the average Judge and juror'.[106]

D *Role or Impact of the Victorian Family Violence Provisions*

In almost half of the Victorian cases, judges made explicit reference to the family violence evidence provisions and their relevance to the particular matter. Cases with at least one reference to the provisions had, on average, 25% more conforming discourse than those with no reference to the provisions.

Figure 1 illustrates the frequency of a Victorian judge making a reference to the family violence provisions, either by name or by reproducing the exact words from

101 See ibid [107]; *Lees* (n 97) [21], cited in *Lees Appeal* (n 97) [39]; *Cahill* (n 97) [62]; *Doolan* (n 87) [17].

102 *Doolan* (n 87) [17].

103 *Cahill* (n 97).

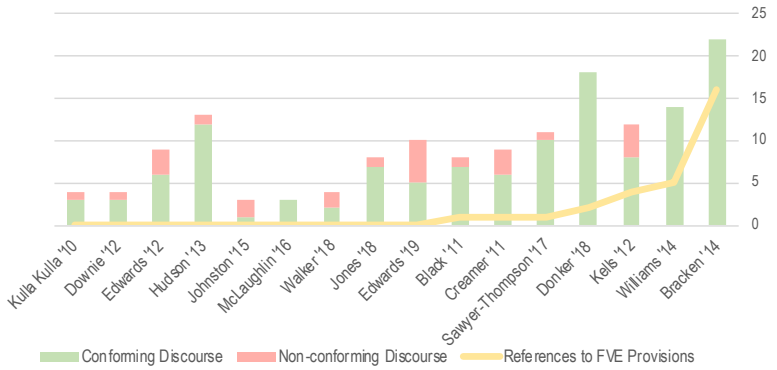
104 *Cahill* (n 97) [2], [186]–[188], citing Hopkins, Carline and Easteal (n 7), *Pasinis v The Queen* [2014] VSCA 97 [54] and *R v Malott* (1998) 1 SRC 123, 144 [43] ('*Malott*').

105 *Cahill* (n 97) [186].

106 Ibid, citing *Malott* (n 104) 144 [43] and Hopkins, Carline and Easteal (n 7) 1235.

the legislation (although not naming the statutes), and its correlation to rates of conforming and non-conforming discourse.

Figure 1. Relationship between Family Violence Provisions and Victorian Judicial Discourse



An example of the latter is *Director of Public Prosecutions (Vic) v Williams* ('*Williams*').[107] In that judgment, Hollingworth J made statements about the nature and dynamics of DV which almost exactly reproduced the legislative text, but without citing the specific legislation.[108] This may explain high rates of conforming discourse in other cases which did not include explicit reference to the provisions, namely *Hudson* and *R v Jones*.[109]

Victorian judges most commonly referred to the legislation in communicating the broad nature of DV, the relevance of DV evidence and the importance of addressing juror misunderstandings about the nature and dynamics of DV.[110] In referring to the provisions, judges demonstrated an understanding of the psychological effects of violence,[111] the importance of contextualising patterns of abuse,[112] and the practical barriers to reporting or leaving a violent relationship.[113] Some judges, like Hollingworth J, simply stated the content of the provisions:

> A number of acts that form a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.[114]

107 *Williams* (n 82).

108 Ibid [20], [32].

109 *Hudson* (n 90); *Jones* (n 69).

110 See *Williams* (n 82); *Sawyer-Thompson* (n 58); *Donker* (n 90); *Bracken [No 12]* (n 90); *R v Bracken* [2014] VSC 94 ('*Bracken*'); *R v Kells* [2011] VSC 679; *R v Creamer* [2011] VSC 196.

111 *Crimes Act* (n 28) s 322J(1)(e).

112 Ibid s 322J(3); *Jury Directions Act* (n 6) s 60(a)(iv).

113 *Jury Directions Act* (n 6) ss 60(b)(ii)(A)–(B).

114 *Williams* (n 82) [20].

Other judges made explicit references to the provisions. Maxwell P, for example, noted, 'I have in mind, of course, the broad definitions of "family violence" and "violence" in s 9AH(4) itself.'[115] Croucher J also remarked that, in light of the provisions, the survivor his Honour was sentencing may have been acquitted had she gone to trial.[116]

E *Effect of Expert Evidence on Discourse*

Another finding from the discourse analysis concerns the impact of expert DV evidence. In Victoria, every case involved the use of expert evidence — most commonly by a psychiatrist or psychologist.

In six matters, the expert gave evidence which included at least one element of social entrapment framing; for instance, relationship evidence about the defendant's specific experience of DV, or the general nature and dynamics of DV.[117] The introduction of this type of evidence is associated with higher rates of conforming discourse.[118] In one of these six (*Williams*), in which the expert was an academic and author who has researched and written extensively on DV,[119] the expert evidence appears to have had a considerable impact on Hollingworth J's understanding of DV as shown next.[120]

Her Honour's description of the DV and its relevance to Angela William's offending demonstrated a sophisticated understanding of DV and engagement with the reality of William's experience. For example, when commenting on the lack of complaint by Williams about the DV, Hollingworth J noted that 'the lack of complaint is not uncommon in cases of family violence'.[121] Later, when assessing the seriousness of William's offending, her Honour dedicated several pages to a summary of the expert evidence and its relevance.[122] This evidence was clearly central to her Honour's reasoning as she stated:

> *Given Professor Esteal's [sic] evidence*, it may not be appropriate in a case such as this one to assess the objective seriousness of the offence primarily by reference to the

115 *Bracken* (n 110) [15]. Section 9AH is the former version of ss 322J and 322M of the *Crimes Act* (n 28).

116 *Donker* (n 90) [99].

117 Ibid; *Williams* (n 82); *Sawyer-Thompson* (n 58); *Black* (n 80); *Jones* (n 69); *Bracken [No 12]* (n 90).

118 This demonstrates that the limited use of family violence professionals as expert witnesses in Victoria does not necessarily undermine the capacity of the family violence provisions to facilitate greater introduction of social framework evidence.

119 The expert in this case was Professor Patricia Easteal AM, who is also an author of this article.

120 This judgment is deconstructed in Charlotte King et al, 'Did Defensive Homicide in Victoria Provide a Safety Net for Battered Women Who Kill? A Case Study Analysis' (2016) 42(1) *Monash University Law Review* 138.

121 *Williams* (n 82) [20].

122 Ibid [30]–[36].

> degree of disproportion between the perceived threat or violence from the male partner and the woman's response to it.[123]

The use of expert evidence in NSW seems to have a different impact. The majority of cases in that sample did include such evidence, although only four of those involved any information germane to social entrapment. In each of these, the expert was a psychiatrist or psychologist. Unlike Victoria, in three of them, the judge rejected or failed to give weight to the expert evidence.[124] In *R v Silva*, for example, Hoeben CJ rejected the finding of an expert report that Jessica Silva suffered from post-traumatic stress disorder as a result of the DV she experienced from the deceased.[125] Relatedly, the original decisions of these three cases presented higher than average rates of non-conforming discourse and identifiable absences of consideration compared to the NSW cases as a whole. Each did lead, however, to a successful appeal, in which the relevance of the expert evidence featured prominently.[126]

V DISCUSSION

In the context of law, equality is understood as the requirement that like cases are treated alike[127] and that, by extension, relevant difference should engender differential treatment.[128] On this basis, the concept of 'equal consideration' asserts that actively engaging with different lived experiences is a precondition for promoting equal justice.[129] The approach taken in our discourse analysis allowed the contents to be interpreted through this lens by asking whether the judicial discourse reflects an engagement with the reality of DV. We were also interested in whether that engagement appears to be related to the Victorian family violence evidence provisions.

The discourse used by Victorian judges demonstrates a better understanding of the nature and dynamics of DV than their NSW counterparts. Engagement with the reality of DV in Victoria was evidenced both by higher rates of conforming discourse, and a greater volume of discourse overall. There is a positive relationship between reference to the family violence evidence provisions and higher levels of conforming discourse, which indicates that the provisions have shaped Victorian judges' understanding of DV. The NSW discourse was less likely to conform with the social entrapment model than in Victoria, suggesting a less

123 Ibid [35] (emphasis added).

124 *R v Silva* [2015] NSWSC 148 ('*Silva*'); *Lees* (n 97); *Tarrant* (n 86).

125 *Silva* (n 124) [39]–[40].

126 *Silva v The Queen* [2016] NSWCCA 284; *Lees Appeal* (n 97); *Tarrant v The Queen* [2018] NSWCCA 21.

127 HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 159.

128 *Postiglione v The Queen* (1997) 189 CLR 295, 301.

129 Hopkins, Carline and Easteal (n 7) 1207–8.

sophisticated understanding of DV. We have noted though that some specific examples of social entrapment were referred to more often by NSW judges.
This analysis highlights that the benefit of the Victorian family violence evidence provisions is in directing attention to the relevance of DV in every case. Therefore, the quality of judicial understanding does not rely solely on the experience or efforts of individual judges, although we do note that as the sample is small, individual judges could weight the outcome. For instance, Hollingworth and Croucher JJ were two judges responsible for four of the 16 Victorian judgments with high levels of conforming discourse.

What appears initially to be counterintuitive is that the use of expert evidence in NSW was correlated with a higher rate of non-conforming discourse by judges. In part though, this can be attributed to the lack of equivalent jurisdictional legislation mandating or facilitating DV expert witnesses. NSW judges are able to opt to deny the expert evidence, thus demonstrating that a major benefit of the Victorian provisions is not only the direction to consider a survivor's reality but also the legislative authority given to that evidence, particularly when delivered by an expert.

These findings do suggest though that the quality of judicial understanding of DV in Victoria is, at least partly, attributable to the legislation and its educative functions, as the content conveyed therein is reproduced in judicial discourse.

The extent of this impact cannot be measured both due to the study's limitations and the number of factors that affect judicial knowledge. Plus, the capacity of the provisions to effect broader change in the legal system is dependent on the legal actors that interpret and apply them. Tyson, Kirkwood and McKenzie assert that their study of Victorian cases from 2005–13 indicates that the potential of the provisions has not been fully met. In particular, they argue, the use of expert evidence by family violence professionals or researchers is limited.[130] Further, the evidentiary provisions come into operation at the end of the criminal justice process. If narrow police investigation, overcharging, plea bargaining and restrictive doctrinal interpretation continue to occur, the family violence statutes can have only limited impact.[131]

VI CONCLUSION

DV survivors who kill their abusive partner face considerable challenges in claiming they acted in self-defence. These challenges are often founded in the failure of legal actors to engage with and understand the nature and dynamics of DV. Absent this understanding, a trier of fact cannot engage in the informed imagining necessary to appreciate a survivor's circumstances. In turn, it is not

130 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, 577. However, this study was limited to cases decided before the *Jury Directions Act* (n 6) reforms came into effect.

131 Domestic Violence Resource Centre (n 34) 42–6.

possible to judge whether their response to those circumstances was reasonable. For this reason, the capacity of the available evidence to reveal the reality of DV is critical to survivors claiming self-defence.

The Victorian family violence evidence provisions were intended to address these difficulties by substantively broadening the definition and description of the manifestations, dynamics and effects of DV and encouraging the use of expert witnesses. These statutes embody the contemporary knowledge of DV research and provide legislative legitimacy to such evidence when adduced.

To date, there has not been a formal empirical evaluation of whether the provisions have fulfilled their objective of improving engagement with the reality of DV. This article has started to fill that gap with a preliminary study that analysed a sample of survivor-perpetrated homicide cases in Victoria and NSW over the past decade. The results of this analysis have revealed that the Victorian judicial discourse showed a moderately closer understanding of survivors' reality than their NSW counterparts. An improved lens is most often directly linked to the family violence evidence provisions, confirming that the Victorian legislative model with its informed imaginings is facilitating more equal consideration in cases of survivor-perpetrated homicide.

As its critics maintain, the provisions are not a panacea for survivors attempting to convey their experience of DV in the courtroom. Nevertheless, the legislation does direct judges' attention to the relevance of DV in survivor-perpetrated homicides. Whilst this does not necessarily change the admissibility of evidence, it may broaden the scope of what is considered relevant by legal actors. By encouraging engagement with the reality of DV on a systemic level, the provisions provide the legislative framework necessary to engender cultural change throughout the legal system.

We leave the reader then with two recommendations. It is our hope that the current study will serve as a springboard for developing and applying further evaluative research that can assess the impact of legislation on judicial understanding. In particular, critical discourse analysis of trial transcripts including judges' directions to the jury, could verify these findings and provide more comprehensive results. Also, by increasing the sample in both time and jurisdictions covered, the results of a similar critical discourse analysis could prove more robust.

Understanding the reality of DV is critical to the legal treatment of survivors who kill their abusive partners. Considering the dominant reality of legal actors, DV is a phenomenon that is not ordinarily well-understood within the legal system. This is evidenced by the doctrinal and evidentiary challenges for survivors attempting to establish self-defence. Having further established an empirical base of knowledge concerning what type of family violence evidence works best and how such legislation could be improved, we recommend that this type of legislative provision be enacted in other jurisdictions, thus facilitating the testimony of witnesses with expertise in the social entrapment model of coercive control.