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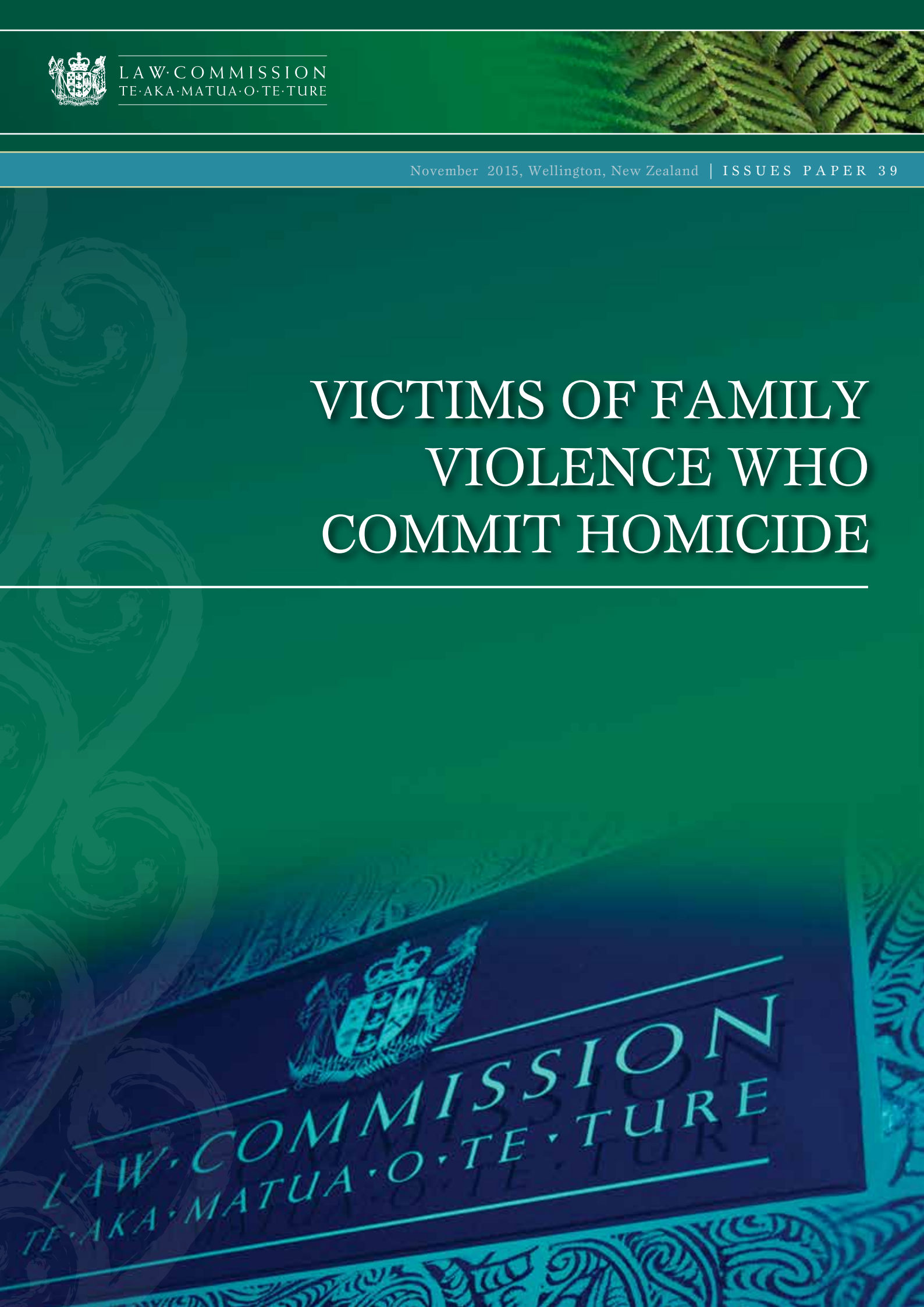
November 2015, Wellington, New Zealand | ISSUES PAPER 39

VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE



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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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Foreword

Family violence is a dreadful blight on New Zealand society. For too long it has not been sufficiently addressed. The current administration, and the Minister of Justice, are now making a determined effort to address this problem.

As part of that enterprise the Law Commission has been asked, as a matter of priority, to address various aspects of this problem. These include a review of the appropriate court structures and procedures to improve the position of victims, and some specific areas of the law.

This Issues Paper considers the position of victims of family violence (almost overwhelmingly women) who are driven to commit homicide, and what the consequences in law of their actions should be.

Self-defence and related aspects have for some time now been a contentious subset of this overall problem.

The Commission is strongly of the view that public consultation is important on a topic of this kind. Such consultation is best carried out on the basis of an Issues Paper, to help structure and inform both public and professional debate. The Commission strongly encourages input into that debate. I express the Commission's thanks to all who take the trouble to respond.

Sir Grant Hammond
President

Acknowledgements

The Law Commission is grateful to all the people and organisations that shared their thoughts with us while we were putting together this Issues Paper. In particular, we would like to thank the members of the expert panel convened to advise us on this matter. The members of the expert panel are:

- John Billington QC
- Helen Cull QC
- Judge Caren Fox
- Dr Ang Jury, Women's Refuge
- Annabel Markham, Senior Crown Counsel
- Associate Professor Elisabeth McDonald
- Superintendent Tusha Penny
- Associate Professor Julia Tolmie
- Former High Court Judge, Ronald Young

The Lead Commissioner on this project is Hon Dr Wayne Mapp

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be received by
18 December 2015

Emailed submissions should be sent to:
family.violence@lawcom.govt.nz

Written submissions should be sent to:
Family Violence and Homicide Review
Law Commission
PO Box 2590
Wellington 6011
DX SP 23534

The Law Commission asks for any submissions or comments on this Issues Paper on victims of family violence who commit homicide. Submitters are invited to respond to any of the questions, particularly in areas that especially concern or interest them, or about which they have particular views. Submitters do not need to address every question. Submissions can be sent in any format, but it is helpful to specify the number of the question you are discussing.

A final report and recommendations to Government will be published in 2016.

Official Information Act 1982
The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus, copies of submissions made to the Law Commission will normally be made available on request, and may be published on the Commission's website. The Commission may refer to submissions (including the name of submitters) in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

If you request confidentiality, we will contact you in the event that we receive a request for your submission under the Official Information Act 1982.

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(b) the fatal force was not proportionate to the force involved in the harm or threatened harm?

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Q8 Which of the three options for reform of self-defence would you prefer, and why?

- *Option 1: Introduce a new provision that clarifies that, under section 48, the force used by the defendant may be reasonable even though the defendant is responding to a harm that is not immediate or uses force in excess of that involved in the harm or threatened harm.*
- *Option 2: Amend section 48 to replace by statute the Wang concept of "imminence" with inevitability.*
- *Option 3: Introduce a new complete defence to extend the concept of self-defence to victims of family violence who act out of necessity.*

Q9 Should Option 1 be limited to situations where family violence is in issue or apply generally?

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Q20 Would you support further education or training on the dynamics of family violence for those operating within the criminal justice system, including lawyers, judges, police and jurors?

Chapter 1
Setting the scene

INTRODUCTION

1.1 Family violence has long been recognised as a significant social problem in New Zealand. The Ministry of Justice's recent discussion paper, *Strengthening New Zealand's legislative response to family violence*,[1] records that this country has the highest reported rate of family violence in the developed world.

1.2 Nearly half of all homicides in New Zealand are related to family violence.[2] The majority of family violence homicides are the result of intimate partner violence (IPV).

1.3 The Family Violence Death Review Committee (FVDRC) was established to review and report on family violence deaths in New Zealand. Its review of IPV deaths between 2009 and 2012 identified that most homicides were committed by a male "predominant aggressor" who, in the history of the relationship, had a pattern of using violence to exercise coercive control over the "primary victim" in the relationship.[3] In most IPV deaths, the deceased was the female primary victim in the violent relationship.[4]

1.4 The FVDRC also identified a small number of cases in which a female primary victim of family violence killed her male predominant aggressor.[5] In its Fourth Annual Report, the FVDRC concluded that primary victims who kill predominant aggressors are not well served by the legal defences to homicide in New Zealand, the result being that primary victims can end up serving long prison sentences for murder rather than having their victimisation recognised in the criminal justice response to their crimes.[6]

1.5 The Law Commission has been asked to consider whether the law in respect of victims of family violence who commit homicide can be improved.

BACKGROUND

1.6 For the reasons we explain in this Issues Paper, it is widely acknowledged that the law can struggle to facilitate "fair" outcomes for victims of family violence who kill their abusers. Such defendants may be acting in response to a long history of abuse but will usually be charged with murder and, if convicted, can face long terms of imprisonment. As a result, it is often recognised that this group of defendants face a significant risk of injustice. In recognition of this risk, in recent decades there have been substantial efforts in a number of jurisdictions to improve the law in this area.

1 Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (August 2015).

2 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (June 2014) at 16.

3 At 14–15.

4 While gender is not determinative, the FVDRC's data indicates that, overwhelmingly, the predominant aggressor is male and the primary victim is female. The FVDRC also identified one female primary victim who was killed by a female predominant aggressor in a same-sex relationship and one male primary victim who was killed by a female predominant aggressor. Family Violence Death Review Committee, above n 2, at 39–41.

5 Nine cases and one suspected case.

6 Family Violence Death Review Committee, above n 2, at 19.

1.7 In New Zealand, the Law Commission has previously considered the law in respect of victims of family violence who commit homicide, and made recommendations, on two separate occasions.

1.8 In 2001, the Commission considered and reported on the position of victims of family violence who kill their abusers in *Some Criminal Defences with Particular Reference to Battered Defendants* (2001 Report).[7] That Report canvassed defences available to such defendants and the law of sentencing for murder. The Commission concluded that some reform was needed to ensure that the legal defences applied equitably to battered defendants. The relevant recommendations included reforming self-defence, abolishing the partial defence of provocation, and replacing the mandatory life sentence for murder with a sentencing discretion.

1.9 In 2007, the Law Commission published another report, *The Partial Defence of Provocation*, in which it reaffirmed its recommendation to repeal provocation.[8] Provocation was repealed in New Zealand in 2009. However, a key basis for the Commission's recommendation for repeal – the drafting of sentencing and parole guidelines – has not eventuated. The Commission's previous Reports, and the Government's response, are discussed in more detail in Chapter 4.

1.10 A number of other countries have also reviewed and reformed their laws to better accommodate the experiences of victims of family violence who commit homicide. The Australian state of Victoria has, over the past decade, introduced a suite of reforms that both amended the substantive law and sought to engender cultural change in relation to community understanding of the dynamics of family violence. Similar reforms have also been adopted in Western Australia and have recently been recommended in Tasmania. Queensland has also endeavoured to recognise the reduced culpability of victims of family violence who kill their abusers but through quite a different legislative approach. Further afield, still more reform has been introduced in England and Wales.

1.11 These reviews and reforms have generated a significant body of legal and social commentary. However, approaches to reform in other countries have varied depending on broader criminal justice policies and existing legal frameworks within each jurisdiction and must therefore be carefully considered in that context.

SCOPE OF THIS REVIEW

1.12 This review considers the law in respect of victims of family violence who commit homicide. The terms of reference for this project are set out at Appendix A.

1.13 As part of this review, we are required to consider whether:

(a) the test for self-defence, in section 48 of the Crimes Act 1961, should be modified so that it is more readily accessible to victims of family violence charged with murder (or manslaughter);

(b) a partial defence that would reduce murder to manslaughter is justified and, if so, in what particular circumstances; and

(c) current sentencing principles properly reflect the circumstances of victims of family violence who are convicted of murder.

1.14 We have taken a relatively broad approach to this project and look at a wide range of options, including but not limited to the matters identified above.

7 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).

8 Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007).

1.15 However, our reference is limited in two key respects. First, we are limited to considering and reporting on the law that applies to defendants who are victims of family violence. It does not permit us to consider homicide law as it applies to other categories of defendant. Second, our reference concerns only defendants who commit homicide. It does not cover other offences a defendant might commit in response to family violence, such as attempted murder or assault. The implications of these limitations are discussed below.

Our review is limited to defendants who are victims of family violence

1.16 Unlike law reform bodies in other jurisdictions, we have not been asked to conduct a general review of the law of homicide or of the defences to homicide. Nor have we been asked to consider the application, or desirability, of a particular defence generally.[9] We have been asked only to consider the law of homicide as it relates to one particular group of defendants, namely, victims of family violence who kill their abusers.

1.17 This necessarily limits the scope of our review, including the issues we can consider and the recommendations we can make. Because the law of homicide is complex, and its application to various kinds of defendant are interconnected, in the absence of a general review we may also be limited in our ability to identify and assess the implications of our recommendations on areas of the law outside our terms of reference.

1.18 We recognise that many commentators and law reform bodies in other countries have argued against reforms specific to victims of family violence, saying that they may result in the differential treatment of persons who have killed in response to family violence, compared with those who have killed in response to non-familial violence.[10] In their joint report, the Law Reform Commissions of Australia and New South Wales cautioned against recognising the circumstances of family violence victims in an "atypical context" or typecasting the reactions of family violence victims who kill as a product of "extraordinary psychology" and concluded it was preferable for family violence-related circumstances to be integrated into existing defences of general application. This would promote substantive equality in the treatment of persons who kill in response to family violence and those who kill in response to other forms of violence.[11]

1.19 Furthermore, it can be difficult to justify distinguishing between victims of family violence and other defendants who fall outside that group but may also be deserving of acquittal or a recognition of reduced culpability (for example, defendants who may have been subjected to ongoing abuse outside of a family relationship, who respond to a threat but use excessive force or who are mentally impaired).

1.20 However, given the complexity of this area of law, there is significant risk in making recommendations that will have wider application in circumstances where we have not completed a comprehensive review of the law of homicide. Change in one area may have implications for other areas, and the potential for unintended consequences is high. This has been the experience in other jurisdictions.[12] In particular, there is a fear that any perceived widening of the defences to homicide may be successfully utilised by "undeserving" defendants.

9 Unlike in 2007, when the Commission reviewed the partial defence of provocation generally.

10 Australian Law Reform Commission and NSW Law Reform Commission *Family Violence — A National Legal Response* (ALRC R114, NSWLRC R128, October 2010) at 649.

11 At 648–650.

12 For example, in Victoria, as discussed at paragraphs 6.64–6.67, the offence of defensive homicide was intended as a "safety net" for victims of family violence who failed to meet the self-defence criteria. Instead, it was used almost wholly by violent men to avoid a murder charge. It has now been abolished.

Our review is limited to the law of homicide and defences to homicide

1.21 Unlike the 2001 Report, which reviewed all criminal defences available to victims of family violence (including for crimes other than homicide), this reference is limited to the law in respect of homicide only. We do not have a remit to consider defences to other crimes that victims of family violence may commit, such as attempted murder or assault.

1.22 We are mindful this has the potential to give rise to anomalies, particularly in our review of self-defence, which is available in respect of all offences. We also recognise that the problems faced by victims of family violence in seeking to rely on self-defence when charged with murder or manslaughter may also arise in the context of other criminal offences.

Our approach to this reference

1.23 While we acknowledge the challenges inherent in "piecemeal" review and reform of a broad area of the law such as homicide, our approach is to focus on the law as it applies to victims of family violence who commit homicide. If we recommend reform, we intend to limit that reform to victims of family violence only, unless we can be satisfied that there are strong reasons for recommending general reform and that the risk of unintended consequences is low.

1.24 We would welcome feedback on our proposed approach and, in particular, on whether the challenges inherent in recommending reform for one group of defendants and one type of offence can be effectively managed.

QUESTIONS FOR CONSULTATION

Q1 Should the Commission's review and any recommendations for reform be limited to victims of family violence who commit homicide?

THE COMMISSION'S APPROACH

1.25 The Commission is required to report to the Minister by 31 March 2016.

1.26 The Commission has convened an expert panel to advise it on this reference. The panel is made up of academics, Crown and defence counsel, judges and victim advocates.

1.27 Given the relatively condensed timeframe for our review, we rely on the empirical research conducted by the FVDRC to supplement our own analysis of reported cases. We have also drawn extensively on the law reform work in other jurisdictions, particularly Victoria, Western Australia, New South Wales, Queensland, Tasmania, England and Wales, and Ireland.

Guiding principles

1.28 We have identified the following three principles to guide our examination of the problems in this area of the law and our analysis of the options for reform:

(a) The law should apply equitably to all defendants, including victims of family violence, and should strive to be free from any form of gender or other bias.

(b) The law of homicide should reflect the context in which homicides typically occur, and any reform must be driven by an understanding of the actual context in which victims of family violence commit homicide.

(c) The law of homicide should reflect community values and, in particular, the sanctity of life, balanced against the individual's right to safety and to be free from torture and cruel or degrading treatment.

1.29 We propose to have regard to these principles throughout our review. They will represent the underlying objectives of any recommendations for reform.

Removing bias

1.30 We consider an appropriate guiding principle is that the law of homicide and defences to homicide should achieve substantive equality as between all classes of defendant.

1.31 Because victims of family violence who commit homicide are typically (but not exclusively) female, particular attention needs to be paid to identifying and removing any gender bias in the law.

1.32 Gender equality does not simply require the law to be gender neutral. Rather, the law must not have the actual effect of discriminating against one gender.[13] The emphasis is therefore on *substantive* equality before the law, which in turn leads to equality of results or equality of outcome. In some circumstances, this may require State intervention:[14]

> Achieving substantive equality requires taking both historical inequalities and the present conditions of women in a certain context into account. Substantive equality may consequently require positive action by the State to address the specific disadvantages and needs of women. The Convention on the Elimination of All Forms of Discrimination against Women encompasses substantive equality, recognizing that gender-neutral laws can have discriminatory effects and that formal equality is not enough to address them.

1.33 Accordingly, offences and defences must be flexible enough and appropriately formulated to cater for differences between genders.

1.34 We also note that Māori women are over-represented as primary victims who commit homicide.[15] We must therefore ensure the law is free from any racial or cultural bias.

Homicide law should reflect the context in which homicides typically occur

1.35 The substantive law governing defences to homicide should reflect the context in which homicides typically occur.[16] That is, reform should not be based on abstract philosophical principles or existing legal categories but contemporary medical and scientific knowledge, community standards and the current social context in which homicides are committed.

1.36 It is important that our review and any recommendations for reform are driven by an understanding of the actual context in which victims of family violence commit homicide. People's lives and the circumstances of their offending may not fit easily into legal categories.[17] Members of our expert panel have told us that victims of family violence who commit homicide are not readily accommodated by existing formulations of self-defence, lack of intent or provocation (when that defence was still part of New Zealand's law).

1.37 We explore the social context in which victims of family violence commit homicide in Chapter 2 of this Issues Paper.

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13 United Nations *Women's Rights are Human Rights* (United Nations, New York; Geneva, 2014) at 30.

14 At 31.

15 Family Violence Death Review Committee, above n 2, at 44.

16 A similar approach was also adopted by the law reform commissions in Victoria and Western Australia. See: Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at 14–15; Jenny Morgan *Who Kills Whom and Why: Looking Beyond Legal Categories* (Victorian Law Reform Commission, Melbourne, 2002) at 1–2; Law Reform Commission of Western Australia *Review of the Law of Homicide* (Project 97, September 2007) at 9.

17 Morgan, above n 16, at 2.

Homicide law must reflect community values placed on the right to life and an individual's right to safety

1.38 Defences to homicide must appropriately balance the individual's right to life against the right to safety. Like other criminal laws, defences to homicide engage various intersecting human rights. We must, therefore, have regard to the rights to life and to freedom from torture or cruel, degrading or disproportionately severe treatment, which underpin our law and are given expression in the New Zealand Bill of Rights Act 1990.

1.39 Currently, the only justification for killing another person recognised under New Zealand law is acting in self-defence or the defence of others. We do not propose that anything other than self-defence or defence of another should justify and therefore completely exculpate intentional killing.

1.40 Whether intentional killing (or infliction of life-threatening injury) that is not justified by self-defence may still be partially justified or excused, so that it is legally equivalent to unintentional killing (manslaughter), is a question that involves difficult and complex policy choices. We explore in this Issues Paper whether and in what circumstances homicide committed by a victim of family violence should be partially excused.

STRUCTURE OF THIS ISSUES PAPER

1.41 The remainder of this Issues Paper is structured as follows:

(a) Chapter 2 discusses the dynamics of family violence in general and in the context of victims of family violence who commit homicide.

(b) Chapter 3 discusses the current law and relevant aspects of the wider criminal legal system.

(c) Chapter 4 summarises previous work in this area.

(d) Chapter 5 identifies problems with how the law currently applies to victims of family violence.

(e) Chapter 6 discusses the various approaches taken to this issue in other countries.

(f) Chapter 7 identifies and discusses options for reform in relation to self-defence.

(g) Chapter 8 identifies and discusses the options of a partial defence or separate homicide offence for recognising a reduced level of culpability.

(h) Chapter 9 identifies other reform options that have the purpose of recognising reduced culpability or of improving on institutional, professional and community understanding of the social context.

1.42 The Commission is seeking submissions particularly on Chapters 5, 7, 8 and 9 but would welcome comment on any other area of this Issues Paper.

Chapter 2
Understanding family violence

INTRODUCTION

2.1 Family violence destroys lives and takes a significant toll on New Zealand society. Almost half of all homicides in New Zealand over the period 2009–2012 related to family violence.[18] Disproportionately, family violence affects the lives of women. Whatever their gender or relationship to an aggressor, however, victims of family violence who kill their abusers have typically suffered years of physical, sexual and/or psychological abuse. The consequences of this abuse can be devastating both for the victims and their families. Discussing intimate partner violence, Jane Maslow Cohen writes:[19]

> Terrible and tragic things happen within the contexts of battering relationships, even beyond the violence and resultant injury itself. These tragedies include the death of the battered victim; the physical and psychological abuse of others, especially children, within the household; the destruction of employment situations and opportunities; the withering away of basic trust, particularly trust in intimacy; and, often, the waste of what might, and should, have been rewarding and productive lives.

2.2 In this chapter, we consider the nature of family violence, the relationships in which it takes place and the circumstances in which victims of family violence commit homicide. Such cases represent a small subset of family violence related homicides in New Zealand.[20] Of the 126 deaths the Family Violence Death Review Committee (FVDRC) reviewed for its Fourth Annual Report, only 10 involved killings by primary victims of intimate partner violence (IPV),[21] while three involved killings by children who had been abused by fathers or step-fathers and witnessed their mothers being abused.[22] All the IPV primary victims who committed homicide were women.

2.3 Unsurprisingly, most IPV homicides are committed by those who have a history of aggression; most homicide offenders have been "predominant aggressors" in their relationships.[23] The data on cases that involve killings of non-intimate family members, including children, is more complex, but it appears most offenders who commit violent killings of non-intimate

18 Family Violence Death Review Committee, above n 2, at 32.

19 Jane Maslow Cohen "Regimes of private tyranny: what do they mean to morality and for the criminal law?" (1995) 57 University of Pittsburgh Law Review 757 at 762.

20 We use the terms "primary victim" and "predominant aggressor", which we explain below at paragraph 2.11, to describe the dynamics of intimate partner violence, per the FVDRC's Fourth Annual Report (Family Violence Death Review Committee, above n 2, at 15). The FVDRC defines those terms by reference only to IPV and not other forms of family violence. Most of the cases we discuss involve IPV, but two, *R v Erstich* (2002) 19 CRNZ 419 (CA) and *R v Raivaru* HC Rotorua CRI-2004–077–1667, 5 August 2005, involve children who killed violent parents. The term "primary victim" is less obviously appropriate for these cases, in part because the offender appears more likely to be reacting to the abuse of another (for example, a mother) in addition to themselves (see, for example, *Raivaru* at [6]–[7] and [19]). Thus, where appropriate, we may describe defendants who kill abusers as simply "victims" of family violence, with appropriate explanation of the extent to which they and/or others were subject to abuse by the deceased.

21 This included one suspected case. See: Family Violence Death Review Committee, above n 2, at 42.

22 At 65. The circumstances of the three intrafamilial (IFV) deaths reviewed by the FVDRC are not clear. In particular, it is unclear whether the deceased were abusive towards the child offenders. If they were not, those cases are outside our terms of reference. As we discuss in this chapter, however, two of the 23 cases we reviewed (which are listed in Appendix B) involved children killing parents.

23 We discuss this term below at paragraph 2.11.

family members have histories of abusing children or intimate partners.[24] Mostly, predominant aggressors in both IPV and non-IPV cases are men.

2.4 People who commit family violence homicides are, in short, normally otherwise violent and usually, albeit not always, male. Primary victims are much less likely to kill their abusers than to be killed, and when they do kill, it is usually after they have suffered very serious and long-term violence themselves.[25]

2.5 While our reference is concerned with family violence deaths, we note there can be a fine line between fatal and non-fatal violence. It has, for example, been consistently found that the "number one risk factor for intimate partner homicide is prior domestic violence, whether the victim is male or female",[26] but a "tiny proportion" of men who have been violent eventually commit homicide.[27] Research from the United Kingdom and the United States has identified "clear empirical evidence to suggest that qualitatively men who kill their spouses do not differ greatly from those who use non-lethal violence".[28]

2.6 It is apparent that neither family violence nor the responses of victims are amenable to simple analysis. Family violence is a feature of a range of interpersonal relationships, and forms and patterns of violence differ, as do victims' experiences and responses. While this review is confined to cases in which victims of family violence kill, many more victims may commit acts of non-homicidal violence or react non-violently. Such cases are outside our terms of reference but, at least in connection with self-defence, will give rise to similar issues.

2.7 We welcome all feedback on our discussion of family violence and the circumstances of primary victims who kill their abusers.

Our sources

2.8 We draw on the FVDRC's Fourth Annual Report, judgments of New Zealand courts, local and overseas law reform work and academic writing to give an insight into the abuse and other circumstances that precede and surround such homicides. Our purpose is to provide context for our discussion of the problems in this area of the law and the options and challenges for reform.

2.9 We understand the FVDRC is due shortly to release its Fifth Annual Report, which will include updated data on family violence deaths in New Zealand. It has not been possible for us to review that data in time for this Issues Paper. We will, however, do so for our Final Report.

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24 The FVDRC divides child abuse and neglect (CAN) deaths into four categories: fatal inflicted injury, filicide and parental suicide, neonaticide, and fatal neglectful supervision. Offenders' abuse histories are identified only in the fatal inflicted injury cases (which account for 19 of the 37 deaths). The circumstances of the neonaticides, filicides and neglectful supervision cases, which overwhelmingly involved female offenders (12 mothers and 3 fathers), are not analysed. That may be because such cases are of a different type to other forms of family violence, but the FVDRC report includes no information on whether they involved antecedent violence, by the women or others, or if other factors typically associated with infanticide, such as post-natal depression, were present.

25 Family Violence Death Review Committee, above n 2. See, also, Victorian Law Reform Commission, above n 16, at 61.

26 Jennifer Martin and Rhonda Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, April 2010) at 38. Some suggest the most reliable predictor of further violence is a victim's own appreciation of risk – the fear he or she feels – because the victim will have become hyper-vigilant and attuned to signals of impending violence. Primary victims who misjudge the likelihood of future violence also tend to underestimate, rather than overestimate, the risk of violence (see Kellie Toole "Defensive Homicide on Trial in Victoria" (2013) 39 Monash University Law Review 473 at 277; Victorian Law Reform Commission, above n 16, at 162; Susie Kim "Looking at the Invisible: When Battered Women are Acquitted by Successfully Raising Self-Defence" (2013) 13–04 UNSWLJ Student Series at 6.)

27 Martin and Pritchard, above n 26, at 39.

28 Aldridge and Browne "Perpetrators of spousal homicide: a review" (2003) 4 Trauma, Violence and Abuse 265–276; discussed in Martin and Pritchard, above n 26 at 39. According to a report commissioned by the United States National Institute of Justice (USNIJ) in 2005, several studies have examined "escalation" within IPV and found that, while patterns vary across different types of relationship and different types of violence, increases in the frequency and intensity of domestic violence were common and unpredictable. The findings of another study undertaken for the USNIJ similarly "contradicted overgeneralisations about high-risk batterers" who are not "easily "typed" or predicted". Findings of these reports are discussed in: Kellie Toole "Self-Defence and the Reasonable Woman: Equality before the New Victorian Law" (2012) 36 Melbourne University Law Review 250 at 276–277.

2.10 In reviewing particular cases in which victims of family violence have killed their abusers, we have relied primarily on sentencing, pre-trial and appeal decisions where they are available. We have also considered media reports, where available.

DYNAMICS AND TERMINOLOGY: "PREDOMINANT AGGRESSORS" AND "PRIMARY VICTIMS"

2.11 The FVDRC records the importance of a "primary victim/predominant aggressor analysis" in any consideration of IPV.[29] The "predominant aggressor" in an IPV relationship is the person "who is the most significant or principal aggressor… and who has a pattern of using violence to exercise coercive control", and the "primary victim" is the person "who (in the abuse history of the relationship) is experiencing ongoing coercive and controlling behaviours from their intimate partner".[30] These roles must be appreciated because it is not uncommon for IPV relationships to include some instances of violence by the primary victim. Some women, the FVDRC found, "retaliate and resist coercive control by using violence themselves", sometimes in an attempt to "try and establish a semblance of parity in the relationship", other times in "violent self-defence, violent retaliation and violent resistance. Primary victims may also use violence when they sense another attack from the predominant aggressor is about to occur".[31]

2.12 While a predominant aggressor "may not be the first party to initiate violence on any particular occasion", however, he or she will use violence more – and differently – across the relationship as a whole. This dynamic is important in assessing culpability for relationship violence because it takes account of the whole of the relationship, not just discrete events.[32] It might also contribute to victims' safety. The Committee explains:[33]

> Whilst identifying the predominant aggressor is not an easy task, if it is not done then abusive (ex-) partners can successfully manipulate the system, primary victims will not be protected, and they may not contact support services the next time violence occurs. For example, a victim dealing with a highly dangerous and potentially lethal (ex-) partner who contacts the police for help and is informed that both she and her (ex-) partner will be arrested because they have both used physical force is not only provided with no assistance on that particular occasion but is discouraged from reaching out for help again.

2.13 The Committee goes on to say:

> It is equally important to consider this type of analysis in relation to children. Children exposed to family violence will experience disruption of the normal pathways for development of emotional regulation and may react with a range of behavioural problems. These children may be perceived as being aggressive, naughty or even bad when in reality they are also primary victims of the abuse occurring within the home. They are acting out the effects of their (often multiple) traumatic experiences.

RELATIONSHIP TYPES AND GENDER

2.14 Historically, consideration of family violence has focused on male aggression towards women and "battered woman syndrome" developed alongside the organised women's movement. Most of the cases we are concerned with involve a heterosexual family context. In that context, violence is a gendered phenomenon. Perpetrators of violence are usually men, victims are

29 Family Violence Death Review Committee, above n 2, at 74.

30 At 15.

31 At 74.

32 See paragraph 2.53 below.

33 Family Violence Death Review Committee, above n 2, at 75.

usually women and children, and men and women kill for different reasons and in different ways.[34]

2.15 It should not, however, be lost sight of that the problems we consider arise – in all likelihood more frequently than the data suggests – in contexts that depart from this type, including non-heterosexual intimate relationships.

2.16 Concepts and models that have traditionally been applied to women, in the context of intimate partner relationships, might be applied to other victims. Most obviously, "battered woman syndrome" has in some cases been reframed as "battered person syndrome"[35] and/or applied to non-female victims. The nature and effects of family violence may perhaps more helpfully be conceptualised in terms of behaviours rather than participant characteristics.

2.17 It does not seem to us to be problematic to extend our consideration to the positon of victims or aggressors who are not or are only minimally represented in the available data. We agree with the Victorian Law Reform Commission that the same legal issues arise for all victims of family violence who kill their abusers, of whatever gender, and whatever their relationship to the abuser.[36]

Relationship types

2.18 Although our terms of reference are confined to cases involving homicide, they are not confined to cases involving intimate partner violence (albeit IPV was the focus of the FVDRC recommendation that precipitated this project).[37] We are required to consider the position of all victims of family violence who commit homicide.

2.19 Intimate partner relationships are the most common context in which primary victims kill predominant aggressors,[38] but victims of family violence kill abusers within other close interpersonal relationships, too. Of the 23 New Zealand cases we have reviewed in which primary victims killed abusers,[39] two involved killings of male parents by male children.

2.20 In the first, *R v Erstich,*[40] the defendant had been subjected by his father to abuse that the Crown accepted amounted to "not much short of a reign of terror".[41] When he was 14 years old, after a decade of being subjected to physical and psychological abuse, and witnessing violence towards his mother and brothers, the defendant killed his father by shooting him at close range. The killing was premeditated, but although he was charged with murder, the defendant was convicted of manslaughter. At trial, he claimed the killing was provoked.[42] He ultimately received a suspended sentence of two years' imprisonment.[43]

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34 At 41. Victims in this context are not always women. One of the 55 IPV deaths considered by the FVDRC about which relationship history information was available involved a male primary victim and a female primary aggressor. In its recent discussion document on New Zealand's legislative response to family violence, the Ministry of Justice noted men's experience of domestic violence is often different to that of women. IPV perpetrated by men against women is much less severe and men are more likely to experience other forms of family violence, like sibling violence. See: Ministry of Justice, above n 1, at 14.

35 In New Zealand, see *RR v KR* [2010] NZFLR 809. In Australia, see *R v Monks* [2011] VSC 626.

36 Victorian Law Reform Commission, above n 16, at 61.

37 Family Violence Death Review Committee, above n 2, at 102–104.

38 Among the 126 deaths the FVDRC reviewed for its Fourth Annual Report, 63 (50 per cent) were IPV deaths, 34 (29 per cent) were CAN deaths and 26 (21 per cent) were cases of intrafamilial violence (IFV). Of the IPV deaths, 75 per cent of the offenders were men, and almost 75 per cent of the deceased were female. Of the 46 female deceased, 44 were killed by their male intimate partner: Family Violence Death Review Committee, above n 2, at 39. Among the CAN deaths, 19 were a result of assault. The remaining CAN deaths were a result of filicide and parental suicide, neonaticide and fatal neglectful supervision: Family Violence Death Review Committee, above n 2, at 53-54.

39 See Appendix B.

40 *R v Erstich*, above n 20, at [3].

41 At [3].

42 The Court of Appeal recorded the verdict "may have reflected acceptance of lack of intent to murder, but was more likely on the facts of the case to have entailed the jury's acceptance of the partial defence of provocation" (at [3]).

43 The sentence of imprisonment was imposed on appeal. The defendant was in the first instance sentenced to two years' supervision.

2.21 In the second, *R v Raivaru,*[44] the defendant was 15 years old when he stabbed his step-father to death with a carving knife in circumstances the sentencing judge considered amounted to "serious provocation". Before the killing, the step-father had assaulted and verbally abused the defendant and his mother, and the judge accepted the homicide arose from the defendant's desire to protect his mother, which "regrettably, resulted in disproportionate use of force with a weapon".[45] The defendant pleaded guilty to manslaughter and was sentenced to four years' imprisonment.

2.22 *Erstich* and *Raivaru* are cases of homicide by children, not intimate partners, but both involved violence against other family members, including the defendants' mothers. The FVDRC notes that IPV and child abuse and neglect (CAN) are "entangled" forms of abuse and that:[46]

> It is well known that exposure to IPV is a form of child abuse and that there is a high rate of co-occurrence between IPV and the physical abuse of children. Many children affected by family violence are living with what Edleson et al [footnote omitted] have described as the 'double whammy' – the co-occurrence of being exposed to family violence in relation to other family members and being a direct victim of child maltreatment. Children are also injured in the 'crossfire' of a violent assault or attack against the adult primary victim and can be used as 'weapons' by abusive (ex-) partners in the context of IPV.

2.23 The FVDRC notes in addition that IPV and CAN are "not necessarily separate co-existing forms of violence" and that their co-occurrence may "only [make] sense if you understand family violence (IPV and CAN) as a pattern of coercive control and that actions directed at one individual are not necessarily designed to impact only on that individual".[47]

2.24 Intrafamilial violence (IFV) – that is, family violence that is not IPV or CAN – is, similarly, often "entangled" with other forms,[48] although that is not always the case.[49]

2.25 We discuss below the nature of coercive control, which is considered by many to be central to contemporary understandings of family violence and particularly intimate partner violence.[50]

Gender

2.26 Men are generally much more likely than women to commit and be victims of homicide, and they are most likely to kill strangers in "confrontational" circumstances.

2.27 When they kill in the context of intimate relationships, men tend to do so out of jealously or a desire for control and to have histories of aggression. Of the 55 IPV deaths the FVDRC reviewed where information was available about the abuse history in the relationship, 41 involved a deceased female, and 40 of those involved a male predominant aggressor.[51] Three further cases involved male offenders and male deceased, and the men who caused the death were in all cases current or former predominant aggressors.[52]

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44 *R v Raivaru*, above n 20.

45 At [19].

46 Family Violence Death Review Committee, above n 2, at 76.

47 At 76–77.

48 At 64–65.

49 See, for example, the Victorian case of *R v Monks*, above n 35. In that case the defendant invoked Victoria's now-repealed defensive homicide provision after he killed his abusive uncle.

50 See, for example, the Ministry of Justice's recent discussion document, Ministry of Justice, above n 1. See also *Strengthening the Law on Domestic Abuse Consultation - Summary of Responses* (United Kingdom Home Office, 2014).

51 Family Violence Death Review Committee, above n 2, at 41. One of the 41 cases involved a female predominant aggressor.

52 At 41.

2.28 Women, by contrast, tend to kill intimate partners in response to long-term family violence, in non-confrontational circumstances and with a weapon rather than their bare hands.[53] Among the FVDRC's sample of 55 IPV deaths where information was available, females who killed were in the main primary victims (10 cases). Female predominant aggressors were responsible for the death of two primary victims (one female and one male).[54]

2.29 We discuss these differences in Chapter 5, where we identify problems with the current law and the operation of self-defence. For the purposes of this chapter, we simply observe that the circumstances in which women kill may also apply to others, such as children abused by parents or non-female primary victims.[55] Women are, however, disproportionately represented among primary victims.

Non-heterosexual intimate partner relationships

2.30 The FVDRC records that same-sex family violence deaths are likely to be undercounted.[56] Even allowing for undercounting, among the 46 female IPV deaths the FVDRC reviewed for its most recent report, one occurred in a same-sex relationship.[57]

2.31 Most literature and data on primary victims of family violence who kill abusers concerns heterosexual relationships. Lesbian, gay, bisexual, transgender and intersex IPV has received less attention,[58] but there is some evidence it may be as prevalent as heterosexual violence.[59] Some contend the dynamics of same-sex IPV are similar to those in heterosexual relationships,[60] while others suggest they may be different in material ways.[61] In any event, it is widely acknowledged further research is required.

GANGS

2.32 The FVDRC considers gangs are environments that compound and exacerbate traditional assumptions about women's roles and violence towards women, and United States research has identified a heightened risk of IPV for women in gangs.[62] The FVDRC posits that violence against women and children in gang cultures is often more frequent and extreme than in other contexts, and victims' fears of retaliation if they leave abusive relationships may be greater.

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53 See Chapter 5, and the references cited therein, at paragraphs 5.6–5.9.

54 Family Violence Death Review Committee, above n 2, at 41.

55 See, for example *DPP v Bracken* [2014] VSC 94, discussed in Kate Fitz-Gibbon and Arie Freiberg "Introduction: Homicide Law Reform in Victoria - Retrospect and Prospects" in Kate Fitz-Gibbon and Arie Freiberg (eds) *Homicide Law Reform in Victoria: Retrospect and Prospects* (The Federation Press, Leichhardt, NSW, 2015) 1 at 11. In that case, the defendant killed his wife who had been physically and psychologically abusive during their relationship.

56 Family Violence Death Review Committee, above n 2, at 39.

57 At 39.

58 For a helpful and recent discussion from the Australian Institute of Criminology, see Alexandra Gannoni and Tracy Cussen "Same-sex intimate partner homicide in Australia" [2014] Trends & issues in crime and criminal justice 469. The lack of focus on non-heterosexual intimate partner violence has received comment as research has emerged, and some attention in popular media. See, for example: "Breaking the taboo of domestic violence in LGBTI relationships" (30 May 2015) Stuff < www.stuff.co.nz > ; Ally Fogg "LGBT victims of domestic abuse are rarely catered for – or acknowledged" *The Guardian* (online ed, London, 14 March 2014); Maya Shwayder "A Same-Sex Domestic Violence Epidemic is Silent" *The Atlantic* (online ed, Washington, 5 November 2013); and Joanna Jolly "Is violence more common in same-sex relationships?" (18 November 2014) BBC News < www.bbc.com > .

59 See, for example, *Reducing the impact of alcohol on family violence* (Social Policy Evaluation and Research Unit (SUPERU), 2015) at 2. See also the press release of the United States Centers for Disease Control and Prevention "CDC releases data on interpersonal and sexual violence by sexual orientation" (press release, 25 January 2013).

60 Leonard D Pertnoy "Same violence, same sex, different standard: an examination of same-sex domestic violence and the use of expert testimony on battered woman's syndrome in same-sex domestic violence cases" (2012) 24 St Thomas Law Review 544 at 545. See also "Reducing the impact of alcohol on family violence", above n 59.

61 Gannoni and Cussen, above n 58. See also Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, Oxford, 2007) at 397.

62 Family Violence Death Review Committee, above n 2, at 85.

2.33 Four of the 10 cases the FVDRC reviewed in which female primary victims of IPV killed abusive male partners, and one suspected such case, had a gang element.[63] Among the cases in Appendix B of this Issues Paper, a gang element was identified in only one court judgment (*Wihongi*), in which that aspect of the defendant's background was addressed in expert evidence filed on appeal. Some degree of gang association appears also to have been a feature of *Brown* and *Keefe,*[64] although our source of information in those cases is media reports.

2.34 We do not have sufficient data or information to draw conclusions about the scale or effect of gang involvement in New Zealand cases in which primary victims of family violence kill their abusers. We welcome submissions on this issue.

NEW ZEALAND-SPECIFIC FEATURES OF FAMILY VIOLENCE

2.35 The following features of family violence have been identified as of specific or particular concern in New Zealand.

2.36 First, Māori are disproportionately represented in family violence deaths, as both offenders and victims.[65] The FVDRC considers this is a matter of significant concern and suggests that "patterns of normalisation of violence" revealed by the regional reviews may be "a legacy of colonisation and institutional racism".[66] It states:[67]

> Family violence is marked by structural inequities (structural relationships of power, domination and privilege). Poverty, social exclusion [footnote omitted], disability, heterosexism, gender inequality and the legacy left behind by colonisation also impact on people's experiences of abuse and the resources available to them in responding to that abuse. The difficulties victims of family violence face in keeping themselves safe can be particularly extreme for some Māori women. Many are dealing with serious levels of victimisation and social entrapment, extreme economic deprivation and high levels of historical and intergenerational trauma affecting, not just themselves, but their whānau and support networks as well.

2.37 The Ministry of Justice, in *Strengthening New Zealand's Legislative Response to Family Violence,* suggests that "compounded disadvantage rather than individual risk factors may underlie the risks of wāhine and tamariki Māori being victims of family violence and tāne Māori being apprehended and convicted of a family violence offence".[68]

2.38 Second, alcohol and drug use and abuse is strongly correlated with family violence in New Zealand, and research demonstrates that alcohol escalates aggressive incidents.[69] Alcohol was identified in 14 of the 23 cases we considered in which victims of family violence killed abusers.

2.39 The Ministry of Justice also identifies that Pacific people and ethnic migrant communities experience higher rates of IPV than the general population.[70] These groups can face distinct socio-economic, cultural and practical barriers that may make it more difficult to seek help. Other groups of people identified as being particularly vulnerable to family violence include

63 At 85.

64 In relation to *R v Brown,* see: "Jail time led to p addiction, a life of crime – and a violent death" *The New Zealand Herald* (online ed, Auckland, 12 January 2010). In relation to *R v Keefe*, see: "Jessica Keefe not guilty of murder" (19 September 2013) Stuff < www.stuff.co.nz > ; and "Murder charge unwarranted - lawyer" (21 September 2013) Radio New Zealand < www.radionz.co.nz > .

65 Family Violence Death Review Committee, above n 2, at 49.

66 At 81.

67 At 80. The footnote omitted from this excerpt records that Māori children are twice as likely as European/Pākehā children to grow up in poor households, in connection with which the Committee cites F Cram "Poverty" in T McIntosh and M Mulholland (eds) *Maori and Social Issues* (Huia, 2001, Wellington) (at n 113).

68 Ministry of Justice, above n 1, at 14.

69 "Reducing the impact of alcohol on family violence", above n 59, at 4.

70 Ministry of Justice, above n 1, at 15.

older people, who may be at risk of IPV or financial abuse by other family members, and disabled people, who may rely on others for day-to-day care, increasing the risk of family violence.[71]

2.40 We note below that coercive control is a helpful way to understand the entrapment many victims of family violence experience. Family violence may, however, take other forms that are particularly prevalent in some cultures. The FVDRC has noted that there is little information in New Zealand about forced marriage and "honour"-based violence, and none of the cases in our sample appear to involve these forms of violence. It seems that such violence may entail elements of coercion, but we would welcome submissions on its nature, characteristics and prevalence.

2.41 We welcome feedback on features of family violence that may be specific or particularly significant in New Zealand.

EVOLVING UNDERSTANDING

2.42 Visibility of family violence, most particularly intimate partner violence, and the legal protection of victims is relatively recent and still evolving.[72]

"Battered woman syndrome"

2.43 In the 1970s, a literature developed on the psychological, social and economic aspects of family violence. Key to this was Dr Lenore Walker's work on "battered woman syndrome", which applied the cycle of violence and learned helplessness theories to battered women.[73]

2.44 Unifying Dr Walker's theory, which has been criticised on various grounds, including that it defines women by reference to victimisation,[74] is the proposition that "women stay with abusive men because they are rendered helpless and dependent by violence".[75] Like other conceptions of "battering", it is incident focused, emphasising the type and number of assaults (or other coercive acts).[76]

2.45 The language of "battering" is still in use and popularly understood, albeit battered woman *syndrome* (now sometimes called battered person syndrome) is problematic and has been discredited.[77]

A focus on "coercion and control"

2.46 A more recent understanding, explored in-depth by American researcher Evan Stark and by others, is that family violence – particularly by men against women – often involves "coercive control". Coercive control includes non-physical harm, behaviours intended to isolate and frighten victims and cumulative, not just discrete, effects.[78] Not all family violence can be explained this way, but coercive and controlling behaviours are "prototypical" in IPV

71 At 15.

72 As to which, see Stark, above n 61, at 142–145. See also Martha Mahoney "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Michigan Law Review 96 at 27.

73 See, Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at ch 2.

74 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in R v Falls" (2014) 38 Melbourne University Law Review 666 at n 2. See also Law Commission, above n 73, at 5.

75 Stark, above n 61, at 120.

76 Mahoney, above n 72, at 28–32.

77 As discussed in Law Commission, above n 7. See also Sheehy, Stubbs and Tolmie, above n 74, at n 2.

78 Stark, above n 61.

cases and help explain why victims stay in abusive relationships.[79] Further, while coercive control has been applied and discussed principally in connection with IPV, non-intimate family relationships may also involve behaviours of coercion and control.[80]

2.47 Stark has said that women with whom he has worked "[insist] that 'violence isn't the worst part' of the abuse they experience".[81] We discuss below how family violence is more than physical assaults and isolates and entraps victims.[82]

THE NATURE OF THE VIOLENCE

Physical and sexual abuse

2.48 Much of the commentary in this area is from overseas and draws on cases that have arisen overseas. It seems to us that many of those cases involve violence and coercion that could equally occur in New Zealand, but the cases below, which we have drawn from Appendix B, all arose in New Zealand.[83]

2.49 It is apparent from these cases (which all resulted in a conviction, but are not intended to be representative of our sample) that the physical and sexual violence to which victims who kill abusers are subjected can be extremely serious:

- *Wihongi v R*:[84] In discussing the sentencing judge's approach, the Court of Appeal recorded that Ms Wihongi had been sexually abused at 14 and prostituted for drugs and money by the deceased's older brother from 14 or 15. She had been gang raped and, during a home invasion, suffered an assault with a bottle that left her scarred. The day of the homicide her partner "demanded sex". The sentencing judge had accepted that Ms Wihongi displayed "complex features of post-traumatic stress disorder, and anxiety and depression dating from the rapes and home invasion".[85]
- *R v Paton*:[86] Ms Paton was regularly beaten and injured by her partner. "[B]eatings were sadly a routine part of [the] relationship".[87] Friends saw her "'all bruised up' as if that was a natural alternative to [her] being, for example, 'all dressed up'", while "another witness spoke of the number of times that she saw or heard from others about [Ms Paton] having had 'the bash', again as if injuries from the domestic assaults were an entirely normal part of life".[88]

79 At 12. See also Evan Stark "Re-presenting Battered Women: Coercive Control and the Defense of Liberty" (paper presented to Violence Against Women: Complex Realities and New Issues in a Changing World, Quebec, Canada, 2012) at 7: "The primary outcome of coercive control is a condition of *entrapment* that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity".

80 See, for example, "Strengthening the Law on Domestic Abuse Consultation - Summary of Responses", above n 50. In a consultation on the proposed enactment of a new offence of domestic abuse to criminalise patterns of coercive and controlling behaviour, the Home Office received submissions on the "the importance of any new offence capturing inter-familial abuse as well as intimate partner abuse" and noted that, while some respondents considered coercive control is limited to intimate partner relationships, others had submitted it was not and that such behaviours may affect other victims, including the elderly (at 9). As enacted, the offence of "controlling or coercive behaviour in an intimate or family relationship" applies both to people in intimate personal relationships and family members who live together (Serious Crime Act 2015 (UK), s 76).

81 Stark, above n 79, at 16.

82 Family Violence Death Review Committee, above n 2, at 71.

83 We have selected these cases for a number of reasons. First, unlike some of the cases in our sample (where the defendant was acquitted), each is associated with a judgment of a court on which we have drawn for a description of the facts. Second, even among those cases that are associated with judicial decisions, not all decisions detail the nature of the violence the defendant suffered before he or she committed homicide. Third, the cases we have selected seem, from the material available to us, to represent particularly serious instances of violence.

84 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.

85 At [22].

86 *R v Paton* [2013] NZHC 21.

87 At [2].

88 At [5].

- *R v Erstich*:[89] Mr Erstich, who killed his father when he was 14, had been subjected to a "reign of terror" from age four. He was beaten with pipes and sticks, had his head battered against hard surfaces, and was thrown against walls. The violence got worse as time went on, and he also witnessed violence against his mother and brothers. On one occasion, he tried to run away, and his father chased him, grabbed him by the throat and pushed him against the wall. The father had a "particular look of hatred" that frightened the defendant.

2.50 What these and other cases also illustrate is that physical and non-physical elements of family violence cannot properly be considered separately. Non-physical elements, like the terror of the "next" assault, the danger and fear victims face when they try to leave abusive relationships and the isolation achieved by coercive and controlling behaviour, are integral to the overall "architecture" of family violence. We discuss this wider context below.

The wider "architecture" of family violence

2.51 In its Fourth Annual Report, the FVDRC considered lingering myths about family violence, which we discuss in Chapter 5.[90] Perversely, beliefs and misconceptions held by a victim's family and society may make it harder for the victim leave, seek help and not return to the relationship.

2.52 The FVDRC says it is important to appreciate the "overall architecture" of family violence.[91] Such violence is complex because it takes place over long periods of time and involves more than individual assaults. It often also involves the isolation and entrapment of primary victims and abuse of secondary victims, like children, who may witness their mother's abuse or be subject to state intervention for their own protection.

2.53 While incident-focused conceptions of family violence may seem useful in court proceedings because "incidents can be asserted and often proven",[92] an emphasis on discrete events may obscure the broader dynamics of family violence.

Cumulative harm

2.54 The impact of family violence is cumulative. Its long-term effects are more than the sum of the effects of individual acts of violence. This is particularly relevant in cases in which primary victims kill their abusers. The FVDRC's regional reviews, for example, showed that:

> The cumulative and compounding effect of the abuse also frequently resulted in a raft of secondary issues. These included physical and mental health issues, histories of self-medicating with drugs and alcohol, suicide attempts and the inability to hold down employment. IPV victims often had difficulty in parenting their children, which – in some cases – resulted in them terminating pregnancies because they could not face bringing another child into "a nightmare situation" or their children being physically removed from them because they were unable to keep them safe.

2.55 Stark notes it is difficult to reconcile long-term abuse and cumulative harm with the criminal law's traditional focus on discrete incidents of violence. He says that:[93]

> Sheer repetition is not the issue. Even though pickpockets, muggers or car thieves typically commit dozens of similar offenses, because each harm is inflicted on a different person, the law is compelled to treat each act as discrete. But the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts. As British sociologist Liz Kelly has pointed out in her work on

89 *R v Erstich*, above n 20.

90 See paragraphs 5.56–5.66.

91 Family Violence Death Review Committee, above n 2, at 71.

92 Mahoney, above n 72, at 30.

93 Stark, above n 61, at 94.

sexual predators, a victim's level of fear derives as much from her perception of what could happen based on past experience as from the immediate threat by the perpetrator.

Coercive abuse

2.56 Tactics of "coercion" include violence and acts of intimidation, which may be non-physical or indirect. Examples of coercive violence include severe beatings and sexual violence and acts like strangulation, which has been described as "the domestic violence equivalent of water boarding".[94] Examples of coercive intimidation include threats and violence against children or pets.[95] Coercive behaviour instils fear and is apparent in the cases we have reviewed. One expert, cited in the Victorian Law Reform Commission's Report on Defences to Homicide, explained the power of this kind of abuse:[96]

> A commonly reported pattern of abuse is the limited use of physical assaults, with daily threats of physical abuse and verbal abuse. The threats of physical violence are often as powerful in maintaining control over a victim as the actual incidents of violence. Once the perpetrator has shown they are capable of carrying out the threats made, there is no need to resort to physical assaults. The often unpredictable nature of abusive outbursts leaves some women in a constant state of fear for their lives.

Tactics of control

2.57 Tactics of control undermine victims' capacity for independence. They are important because they inhibit a victim's ability to resist and escape. Examples of controlling behaviour by the primary aggressor recorded by the FVDRC include smashing multiple phones so their partners are uncontactable and cannot contact others, keeping at least one child at home every time a partner leaves so the partner has to return and controlling access to friends and relatives.[97]

2.58 These behaviour types receive little attention in the cases we have reviewed. They are less obvious than physical assaults and may, of course, not be reported by victims. The FVDRC cautions that, within a coercive and controlling environment:[98]

> Many women are hypervigilant in order to manage their and their children's safety. Thus, apparent rejections of help or a lack of response to service enquiries may be an attempt to maintain their personal safety and that of their children.

Entrapment

2.59 Evidence demonstrates it is very difficult for primary victims of family violence to leave abusive relationships. Half the IPV deaths the FVDRC reviewed took place in the context of a planned or actual separation.[99] A 2008 report by the Ministry of Social Development included a similar finding. Of the 74 couple-related homicides the Ministry reviewed for the period 2002–2006, 58 (78 per cent) included threatened, imminent or recent separation as a precipitating factor.[100]

2.60 Despite the dangers separation poses for primary victims and the controlling tactics that may inhibit escape, the FVDRC records that many victims go to considerable lengths to try and protect themselves and their children. They may relocate to refuges, take out protection orders

94 Susan B Sorenson, Manisha Joshi and Elizabeth Sivitz "A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern" (2014) 104 Am J Public Health e54 at 57. Strangulation is the subject of another reference the Law Commission is currently considering and also scheduled to report on in March 2016.

95 Family Violence Death Review Committee, above n 2, at 72.

96 Victorian Law Reform Commission, above n 16, at 161.

97 Family Violence Death Review Committee, above n 2, at 72.

98 At 73.

99 At 40.

100 Martin and Pritchard, above n 26, at 34.

or contact police or other agencies or family and friends for help.[101] Other victims may perceive or find no practical help from outside sources or, counter-intuitively, not wish to leave an abusive partner, but that does not mean they do not want the violence to stop.[102] Entrapment of primary victims is complex.[103]

2.61 The FVDRC cautions that, beyond the dynamics of individual relationships, wider structures contribute to entrapment.[104] In connection with family violence among Māori, the Committee emphasises structural inequities, and the Ministry of Justice has made reference to "[compounded] disadvantage". More generally, victims might be entrapped by social isolation, inequalities and institutional indifference[105] as well as misunderstandings about the nature of family violence. Seen in this way, the entrapment of family violence can be social as well as personal or relationship specific. It is on this basis that the FVDRC criticises the "empowerment" approach to responding to family violence:[106]

> It is important to put the concept of empowerment within victims' complex and sometimes chaotic lives, as structural inequities constrain and shape the lives of victims, albeit in different ways. The concept of "empowerment" is problematic when working with victims facing lethal violence, who also frequently face severe structural disadvantages. This is because it may appear as though an individual's inability to keep themselves or their children safe is a result of their decisions and choices. It renders invisible the systemic barriers that impede those choices (such as lack of stable housing and access to money, poverty, racism, sexism and the legacy left behind by colonisation) [footnote omitted].

HOMICIDES BY PRIMARY VICTIMS OF FAMILY VIOLENCE

2.62 To support our understanding of the context in which victims of family violence kill their abuser, and how the law responds in these circumstances, we have reviewed relevant homicide cases decided since 2001.[107] While this exercise has methodological challenges[108] and the sample size is too small to draw firm conclusions, it provides some insight and context for our terms of reference.

2.63 We identified 23 homicides that are within our terms of reference. This accounts for approximately six per cent of all family violence-related homicides per year or two per cent of all homicides in New Zealand.[109] This is broadly consistent with the FVDRC's findings[110] and

101 Family Violence Death Review Committee, above n 2, at 80.

102 At 80.

103 Stark writes that the women with whom he has worked "have repeatedly made clear that what is done to them is less important than what their partners have prevented them from doing for themselves by appropriating their resources; undermining their social support; subverting their rights to privacy, self-respect, and autonomy; and depriving them of substantive equality". Thus, he suggests, coercive control is a "liberty crime rather than a crime of assault" Stark, above n 61, at 13.

104 Family Violence Death Review Committee, above n 2, at 80–81.

105 At 80 (citing J Ptacek *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston, Northeastern University Press, 1999) at 10.

106 At 83.

107 Being when the Law Commission published its Report *Some Criminal Defences with Particular Reference to Battered Defendants.*

108 Methodological challenges are inevitable as neither jury verdicts, nor their reasons for reaching a verdict, are reported. This means we are limited in the conclusions we can draw from jury verdicts. Additionally, because we can only identify cases indirectly through searches of news databases and of legal databases for reported sentencing notes or related interlocutory or appeal decisions, we cannot guarantee that we have identified all relevant homicides (for example, unreported decisions or homicides that did not result in charges being laid on the basis that the victim of family violence was clearly acting in self-defence). Due to the time constraints on this project, we have not undertaken a full audit of all relevant homicides in New Zealand.

109 The FVDRC identified 312 family violence deaths in New Zealand from 2002–2012 out of a total of 776 homicides. See Family Violence Death Review Committee, above n 2 at 34. We identified 18 cases in the same timeframe (and an additional six cases outside this timeframe).

110 For the period 2009–2012, the FVDRC identified nine cases where a female primary victim killed a male predominant aggressor and one further suspected case. See: Family Violence Death Review Committee, above n 2 at 75.

those in an earlier study by the Ministry of Social Development.[111] A table summarising the 23 cases is in Appendix B. The following features emerge:

(a) The defendants were mainly, but not always, the female partner of the deceased,[112] and in all cases, the deceased was male.

(b) The extent of violence in the relationship and how it is described by both the defendant and the sentencing judge varies significantly – from a clear description of the deceased as the "primary aggressor"[113] and recognition of the defendant as a "battered defendant"[114] to a description of the relationship as "physically volatile"[115] or a "violent relationship where both parties would instigate violence".[116]

(c) In the vast majority of cases, the act that caused death occurred during a confrontation between the defendant and the deceased,[117] and in over half of those cases, the confrontation allegedly included physical violence or threats of violence by the deceased against the defendant.[118]

(d) The defendant almost always used a weapon (typically, but not always, a kitchen knife) in circumstances where the deceased was unarmed.[119]

Legal outcomes

2.64 Data for the 23 cases is set out in the tables below:

DISPOSAL OF CHARGES			
Original charge	Guilty plea to murder	Guilty plea to manslaughter	Charges defended at trial
Murder (n=17)	1	2	14
Manslaughter (n=6)	-	4	2
TOTAL (n=23)	**1**	**6**	**16**

TRIAL RESULTS			
Original charge	Acquittal	Convicted of murder	Convicted of manslaughter
Murder (n=14)	3	3	8[120]
Manslaughter (n=2)	1	-	1
TOTAL (n=16)	**4**	**3**	**9**

111 The Ministry of Social Development identified two cases in the five years from 2002 to 2006 of a female against male homicide where there was documented evidence of the male's violence towards the female in the past and in the context of the event. This accounted for 1.5 per cent of family violence deaths and 0.7 per cent of total homicides for that same period. See: Jennifer Martin and Rhonda Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, Wellington, 2000) at 38.

112 In *R v Erstich*, the accused was the son of the victim, and in *R v Raivaru*, the accused was the step-son of the victim.

113 *R v Rakete* [2013] NZHC 1230 at [34].

114 *R v Wihongi*, above n 84, at 776.

115 *R v Tamati* HC Tauranga CRI-2009–087–1868, 27 October 2009 at [4].

116 *R v Mahari* HC Rotorua CRI-2006–070–8179, 14 November 2007 at [24].

117 In all but one case (*R v Erstich*), the fatal act occurred during or immediately following the course of a confrontation with the deceased.

118 13 of the 23 cases identified. Those 13 cases (full citations for which are in Appendix B) are *Stephens*, *Raivaru*, *Stone*, *Mahari*, *Reti*, *Tamati*, *Wickham*, *Ford*, *Woods*, *Paton*, *Gerbes*, *Keefe* and *Wharerau*.

119 The only cases where a weapon was not used are *R v King*, where the defendant crushed 30 + sleeping pills into the defendant's food, and *R v Fairburn*, where the defendant drove her car 13 kilometres with her former partner on the car bonnet before crashing and killing him (although arguably the car was the weapon in this case).

120 In *R v Fairburn*, the defendant was initially convicted of murder, but on appeal, the conviction was quashed and a new trial ordered. After the second trial, the defendant was convicted of manslaughter. For the purposes of this analysis, we treat this case as a manslaughter conviction.

2.65 The defendant relied on self-defence in the majority of cases going to trial, with increased reliance on self-defence following the repeal of the partial defence of provocation in 2009.[121] In the eight cases where self-defence was put to the jury, three cases resulted in an acquittal, and five cases resulted in a conviction for manslaughter.

2.66 In most cases where the defendant relied on self-defence, the deceased was killed in a confrontation during which the defendant alleged the deceased was physically violent or threatening.[122] There was an independent witness in each of the cases where the defendant was acquitted.

2.67 Provocation was relied on in half of the cases that went to trial before its repeal in 2009. In all cases tried before 2009, the accused was charged with murder. In three of the five cases where provocation was relied on the defendant was convicted of manslaughter. In two of the four cases where the accused pleaded guilty to manslaughter before 2009, it was either accepted or intimated during sentencing that provocation would have been engaged had the case gone to trial.

2.68 The sentences for manslaughter included one of 12 months' home detention,[123] one suspended sentence of two years' imprisonment with supervision[124] and sentences of imprisonment ranging from two years to five years six months.[125] The one defendant who pleaded guilty to murder was sentenced to 10 years' imprisonment,[126] and the sentences imposed following convictions for murder at trial were, in two cases, life imprisonment with a minimum non-parole period of 10 years,[127] and in the other, eight years' imprisonment, increased on appeal to 12 years' imprisonment.[128]

2.69 We discuss characteristics of homicides by primary victims of family violence in other parts of this Issues Paper, where we analyse the problems in this area of the law and the options for reform.

QUESTIONS FOR CONSULTATION

Q2 We welcome feedback on our discussion of family violence and the circumstances of primary victims who kill their abusers.

121 Ten out of the 16 cases that went to trial involved a claim of self-defence. This accounted for five out of ten homicides occurring before provocation was repealed and five out of six homicides occurring after provocation was repealed. In one case (*R v Fairburn*), self-defence was withheld from the jury, and that was upheld on appeal.

122 We have insufficient information to know whether the deceased was violent towards the defendant during the confrontation in *R v Neale*. In all other cases where the defendant relied on self-defence, it is clear from the sentencing decision or other reports that a violent or threatening confrontation preceded the defendant's use of force.

123 Where the defendant suffered from multiple sclerosis (*R v Wickham*).

124 Where the defendant (the deceased's son) was 14 at the time of the homicide. This sentence was imposed following appeal of the original sentence of two years' supervision (*R v Erstich*). Under the Criminal Justice Act 1985, where an offender was sentenced to a term of imprisonment of between six months and two years, the court was able to make an order suspending the sentence for a period of up to two years (Criminal Justice Act 1985, s 21A). The Sentencing Act 2002 abolished that provision, and so the sentence imposed in *Erstich* would no longer be an option.

125 Taking into account final sentences on appeal.

126 *R v Rihia* [2012] NZHC 2720.

127 *R v Reti* HC Whangarei CRI 2007–027–002103, 9 December 2008; *R v Neale* HC Auckland CRI-2007–004–3059, 12 June 2009.

128 *R v Wihongi*, above n 84.

Chapter 3
The current law

INTRODUCTION

3.1 In New Zealand, any person charged with murder may, broadly speaking, defend the charge in one of three ways, which are to:

(a) contend they were acting in self-defence;

(b) contend they did not have the requisite murderous intent;[129] or

(c) plead not guilty and put the prosecution to proof.

3.2 Self-defence is a complete defence. If the jury accepts it, the defendant will be acquitted; the killing is not a culpable homicide.[130] The alternative strategies in (b) and (c) will not necessarily result in an acquittal. The jury may find that the evidence proves culpable homicide but, because of lack of murderous intent, does not prove murder. In that case, the jury may find the defendant guilty of manslaughter.[131] That may also be the case where self-defence is rejected by the jury. This is discussed further below.

3.3 A person charged with manslaughter can also claim they acted in self-defence or, again, can simply put the prosecution to proof.

SELF-DEFENCE

3.4 Self-defence is provided for by section 48 of the Crimes Act 1961:

> Everyone 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.

3.5 Self-defence represents a balance between the needs of an ordered society (in which people are generally not permitted to use force and "take the law into their own hands") and the right of individuals to ensure their own protection where the State cannot.[132] It does so by providing that people have a right to defend themselves against violence or threats of violence, so long as the force used is no more than is reasonable for that purpose. The fundamental principle underlying self-defence is necessity – the degree of force used is justified because no alternative is available to the defendant in order to protect themselves (or another).[133]

129 "Murderous intent" refers to the intention to cause death, or intention to cause bodily injury that is known to the defendant to be likely to cause death and the defendant was reckless to whether death ensues or not: Crimes Act 1961, s 167. The requisite knowledge and intent can be inferred from the nature of the act and the circumstances that the defendant must have known. See: AP Simester and Warren Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, NZ, 2012) at 554.

130 If self-defence is established, the killing is not simply excused, it is justified, or permitted, and involves no violation of the deceased person's rights (see Jeremy Horder *Homicide and the Politics of Law Reform* (Oxford University Press, Oxford, 2012) at 250–251).

131 Criminal Procedure Act 2011, s 110.

132 Law Reform Commission of Ireland *Defences in Criminal Law* (LRC 95, 2009) at 26.

133 Mark Campbell "Pre-Emptive Self-Defence: When and Why" (2011) 11 Oxford University Commonwealth Law Journal 79 at 80. For example, in *Osland v R* (1998) 75 HCA, 197 CLR 316 at 342, Kirby J did not consider that the defendant's actions were "reasonably necessary to remove further violence threatening her with death or really serious injury".

3.6 Self-defence is a general defence. It can apply to justify the use of force by any person against almost any form of attack or threat to that person or any other, and is not limited to defence against unlawful assault.[134]

3.7 It is for the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence, and a defendant may be discharged if no jury could properly exclude self-defence. However, before self-defence goes to the jury, there must be evidence of a credible or plausible narrative that might lead the jury to entertain the reasonable possibility of self-defence.[135] It is for the judge to determine, on the view of the evidence most favourable to the defendant, whether there is sufficient evidence to leave the defence to the jury, and self-defence must be left unless the judge is satisfied that it would be impossible for the jury to entertain a reasonable doubt.[136]

3.8 It is well established that section 48 involves three inquiries:[137]

(a) What were the circumstances as the defendant believed them to be at the time?

(b) In those circumstances as the defendant believed them to be, was the defendant acting to defend himself or herself or another?

(c) Given that belief, was the force used reasonable?

3.9 The first two inquiries are subjective. The defendant's belief need not be reasonable, although the fact-finder may be sceptical of the genuineness of an unreasonable belief.[138]

3.10 The third inquiry is objective, although it is applied to the defendant's subjective view of the circumstances.[139] While section 48 is silent regarding how the fact-finder should determine whether the defendant's use of force was reasonable, three related concepts have developed through case law. These are:[140]

(a) the perceived imminence and seriousness of the attack or threatened attack;

(b) whether there were alternative courses of action reasonably available of which the defendant was aware; and

(c) whether the defensive reaction was reasonably proportionate to the perceived danger.

3.11 *R v Wang* remains authority for the need to show that the defendant was under imminent threat in order to rely on self-defence. In that case, the defendant was an immigrant from China who was charged with the murder of her husband. On the night of the homicide, the deceased threatened to kill the defendant and her sister, who lived with them. He then went to bed in an intoxicated state. The defendant tied him up while he was unconscious and then killed him with a knife. At trial, a psychiatrist gave evidence that, in her mental state, the defendant would have believed that the threats of her husband would be carried through and that she could not see any alternative to the use of force. The trial judge withheld self-defence from the jury, finding that "the only view of the evidence open is that the accused was in no immediate danger" and

134 Simester and Brookbanks, above n 129, at 507.

135 *R v Wang* [1990] 2 NZLR 529 (CA) at 534; *R v Tavete* [1988] 1 NZLR 428 (CA) at 430; *R v Kerr* (1976) 1 NZLR 335 (CA) at 340; *Adams on Criminal Law* at [CA48.17].

136 *R v Whareraу* [2014] NZHC 1857 at [8]; *R v Wang*, above n 135, at 534; *R v Tavete*, above n 135, at 431; *R v Kerr*, above n 135, at 340.

137 *R v Li* [2000] CA140/100, CA141/100 at 6; *Fairburn v R* (2010) 44 NZCA (CA) at [34]; *R v Whareraу*, above n 136, at [4]; *R v Ford* HC Auckland CRI-2010-044-000132, 22 July 2011 at [19].

138 Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at 11.

139 At 12.

140 *Adams on Criminal Law*, above n 135, at [CA48.08].

accordingly that it was impossible for the jury to entertain a reasonable doubt on this point. The Court of Appeal upheld that decision, stating:[141]

> It is accepted that in the context of self-defence "force" includes not only the use of physical power but a threat to use physical power. But what is reasonable force to use to protect oneself or another when faced with a threat of physical force must depend on the imminence and seriousness of the threat and the opportunity to seek protection without recourse to the use of force. There may well be a number of alternative courses of action open, other than the use of force, to a person subjected to a threat which cannot be carried out immediately. If so, it will not be reasonable to make a pre-emptive strike.

3.12 The Court of Appeal considered *Wang* in the recent case of *Vincent v R*. In that case, the defendant had appealed the trial judge's decision to withdraw self-defence from the jury. While the situation in *Vincent* was very different to the circumstances faced by the defendant in *Wang*,[142] the Court of Appeal confirmed:[143]

> While the imminence of the threat is not treated as a distinct or separate requirement, the authorities have emphasised that the imminence or immediacy of the threat is a factor that is to be weighed in assessing whether the defence is available. This is a question of fact and degree. Amongst other things, the opportunities available to the defendant to seek protection or adopt some other alternative course of action are to be considered. The defendant must have seen himself or herself as under a real threat of danger and not merely believe there may be some future danger.

3.13 The Court of Appeal went on to consider the defendant's claim of self-defence against the concepts of imminence, lack of alternatives and proportionality. It upheld the trial judge's decision, finding:[144]

> On the facts, taking the most favourable view from Mr Vincent's perspective, there was no realistic possibility that the jury could entertain a reasonable doubt that Mr Vincent was acting in his own defence or in defence of Mr Pratt within the terms of s 48. We reach that conclusion for these reasons. It may be that Mr Vincent genuinely believed it was necessary for him to take the actions he did in the circumstances as he believed them to be. However, his actions could not be described as being taken in defence of himself or Mr Pratt. Neither was facing any imminent threat of force from Mr Stoneham. The incident involving the basketball and the ensuing scuffle had taken place some four days previously and there had been no material conduct on Mr Stoneham's behalf since that time that could have increased Mr Vincent's concerns that he was under imminent attack. His actions are more accurately described as retaliatory in nature.
>
> Significantly, Mr Vincent had a range of options reasonably available to him other than taking the action he did. He may have believed that the Corrections personnel at the prison were not taking adequate steps to secure his safety but he had the opportunity, for example, to seek the assistance of the Corrections officers and be placed in the separate regime that had existed in the period between 24 and 28 August. He had effectively removed himself from this separate regime and placed himself back into contact with Mr Stoneham. Finally, his actions in stabbing Mr Stoneham four times in the neck could not possibly be seen as a reasonable or proportionate response to a perceived threat of attack from a basketball in the exercise yard.

3.14 The concepts of imminence, lack of alternative options and proportionality in relation to victims of family violence who commit homicide are discussed further at Chapter 5.

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141 *R v Wang*, above n 135, at 535–536.

142 In *Vincent*, the defendant was a prison inmate, charged in relation to the stabbing of another inmate four times in the neck. The attack followed an incident on the exercise yard four days earlier, where it was alleged the victim deliberately kicked a basketball towards the defendant. The defendant claimed he was acting pre-emptively in self-defence in response to a threat of future violence from the victim.

143 *Vincent v R* [2015] NZCA 201 (CA), at [28]-[29].

144 At [32]–[33].

PARTIAL DEFENCES AND SENTENCING

3.15 Partial defences are only available in homicide cases. They recognise situations where lethal force is used in circumstances that mitigate the defendant's culpability or blameworthiness for using violence. Unlike self-defence, which is a complete defence, partial defences operate only to reduce murder to manslaughter.[145] Their historic rationale was to circumvent the mandatory sentence for murder (whether capital punishment or, more recently, life imprisonment) in cases with mitigating features.[146]

3.16 The mandatory life sentence for murder was abolished in New Zealand with the passage of the Sentencing Act 2002, and the partial defence of provocation was abolished in 2009.[147] The history behind the repeal of provocation is discussed in Chapter 4 of this Issues Paper.

3.17 The only remaining partial defences under New Zealand law are infanticide and killing pursuant to a suicide pact, both of which are not relevant to victims of family violence who kill their abusers.[148] Unlike a number of other jurisdictions, New Zealand law does not recognise excessive self-defence as a partial defence. Where the defendant uses more force than the law allows, he or she is liable for the full consequences of the offence – there is no "intermediate category of exculpation".[149] Nor does New Zealand law recognise a general partial defence of "diminished responsibility", although infanticide is a limited form of that defence.[150] These partial defences are discussed in Chapters 6 and 8 of this Issues Paper.

Assessing defendant culpability at sentencing

3.18 Under the Sentencing Act, life imprisonment is the presumptive sentence for murder, but a court may impose a lesser sentence if "given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".[151] In *R v Rapira*, the Court of Appeal held manifest injustice in terms of section 102 would be established only in exceptional cases but noted Parliament's apparent intention that cases with evidence of prolonged and severe abuse might qualify.[152]

3.19 The Sentencing Act lists a number of mitigating factors the court must take into account in sentencing and provides that the court can take into account any other mitigating factor it thinks fit.[153] Relevant mitigating factors that must be taken into account include:[154]

(a) the conduct of the victim (in homicide cases, the deceased);

(b) that the defendant has, or had at the time the offence was committed, diminished intellectual capacity or understanding;

(c) any remorse shown by the defendant; and

145 Infanticide can also operate to reduce manslaughter to the offence of infanticide, which carries a maximum penalty of three years' imprisonment. Crimes Act 1961, s 178.

146 Law Commission, above n 8, at 9.

147 The Law Commission had recommended abolition, in *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) and again in *The Partial Defence of Provocation* (NZLC R98, 2007). These reports are discussed in Chapter 4.

148 Infanticide, as we note below in Chapter 8, is a dual-role or "hybrid" criminal provision. That is, it can be charged as an offence or pleaded as a defence if a defendant is charged with murder or manslaughter, in which case the prosecution must negative the defence. In either case, it attracts a maximum sentence of three years' imprisonment (Crimes Act 1961, s 178(1)).

149 Simester and Brookbanks, above n 129, at 500.

150 At 560 and 590.

151 Sentencing Act 2002, s 102.

152 *R v Rapira* (2003) 3 NZLR 794, (2003) 20 CRNZ 396 (CA) at [121]; *R v Wihongi*, above n 84, at [83]–[85].

153 Sentencing Act 2002, s 9(4).

154 Sentencing Act 2002, s 9(2)(a)–(g).

(d) any evidence of the defendant's previous good character.

3.20 Sentencing decisions in respect of victims of family violence who killed their abuser are discussed in Chapter 5.

THE BROADER CRIMINAL LEGAL SYSTEM

3.21 In order to fully understand how the law operates in respect of victims of family violence who commit homicide, it is important to consider the broader criminal legal system and three aspects in particular, which are:

(a) the decision to lay charges;

(b) plea discussions and arrangements; and

(c) the role of the jury.

The decision to lay charges and negotiate a guilty plea

3.22 We understand that, in accordance with the *Solicitor-General's Prosecution Guidelines*, a victim of family violence who kills their abuser will, like any defendant, generally be charged with murder if the test for prosecution is met. This comprises an evidential test and a public interest test. The evidential test requires credible evidence upon which a jury could "reasonably be expected to be satisfied beyond reasonable doubt" that the defendant committed the offence.[155] This could be met in respect of murder if murderous intent (including intent to cause injury that the defendant knew would be likely to cause death and therefore was reckless to whether death ensued or not) could be inferred from the act itself and the circumstances the defendant must have known.[156] As discussed above, in murder cases, the jury can find the defendant guilty of manslaughter if they find that the defendant killed but lacked murderous intent.

3.23 We also understand that, where the evidence otherwise supports a prosecution for murder, adjudication of a defendant's self-defence claim may be regarded as a matter for the jury, not prior evaluation by the prosecutor. Decisions not to prosecute in respect of homicide are rare,[157] and we are not aware of any such decision being made in relation to a victim of family violence who had killed their abuser. We have also observed that, in most of such cases, the defendant is charged with murder.[158] However, very few defendants are convicted of murder.[159] Most are convicted of manslaughter, and some are acquitted.[160]

3.24 While our case sample is too small to draw any firm conclusions, we do observe that the rate of conviction for murder in these cases does appear to be lower than the overall rate of conviction for murder in intimate partner homicides.[161] It may be asked why a majority of cases in which murder is charged result in a conviction for manslaughter.

155 Crown Law *Solicitor-General's Prosecution Guidelines* (2013) at [5.3].

156 Simester and Brookbanks, above n 129, at 554.

157 That is, the public interest test in the *Solicitor-General's Prosecution Guidelines* is likely to be usually met in respect of homicide, given the value placed on the sanctity of human life.

158 In 14 of the 16 cases that went to trial, the defendant was charged with murder.

159 Only three of the 14 defendants charged with murder that went to trial were convicted of murder.

160 Eight of the defendants charged with murder that went to trial were convicted of manslaughter, and three were acquitted.

161 The FVDRC observes that, out of 44 intimate partner violence (IPV) homicides between 2009–2012 where a defendant was charged and the case was concluded, 31 (70 per cent) were convicted of murder. Ten (33 per cent) were convicted of manslaughter and three (seven per cent) were acquitted. See: Family Violence Death Review Committee, above n 2 at 48. Earlier research undertaken by the Ministry of Social Development identified that, from 2002–2006, 50 defendants were charged with murder in relation to a couple-related homicide (including homicides where the motivation arose from relationship distress, but the victims were people in addition to or instead of the partner). That research identified that 29 defendants were convicted of murder (58 per cent), nine were convicted of manslaughter (18 per cent), two were acquitted (four per cent) and in 20 per cent of cases, the outcome was unknown. See: Martin and Pritchard, above n 26, at 36.

3.25 On one level, the answer is clear – the jury will convict the defendant of manslaughter rather than murder when they are satisfied that the defendant killed the deceased but lacked murderous intent.[162] The role of the jury is discussed below.

3.26 However, some commentators have raised concerns regarding charging practices and plea negotiations in these cases. Julia Tolmie, Elizabeth Sheehy and Julie Stubbs have reviewed how victims of family violence who kill their abusers are charged in the Australian jurisdictions, Canada and New Zealand. They found:[163]

> The resolution of cases [in New Zealand] seems markedly out of alignment with Australia and Canada… Guilty pleas were offered and accepted in 10 percent of New Zealand cases compared to 63 percent of Australian and 56 percent of Canadian cases, with the result that 90 percent of cases proceeded to trial, as compared to 34 percent in Australia and 42 percent in Canada – all on charges of murder. Murder convictions occurred in 40% of New Zealand cases, as opposed to only 3 percent of Australian cases and 5.5% of Canadian cases. [Table omitted]
>
> Although, as noted above, we cannot draw definite conclusions because of the small number of cases that have occurred in New Zealand in this period, the data raise the disturbing possibility that the New Zealand criminal justice system is considerably more punitive in its response to battered women defendants who have killed their violent abusers. Furthermore, the data may suggest that the legal profession in New Zealand, including lawyers acting on behalf of the Crown, have been impervious to recent international developments, particularly contemporary social science understandings about how the phenomenon of domestic violence operates in cases that escalate to homicide and the "social entrapment" of the targets of domestic violence (see Stark, 2007; US Department of Justice and US Department of Health and Human Services, 1996).
>
> Whilst the percentage of acquittals in New Zealand appears to be lower than it should be (if it includes cases such as *Wickham*), one could argue that it is consistent with smaller Australian states such as Queensland and WA, which have similarly small numbers of cases. However, New Zealand differs from comparable jurisdictions in the prosecutorial practice of refusing to accept guilty pleas, instead proceeding to trial on murder charges, and in the number of murder convictions that result. New Zealand had four murder convictions (of 10 cases), which is the same number of murder convictions as all the states of Australia combined with Canada (from a total of 103 cases).

3.27 Our own case review also identified a high proportion of cases going to trial in New Zealand and, of those cases, a high proportion of defendants who are charged with murder rather than manslaughter.[164] Only three of the 17 defendants who were charged with murder pleaded guilty – two to manslaughter and one to murder. However, in some sentencing decisions following a verdict of manslaughter after trial, the judge acknowledged the defendant would have pleaded guilty to manslaughter to avoid a trial, had that been on the table.[165] While we found that a much smaller percentage of cases actually resulted in a murder conviction (17 per cent), this is still higher than rates of conviction identified in Australia and Canada.

3.28 However, we are reluctant to draw any firm conclusions from these observations, given the small size of our case sample. Further, these findings may not reflect current practice, given that the 2013 iteration of the Prosecution Guidelines expressly sanctions plea negotiations. The ability to request a sentence indication under the Criminal Procedure Act 2011 may also affect

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162 That is, not falling within section 167 of the Crimes Act 1961.

163 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Battered Women Charged with Homicide in Australia, Canada and New Zealand: How Do They Fare?" (2012) 45 Australian & New Zealand Journal of Criminology 383 at 393–395.

164 The statistics from our review of New Zealand cases differ from those of Tolmie, Sheehy and Stubbs, given the different time frames considered. Tolmie et al identified 10 cases that were resolved from 2000 to 2010. We identified 23 cases that were resolved between 2001 and 2015. Our analysis suggests guilty pleas were accepted in 30 per cent of cases, with 70 per cent of cases proceeding to trial, all but two of which on a charge of murder. Murder convictions occurred in 17 per cent of cases, manslaughter convictions in 65 per cent of cases and acquittals in 17 per cent (rounded to nearest percentage).

165 *R v Mahari*, above n 35; *R v Suluape*, (2002) 19 CRNZ 492 (CA).

how defendants make plea decisions.[166] We are, in addition, mindful there may be incentives operating in the Australian and Canadian jurisdictions that are not present in New Zealand, which may explain the higher proportion of guilty pleas (such as financial incentives to avoid the cost of a trial). We do not have the information to determine whether a guilty plea in any given case has been offered or accepted on the basis of a critical assessment of the facts or because of some other incentive.

3.29 However, the rate of murder conviction in the cases we have identified could suggest the Prosecution Guidelines are not being properly applied or that alternative considerations should apply in these cases. The Guidelines are discussed further in Chapter 9 below.

The role of the jury

3.30 The primary function of the jury is to determine the relevant facts in light of their assessment of the defendant's credibility and apply the law to reach a verdict. Juries also have an important role in acting as the "community conscience", representing what the community regards as fair and just and acting as a safeguard against arbitrary and oppressive government.[167] Jury deliberations are conducted in private and are protected from outside scrutiny, and the jury is not required to give reasons for their verdict.[168]

3.31 Murder trials are heard by juries in the High Court.[169] As noted above, on a charge of murder, the jury has the option to find the defendant guilty of manslaughter.[170] That is, the jury does not have the binary choice of "guilty" or "not guilty" to murder; they can also acquit the defendant of murder but return a verdict of guilty to manslaughter.

3.32 On one view, if every victim of family violence who commits homicide is charged with murder, the question whether the defendant should be convicted of murder or manslaughter or acquitted on the basis of self-defence is left to the jury. This approach can be seen as one of the advantages or disadvantages of the jury system, depending upon one's perspective. It allows the jury to apply community values in considering whether the prosecution has proved the homicide is culpable and, if so, to what degree.

3.33 Lack of murderous intent (including intent to cause injury likely to result in death) is, since the repeal of provocation, the only legitimate ground for reducing a murder charge to manslaughter. However, in some of the murder trials we reviewed, it is difficult to explain a manslaughter verdict on the basis of lack of murderous intent. In these cases, the fatal injury is of a kind that most people would regard it as likely to cause death, yet the defendant is found not guilty of murder but guilty of manslaughter.

3.34 For example, in *R v Wickham*, the defendant was charged with murder for killing her husband with a single shotgun blast. The defendant told police that she had killed her husband as "he'd tried to throttle me again", that he had been abusive and she'd "had enough".[171] While the jury rejected her claim of self-defence, it found her guilty of manslaughter "on the apparent basis that the killing was accidental", despite the fact that the defendant first called the police, then went to her bedroom to get the shotgun before returning to the lounge and shooting her husband.[172] On the facts, it was clearly open to the jury to infer murderous intent.

166 See: Criminal Procedure Act 2011, Part 3, Subpart 4 – Sentence indications.

167 The functions of juries are discussed in detail in a previous Report: Law Commission *Juries in Criminal Trials* (NZLC R69, February 2001).

168 Neil Cameron, Susan Potter and Warren Young "The New Zealand Jury" (1999) 62 Law and Contemporary Problems 103 at 129–130.

169 With the exception of the limited situation in section 103 of the Criminal Procedure Act 2011 relating to juror intimidation.

170 Criminal Procedure Act 2011, s 110.

171 "Murder-accused lived in fear" (4 October 2010) Stuff < www.stuff.co.nz > .

172 Brenda Midson "Degrees of Blameworthiness in culpable homicide" (2015) 6 New Zealand Law Journal 220 at 231.

3.35 Another example, where the judge has sought to explain the jury's verdict, is *R v Paton.*[173] In that case, the defendant was charged with the murder of her partner. They began arguing after drinking. The deceased attacked the defendant, and she attempted to defend herself. While the sentencing judge noted that she had facial and other injuries consistent with being beaten the next day, "that was nothing new... You lived long-term within a violent relationship, and beatings were sadly a routine part of that relationship."[174] The deceased followed the defendant into the kitchen, and the defendant grabbed two large kitchen knives. On the defendant's evidence, the deceased challenged her to use one of them, and she stabbed him in the neck, killing him. The jury found the defendant guilty of manslaughter, not murder. Dobson J, during sentencing, discussed the verdict:[175]

> The jury rejected your claim that you acted in self-defence, but found that you did not have murderous intent. Now murderous intent can be present where you do not actually intend to kill, but intend to cause injuries of a type that are likely to kill, and where you are reckless as to whether death does occur. A stab wound to the neck with a large kitchen knife is likely to kill the victim. You may recall the evidence from the pathologist that the injury was effectively "unsurvivable". I treat the jury analysis as recognising that the view as to the risk of death from a stab wound of this kind, by a woman in your position, would not be analysed as it would be by most of us. The prolonged history of beatings conditioned you to downplay the risks and consequences of violent attacks, so that a woman in your position would not appreciate the risk of causing death when others, who had not experienced the sad domestic history you had, could reasonably be expected to recognise that risk.

3.36 His Honour assessed the offending as at the high end of the scale and sentenced the defendant to five years' three months' imprisonment. He put the verdict down to a lack of appreciation of the risk of death as an effect of the history of family violence within the relationship.

Jury nullification

3.37 Jury nullification occurs where the jury deliberately does not apply the law to the evidence presented to it as, in the opinion of the jury, doing so would be contrary to its view of the justice of the case. The concept is an accepted and important part of the jury system. The Canadian Supreme Court in *R v Sherratt* stated:[176]

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community: the jury can act as the final bulwark against oppressive laws or their enforcement.

3.38 The United States Supreme Court has expressed the importance of the jury as the guardian of liberty and protector of community values on many occasions. In *Taylor v Louisiana*, the Court stated:[177]

> The purpose of a jury is to guard against the exercise of arbitrary power – to make available the common sense judgement of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional, or perhaps overconditioned or biased response of a judge.

3.39 The previous Law Reform Commission of Canada has also referred to this role of the jury. In its Working Paper *The Jury in Criminal Trials,* it observed that practical studies and anecdotal experience of legal professionals suggested that, when the jury deviates from a strict application

173 *R v Paton*, above n 86.

174 At [3].

175 At [11]–[12].

176 *R v Sherratt* (1991) 1 SCR 509 at 523–524.

177 *Taylor v Louisiana* 419 US 522 (1975) at 530.

of the law, it most often does so in a manner consistent with shared community notions of equity as opposed to prejudice.[178] It concluded:[179]

> We think that a case can be made for retaining the jury because of its ability to nullify what it regards as oppressive laws. Even though the number of cases in which the jury acts as a check upon arbitrary government or arbitrary enforcement of the law is small, the protection is an important one and is applied in cases of great public importance. As well, the publicity attendant upon a jury acquittal in the face of an oppressive act of the state is itself a deterrent to the arbitrary conduct on the part of state officials. The resulting publicity alerts the public to possible abuses of power. It is also symbolic of the fact that centralised government power must be exercised in a way which is ultimately responsible to the community's needs and values.

Jury nullification in murder cases

3.40 Jury nullification has a particular role in murder cases. The concept goes beyond the legitimate choice that a jury has to find the defendant guilty of manslaughter instead of murder where it is not satisfied that the defendant had murderous intent. Jury nullification occurs when the jury is unwilling to find a person guilty of murder, even when the nature of the act causing death would seem to enable an inference to be drawn that the defendant had the requisite intent.

3.41 For example, a jury may accept that the defendant was a victim of family violence and was acting defensively or out of self-preservation but did not satisfy the reasonable force requirement in section 48 in order to be acquitted on the basis of self-defence. On a strict interpretation of the law, where the defendant's conduct suggests the necessary intent was present, the proper verdict, notwithstanding the defendant's motivations, is arguably murder – there is no "intermediate category of exculpation" in New Zealand for excessive self-defence.[180] Nonetheless, a jury might instead find such a defendant guilty of manslaughter. In such circumstances, the jury may have effectively allowed the defendant to have the benefit of a partial defence (such as excessive self-defence), even though no relevant partial defence exists in New Zealand law. This would be an example of jury nullification since the jury did not correctly apply the law to the evidence.

3.42 Referring to the case of *Wickham* discussed at paragraph 3.34 above, a shotgun blast to the chest would normally be suggestive of intent to kill or to cause injury likely to kill. Having rejected the defendant's claim of self-defence, on a strict interpretation of the law, the defendant should have been convicted of murder. However, as one commentator notes:[181]

> [This outcome is] undoubtedly fair if moral blameworthiness is the basis of criminalisation. In the case of Dale Wickham, taking into account the longstanding history of abuse coupled with threats to kill her and the fact that she suffered from multiple sclerosis, convicting her of murder for a low degree of moral blameworthiness would be unjust.

3.43 This phenomenon has been noted in other jurisdictions. The Queensland Law Reform Commission noted that, while the law in that state does not provide for manslaughter "on the basis of excessive force in self-defence", in several cases it examined as part of its review of the defence of provocation, case outcomes appeared to reflect that position "de facto".[182]

178 Law Reform Commission of Canada *The jury in criminal trials: Working Paper 27* (1980) at 10.

179 At 12.

180 Simester and Brookbanks, above n 129, at 500.

181 Midson, above n 172, at 231.

182 Queensland Law Reform Commission *A review of the excuse of accident and the defence of provocation* (Report No 64 September 2008) at [15.131].

3.44 Literature on how juries view victims of family violence who are charged with murder also supports the existence of this phenomenon. Australian research into cases where victims of family violence were convicted of manslaughter identified that, in many of those cases, the act that caused death would seem to have permitted an inference the defendant had murderous intent.[183] In those cases, the effect of family violence on the defendant's psychological/emotional state, together with the defendant's fear or anger before the killing, are used to explain the finding of lack of intent.[184]

3.45 In that study, it was concluded that lack of intent was being used as a "defacto defence of domestic violence":[185]

> Although difficult to verify, my view is that in some cases reliance on lack of intent was used to account for a manslaughter conviction in circumstances where the accused's circumstances called for a compassionate outcome, rather than a strictly legal one… It was used as a 'defacto' defence of domestic violence. There has been recognition by prosecutors and judges that women who kill in response to a history of domestic violence (physical and mental abuse) do not conform to the socially endorsed construct of the 'murderer'. In some sentencing comments, there is clearly sympathy for the difficult life that the accused has led as a result of the deceased's physical and psychological abuse. However, while there has been judicial recognition of the battered woman's claim to sympathy, there has been a reluctance to recognise her actions as legitimate self-defence… The motive is self-preservation but its form is one that the law does not (or is not willing to) recognise. Yet the accused is not a 'murderer', so the conduct of the accused has to be shaped into a partial defence to murder – provocation or lack of intent.

3.46 It is, of course, impossible to be certain in any given case why a jury reaches a particular verdict. However, the fact a jury can find a person charged with murder guilty of manslaughter may be one way a jury can apply community values in a homicide case. Of course, it may also be that the jury is simply not satisfied the prosecution has proved the defendant had murderous intent. For whatever reason and notwithstanding the absence of any relevant partial defence in New Zealand, juries appear reluctant to convict a victim of family violence of murder.

3.47 Some argue that, while sympathetic verdicts might be returned in some cases, it is objectionable that victims of family violence must rely on the sympathy of the jury, rather than legal principles, as a basis for their defence.[186] That is, if juries are already delivering sympathetic verdicts based on de facto partial defences, the law should be amended to legitimise that practice. As one commentator puts it:[187]

> The fundamental problem with these decisions [where the verdict does not reflect the proper application of the law] is that they signal that the outcome for a defendant depends upon the whims of the jury rather than the application of legal principles. If these decisions continue unchecked, inconsistent outcomes will result. In other words, if there are degrees of culpability then it would be as well to be upfront about them.

183 Rebecca Bradfield "Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide" (2001) 13 Current Issues Crim Just 143 at 151–152.

184 At 152.

185 At 155–156.

186 Victorian Law Reform Commission, above n 16, at 67.

187 Midson, above n 172, at 231.

Limitations on jury discretion

3.48 In recent years, there has been greater judicial direction to juries on how they should consider their task. Judges now routinely provide "question trails" to assist the jury in its deliberations. They are intended to inform the jury of the issues to be decided in a structured, logical sequence either as lists of questions or in the form of a flowchart. They "collapse the relevant legal issues into a number of factual questions that guide the jury to its verdict".[188]

3.49 We note that informed researchers into jury practice have suggested that the increasing use of "question trails" may leave less scope for jury nullification.[189] The suggestion is that, with the structure of "question trails" to guide their assessment, juries will have considerably less latitude to depart from the requirements of the law. However, we are not in a position to assess whether juries have changed their approach as a result of "question trails". There are insufficient cases that would enable the Commission to come to such a conclusion, and in any event, jury deliberations are conducted in secret, and their reasons for arriving at verdicts remain unknown.

188 Peter Berman "Question trails in jury instruction - a note of caution" (2012) 24 Judicial Officers' Bulletin 27.

189 Based on discussions in the course of this reference that the Law Commission had with researchers into jury practice.

Chapter 4
Previous work

INTRODUCTION

4.1 The Law Commission has examined the issues raised by this reference on two previous occasions. In 2001, the Commission published *Some Criminal Defences with Particular Reference to Battered Defendants* (the 2001 Report),[190] and in 2007, the Commission addressed the position of family violence victims in its review of the partial defence of provocation.[191]

4.2 Neither the 2001 Report nor the Commission's consideration of provocation was, however, a comprehensive review of the law of homicide.[192] The first was confined to a specific group of defendants and the second to a particular criminal defence.

4.3 Our current terms of reference are also confined, as we note in Chapter 1. This review is limited to the law relating to victims of family violence who commit homicide. Our remit is, therefore, differently contoured than in previous reviews and narrower than in some overseas jurisdictions – including Australian states, England and Wales, and Ireland – that have recently considered similar issues. We discuss overseas law reform in Chapter 6.

THE 2001 LAW COMMISSION REPORT

4.4 The 2001 Report canvassed criminal defences available to victims of family violence generally but with some emphasis on defences to homicide. That Report also examined the law of sentencing for murder. The Commission concluded various reforms were warranted. Its recommendations were focused on the law of homicide but intended to be of general application rather than specific to victims of family violence, even though that category of defendant had been the impetus for the review. The key recommendations were that:

(a) section 48 of the Crimes Act 1961 (self-defence) be amended:

- "to make it clear that there can be fact situations in which the use of force is reasonable where the danger is not imminent but is inevitable";[193] and
- to require that, whenever there is evidence capable of establishing a reasonable possibility that a defendant intended to act defensively, the question of whether the force used was reasonable is always a question for the jury;[194]

(b) the partial defence of provocation be abolished;[195]

(c) no new partial defence, whether of general application or specific to battered defendants, be introduced into New Zealand law;[196]

190 Law Commission, above n 7.

191 Law Commission, above n 8.

192 The 2001 Report only considered criminal defences from the perspective of victims of family violence. The 2007 Report took a broader approach but only in respect of one specific defence – the partial defence of provocation.

193 Law Commission, above n 7, at [32].

194 At [42].

195 At [120].

196 At [86].

(d) the mandatory life sentence for murder be abolished and replaced with a sentencing discretion;[197] and

(e) the duress defences be reformed (these do not apply to homicide).[198]

4.5 A number of recommendations were ultimately adopted, albeit not immediately and, in the case of sentencing, not in their entirety.

4.6 Provocation was not repealed until 2009. There was some question whether repeal might prejudice mentally ill or impaired offenders and some residual doubt about the impact on battered defendants, as discussed below.[199]

4.7 Sentencing reform was somewhat piecemeal. The Sentencing Act 2002 abolished the mandatory life sentence for murder and replaced it with a rebuttable presumption in favour of that sentence: section 102 permits a judge to impose a lesser sentence if "given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".

4.8 Subsequently, the Sentencing Council Act 2007 implemented the recommendations that had been made in *Sentencing Guidelines and Parole Reform*.[200] The Sentencing Council has, however, not been pursued, and the 2007 Act is likely to be repealed shortly.[201]

4.9 Other reforms recommended in 2001 were not taken up at all. In particular, the test for self-defence was not amended, and the *R v Wang* "imminence" requirement remains a restriction on the practical scope of section 48. We discuss the problems with this requirement, and options for addressing them, in Chapters 5 and 7.

The Ministry of Justice's decision not to amend self-defence

4.10 The Ministry of Justice considered and decided against amending self-defence in 2003. It concluded legislative change was unnecessary because, while the Court of Appeal in *R v Wang* had glossed the "reasonable force" test with a requirement for "immediacy of life-threatening violence", *Wang* did not appear to have been strictly followed.[202] In *R v Oakes*, a claim of self-defence had been put to the jury even where it did not appear the defendant had acted on an immediate threat.[203]

4.11 The Ministry also concluded amendment was otherwise undesirable. It noted, first, that the fact some defendants fail on self-defence does not mean juries are applying an imminence or immediacy test. A jury may, for example, reject self-defence if it does not accept the defendant genuinely believed their circumstances warranted the use of force.

4.12 The Ministry also considered there was merit in the conclusion of the Criminal Law Reform Committee in its 1979 *Report on Self Defence* that a self-defence provision should be framed in

197 At [151].

198 At [198], [201] and [208].

199 Law Commission, above n 8, at 6.

200 Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, August 2006).

201 The Hon Simon Power indicated in early 2008 that the Government did not intend to pursue the Sentencing Council, preferring to put the money set aside for it into funding services for victims. It appears the view was taken that the Council would be undesirably bureaucratic and may reduce sentence levels, to which the Government was opposed. See: "National to scrap sentencing council" (2 August 2008) Stuff <www.stuff.co.nz>. The Sentencing Council Act 2007 is now listed for full repeal in Schedule 1 to the proposed Statutes Repeal Bill, an exposure draft of which the Parliamentary Counsel Office is currently seeking feedback on. In the draft Bill's explanatory material, it is stated that "The Sentencing Council Act 2007 came into force on 1 November 2007 but was not implemented. No appointments have been made to the Council. Repealing the Act will clarify that the Sentencing Council will not be created" (Statutes Repeal Bill (Consultation Draft) (explanatory material) at 13).

202 Ministry of Justice *Criminal Defences Discussion Paper: Provocation and Other Partial Defences, Self Defence, and Defences of Duress* (2003) at [32].

203 At [32.1], referring to *R v Oakes* (1995) 2 NZLR 673 (CA), in which the Judge left self-defence to the jury notwithstanding the clear absence of an imminent threat. Mrs Oakes had suffered abuse over an 11-year period and ultimately killed her husband by dissolving a large number of tablets in a cup of coffee.

general terms,[204] with the "infinite variety" of factual scenarios that may constitute reasonable force left for case-by-case assessment. "[W]hether the proximity of danger on a continuum from immediacy to inevitability justifies the use of force", the Ministry considered, "is best assessed in the circumstances of each case".[205]

4.13 Since 2003, however, despite the Ministry's expectation, the Courts have broadly accepted that *Wang* remains authoritative.

THE 2007 LAW COMMISSION REPORT

4.14 In 2004, the Commission was asked to consider further the implications of repealing the partial defence of provocation. In 2007, the Commission published *The Partial Defence of Provocation* (the 2007 Report).

4.15 Recommending repeal of provocation in the 2007 Report, the Commission opined that the question was "not whether something should be done about section 169, but what should be done about it":[206]

> We encountered very widespread consensus across a substantial majority of stakeholders that the present operation of section 169 of the Crimes Act 1961 is unsatisfactory. Even the defence bar (which was the principal constituency defending the existence of the section, on the basis that it performs a useful and necessary function in the criminal justice system) indicated that reform of the partial defence framework would be supported to expand and clarify its scope; they were opposed to the repeal of partial defences, rather than particularly wedded to the current form of section 169…
>
> Broadly, stakeholders' views as to the appropriate remedy were twofold. Those who considered that it is important to involve juries in the assessment of relative culpability, and similarly important to signal reduced culpability by means of a manslaughter verdict, favoured reform of the partial defence framework. This opinion was not wholly confined to the defence bar; some (a small minority) of Crown Solicitors shared it, as did some in the mental health area…
>
> Others agreed with our view that dealing with the issues on sentence, with the aid of a sentencing guideline addressing section 102 of the Sentencing Act 2002, could suffice or indeed be preferable… However, some – particularly the Ministry of Health and some of the women's groups – offered cautious or conditional support for this option because no draft guideline was available for their review…

4.16 While sentencing law was the Commission's reform focus, it acknowledged that other options included introduction of a "smorgasbord" of partial defences or a single generic partial defence.[207] It rejected both.[208] A "smorgasbord" would be inescapably arbitrary, since "[t]here is no way of articulating the distinction between what is properly to be regarded as a partial defence, and what is "merely" a mitigating circumstance".[209] A generic defence would be simpler, but the Commission doubted juries have any particular capacity to arbitrate who is and is not properly labelled a "murderer".[210] The Commission considered that:[211]

> The reality probably is that, in the absence of any legal guidance, the only delineation will be the extent to which a jury sympathises with various defendants and their predicaments. This has the potential

204 Criminal Law Reform Committee *Report on Self Defence* (Report 15, November, 1979).

205 Ministry of Justice, above n 202, at [35].

206 Law Commission, above n 8, at [151]–[154].

207 At [155].

208 At [183].

209 At [162].

210 At [166].

211 At [166].

> to reduce homicide to a lottery: it is an invitation to jurors to dress up their prejudices as law, and substantially increases the risk that more weight will be placed on jury composition and the advocacy skills of defence counsel than on the legal merits of the case.

4.17 The 2007 Report also concluded that a fundamental argument against retention or reform of provocation was that the defence was prone to legitimise violent anger:[212]

> There is one further and final issue, that to our minds much more fundamental than the legal, conceptual and practical difficulties already canvassed. Section 169 excuses a homicidal loss of self-control, in the face of a provocation of such gravity that it would have prompted a person with ordinary self-control to do likewise. The defence is thus open-ended about the precise emotions that might be driving the defendant; in other words, on its face, provocation is not necessarily confined to an angry loss of self-control, as opposed to one prompted by fear or sympathy. However, anger is the context in which it is commonly understood to operate, and is most frequently used. We would thus argue that the defence puts a premium on anger – and not merely anger, but homicidally violent anger. This, to our minds, is or should be a central issue in considering whether reform is required: out of the range of possible responses to adversity, why is this the sole response that we choose to partially excuse? Ultimately, issues such as the sexist and heterosexist bias of the provocation defence, that are accorded considerable weight in the literature, strike us as relatively immaterial, when weighed against the larger question of how we, as a society, would wish to respond to violence.

4.18 The Commission acknowledged that repealing provocation would limit the options for "battered" defendants but considered that, for most such defendants:[213]

> [S]elf defence will tactically offer a preferable alternative to provocation, because it results in an acquittal. We adhere to the Law Commission's previous view that provocation is not benefiting battered defendants sufficiently to warrant its retention, and our review of case law confirms this… While provocation may in the past have offered one option for some battered defendants in New Zealand, it has also arguably been something of a mixed blessing. Although we were not able to confirm it in our own review of recent New Zealand homicide cases, there is a compelling case in the literature to suggest that provocation is a defence typically working against, rather than for, battered defendants – by the same violent and controlling jealous spouses that have been the subject of much of the feminist critique of this defence.

4.19 In line with the Ministry's decision not to amend section 48, the Commission considered repealing provocation would not require any other legislative amendment to address the needs of primary victims of family violence. Central to this conclusion was the Commission's view that section 48 involved a relatively generous test, under which the nature of the circumstances in which the defendant uses defensive force is a subjective enquiry able to cover a wide range,[214] with the objective limb of the test confined to the degree of force used in response to those (perceived) circumstances.

4.20 The 2007 recommendations were consistent with the 2001 Report. In neither Report did the Commission demur from concluding that New Zealand's provocation defence was, as a matter of theory and practice, irredeemably problematic. In both reviews, the Commission preferred that mitigating factors be matters for sentencing, not verdict, and placed weight on sentencing reform. In the 2007 Report, the Commission recommended sentencing guidelines addressing the "manifestly unjust" test in the Sentencing Act, which it anticipated would help guide the length of finite sentences in particular categories of case, including homicides committed by primary victims of family violence.[215]

212 At 11.

213 At [121].

214 At [123]–[124].

215 At [206]–[207].

4.21 Despite the 2007 Report's firm recommendation, provocation was not immediately repealed. The Crimes (Provocation Repeal) Amendment Act 2009 was passed, by an overwhelming majority, in December 2009.

THE FAMILY VIOLENCE DEATH REVIEW COMMITTEE REPORT

4.22 In its Fourth Annual Report, the Family Violence Death Review Committee (FVDRC) considered the law relating to victims of family violence who kill their abusers. It considers New Zealand is out of step in the way the law provides for such victims:[216]

> Compared with similar international jurisdictions, Aotearoa New Zealand is out of step in how the criminal justice system responds to [intimate partner violence] primary victims when they face homicide charges for killing their abusive partners… Firstly, it can be attributed to the fact that the defence of self-defence has been interpreted in a restrictive manner in Aotearoa New Zealand, making it difficult to apply in cases involving primary victims. Secondly, by abolishing provocation New Zealand now has no partial defences to murder for those primary victims whose circumstances do not fit within the full defence of self-defence. These defendants will now be convicted of murder rather than manslaughter. And thirdly, Aotearoa New Zealand retains a presumption of life imprisonment for murder, which is difficult to overturn even in such cases and, when it is overturned, still results in long sentences of imprisonment. As such the violent circumstances (that offenders who were primary IPV victims were entrapped in and responding to) do not appear to be reflected in local verdicts to the same degree as they are in comparable international jurisdictions.

4.23 The FVDRC recommended that the Government consider modifying self-defence so that it is more readily accessible to victims of family violence.[217] This means introducing an inevitability test to section 48 and reintroducing a partial defence for such defendants who are responding to violence but not acting in self-defence at the time of the homicide.[218]

4.24 The Government asked the Law Commission to conduct this review by reference to the FVDRC Report.[219]

216 Family Violence Death Review Committee, above n 2, at 102.

217 At 103.

218 At 103.

219 Terms of Reference: Victims of family violence who commit homicide.

Chapter 5
Problems with the current law – is there a need for reform?

5.1 In this chapter, we identify potential problems with how the criminal justice system responds to victims of family violence who commit homicide and discuss whether there is a need for reform. The perceived problems can be separated into three broad categories of:

(a) problems in relying on self-defence;

(b) where self-defence does not apply, how the law recognises the reduced culpability of defendants who commit homicide in response to family violence; and

(c) other problems that arise in practice from a misunderstanding of the dynamics of family violence.

5.2 Categories (a) and (b) concern problems with the law itself. Category (c) is focused on problems in practice that, notwithstanding the law, can act as a barrier to achieving substantive equality in how the law accommodates the experiences of victims of family violence.

5.3 Our analysis in this chapter is guided by the principles identified in Chapter 1, namely that:

(a) the law should apply equitably to all defendants, including victims of family violence, and should be free from any form of gender or other bias;

(b) the law of homicide should reflect the context in which homicides typically occur, and any reform must be driven by an understanding of the actual context in which victims of family violence commit homicide; and

(c) the law of homicide should reflect community values and, in particular, the sanctity of life, balanced against the individual's right to safety and to be free from torture and cruel or degrading treatment.

PROBLEMS RELYING ON SELF-DEFENCE

5.4 The majority of victims of family violence who defend murder or manslaughter charges at trial rely on self-defence.[220] Self-defence is provided for in section 48 of the Crimes Act 1961 and is discussed in Chapter 3 of this Issues Paper.

5.5 While the discussion below is focused on female primary victims who kill their male predominant aggressor in response to family violence (as this represents the majority of cases), we recognise that other victims of family violence, such as male partners, children and step-children, also kill their abusers.[221] We also recognise that family violence can be perpetrated in

220 See paragraph 2.65 above.

221 For example, in *R v Erstich*, above n 20, the deceased was the defendant's father. The defendant obtained a key to his grandfather's gun cabinet, obtained a gun and waited for the deceased to return home before fatally shooting him. The circumstances of this case bear more similarities to cases of battered women killing their abuser than the one-off spontaneous encounters on which the law of self-defence arguably developed. In *R v Raivaru*, above n 20, the deceased was the defendant's step-father. In the Australian case of *DPP v Bracken* (2014) 96 VSC, the defendant was the male de facto partner of the female deceased.

same-sex relationships.[222] The issues that arise for female primary victims who kill their abusive partners are also likely to arise for all other victims of family violence who kill their abusers.[223]

Problems applying self-defence to the circumstances in which women kill

5.6 While self-defence is, on its face, gender neutral, it is widely accepted by commentators[224] and law reform bodies[225] that the way in which self-defence is interpreted and applied can disadvantage women.

5.7 Homicide in New Zealand (and indeed worldwide) is overwhelmingly committed by men.[226] As a result, the law of self-defence, and in particular the concepts developed by the courts to assess whether the force used by the defendant was reasonable in the circumstances, have developed in the context of male violence, with male standards of reasonableness.[227] However, research shows that the circumstances in which men and women kill in self-defence are quite different. When men kill in self-defence, they are usually responding to a one-off, spontaneous encounter with a stranger, such as a pub brawl between two people of relatively equal strength.[228] As such, they are responding with "immediacy" and in a manner "proportionate" to that threat.[229]

5.8 In contrast, when women kill, they most often kill intimate partners and are most likely to kill in response to violent and psychological abuse from their partner over a long period of time.[230] The way in which a woman kills in these situations is often dictated by her physical strength relative to her abuser. For example, research suggests that women often kill their partners in a non-confrontational situation (a pre-emptive attack) rather than waiting to match their strength against the abuser in a direct confrontation.[231] Women will frequently use a weapon when retaliating, rather than defending themselves with their bare hands.[232]

5.9 Many commentators argue that, while a male acting in self-defence will normally satisfy the concepts used to assess the reasonableness of the force used, women who are primary victims acting in response to family violence find it more difficult, as their behaviour is often at the margin of what is traditionally regarded as self-defence. Questions arise as to whether the danger posed by the deceased predominant aggressor was sufficiently imminent, thereby excluding alternative non-violent options, and whether the response was proportionate to the threat. Some commentators argue that this can deny victims of family violence the protection

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222 The findings of the FVDRC in relation to family violence-related homicide in same-sex relationships is discussed at paragraph 2.30.

223 Victorian Law Reform Commission, above n 16, at 61.

224 For example, see: Kellie Toole "Self-Defence and the Reasonable Woman: Equality before the New Victorian Law" (2012) 36 Melbourne University Law Review 250; Kim, above n 26; Anthony Hopkins and Patricia Easteal "Walking in Her Shoes: Battered women who kill in Victoria, Western Australia and Queensland" (2010) 35 Alternative Law Journal 132; Victorian Law Reform Commission, above n 16; Law Commission, above n 73; Mandy McKenzie, Debbie Kirkwood and Danielle Tyson "'Unreasonable' self-defence?" (2013) 2 DVRCV Advocate 12.

225 Victorian Law Reform Commission, above n 16; Law Reform Commission of Western Australia, above n 16; Law Reform Commission of Ireland, above n 132; Law Commission of England and Wales *Partial Defences to Murder* (August 2004); Queensland Law Reform Commission, above n 182.

226 84 per cent of offenders convicted of homicide and related offences in the past 10 years in New Zealand were male. This profile is typical of offending across the world. See: Statistics NZ "Adults convicted in court by sentence type - most serious offence fiscal year" < nzdotstat.stats.govt.nz > ; Victorian Law Reform Commission *Defences to Homicide: Options Paper* (2003) at xiv; Toole, above n 224, at 255.

227 Law Commission, above n 73, at 12; Toole, above n 224, at 256–257; Kim, above n 26, at 3.

228 Victorian Law Reform Commission, above n 16, at 61.

229 Toole, above n 224, at 256.

230 Ten of the 15 female intimate partner homicide offenders identified by the FVDRC were responding (or suspected to be responding) to family violence. While there is limited analysis of female homicide offending in New Zealand, this is supported by Australian homicide studies, particularly those conducted in Victoria. See: Family Violence Death Review Committee, above n 2, at 40–41; Toole, above n 224, at 256–257; Victorian Law Reform Commission, above n 16, at 61; Victorian Law Reform Commission, above n 226, at xiv.

231 Law Commission, above n 73, at 12–13; Victorian Law Reform Commission, above n 16, at 62; Toole, above n 224, at 256; Kim, above n 26, at 6; McKenzie, Kirkwood and Tyson, above n 224.

232 The FVDRC identified that 80 per cent of female primary victims who killed their male predominant aggressors used a knife to inflict one or sometimes two stab wounds. See: Family Violence Death Review Committee, above n 11, at 47; Toole, above n 5, at 256–257; McKenzie, Kirkwood and Tyson, above n 5, above n 5.

of self-defence because their actions do not conform to established patterns of "male versus male" violence and that this constitutes a gender bias in the interpretation and application of the defence, which is inconsistent with the bedrock principle of equality before the law.[233]

5.10 Others argue that the simple fact that aspects of the defence work against victims of family violence is not itself evidence of unfairness.[234] Unfairness would only arise if the motivation and circumstances of the offending fall within the reason for allowing the defence, but the offenders are unable to avail themselves of the defence because of the way it is constructed.[235] As discussed above, the fundamental principle underlying self-defence is necessity – force is justified because no alternative is available to the defendant in order to preserve his or her life.[236]

5.11 Yet another view advanced by some, particularly Australian commentators, is that it is not the law but rather prevailing community understandings and institutional attitudes towards family violence that continue to make self-defence relatively inaccessible to women.[237] This is discussed further at paragraphs 5.52–5.71 below.

5.12 We address below the specific problems with applying the concepts of reasonableness – imminence, lack of alternative options and proportionality – in circumstances where a victim of family violence commits homicide.

Imminence and lack of alternative options

5.13 The effect of *Wang* is that self-defence is only available where there is imminence or immediacy of life-threatening violence and no reasonable opportunity to seek protection without recourse to the use of force.[238] This is problematic for two reasons.

5.14 First, the concept of "imminence" is difficult to reconcile with the ongoing and cumulative nature of family violence, described in Chapter 2 above. It requires a defendant who has suffered abuse and controlling behaviour for some time to nominate a single point of confrontation or threat as the reason for his or her retaliation. It focuses on the events immediately preceding the homicide rather than on the dynamics of the abusive relationship as a whole. This misunderstands the nature of violent relationships.[239] While individual incidents of violence on their own may not be life threatening, the cumulative effects of abuse may well be.[240]

5.15 Second, the requirement to demonstrate imminence wrongly assumes that a delayed threat will always be avoidable.[241] The rationale for requiring imminence is that the more removed in time the threat is, the greater the opportunity for non-violent intervention or avoidance. While this may be the case most of the time, it may not always be true. In particular, the Family Violence Death Review Committee (FVDRC) identifies that it can be very difficult for a primary victim to safely leave a violent relationship, and indeed, they are at greatest risk of being killed by their abuser in the context of separation.[242] This is discussed below at paragraphs 5.62–5.66.

233 Toole, above n 224, at 257.

234 Kevin Dawkins and Margaret Briggs "Criminal Law" (2001) 3 New Zealand Law Review 317 at 349.

235 At 349.

236 Campbell, above n 133, at 80. For example, Kirby J did not consider that the defendant's actions were "reasonably necessary to remove further violence threatening her with death or really serious injury" *Osland v R*, above n 133, at 342.

237 Kim, above n 26; Toole, above n 224; McKenzie, Kirkwood and Tyson, above n 224; Hopkins and Easteal, above n 224.

238 *R v Wang*, above n 135, at 539; Simester and Brookbanks, above n 129, at 522.

239 Law Reform Commission of Western Australia, above n 16, at 274; Victorian Law Reform Commission, above n 16, at 77–79.

240 Victorian Law Reform Commission, above n 16, at 78.

241 Campbell, above n 133, at 81.

242 Family Violence Death Review Committee, above n 2, at 80; Martin and Pritchard, above n 26.

5.16 The imminence requirement can therefore act as a threshold that prevents a defendant from relying on self-defence when, in reality, they had no real alternative to the use of force. This interpretation can undermine the underlying principle of necessity.[243] Imminence arguably functions only to provide assurance that the defensive action is necessary to avoid the harm. Where there is a conflict between imminence and the underlying principle of necessity, necessity must prevail.[244]

5.17 In 2001, the Law Commission concluded that:[245]

> So long as the action is necessary, in that no non-violent alternative will achieve that end, there should be no additional requirement of imminence. Imminence of harm can be a factor to be considered in making judgments of necessity, but it should not be an independent requirement in addition to necessity. In New Zealand, imminence is an evidential presumption and not a rule of law. It is useful because in the absence of imminent danger, there is usually no necessity for defensive force, as the danger can be avoided in other ways. However [...] necessity can exist without imminence if the danger is unavoidable. In some situations, inevitability may be a better tool for assessing the need for defensive action.

Proportionality

5.18 Proportionality is another related concept that causes difficulties for victims of family violence. Where there is equality of arms between the defendant and the deceased, such as the traditional one-off pub brawl scenario, there is little difficulty in demonstrating that the force used by the defendant was proportionate to the threatened violence. However, where chronic family violence is involved, the notion of proportionality of force loses coherence, as the defendant is not necessarily responding to a single event but in anticipation of future repeated violence.

5.19 Some commentators have identified that the level of force used in these circumstances can present a barrier to the successful reliance on self-defence.[246] As noted at paragraph 5.8 above, a primary victim will often use a weapon (typically a kitchen knife) against their unarmed predominant aggressor. Taken out of context, a victim of family violence can be seen as responding to a threat or attack that is not imminently "life threatening", in which case, the use of fatal force may be regarded as excessive.[247]

5.20 Some commentators argue that, if the defendant is trapped in a situation in which repeated violence is reasonably expected, considerable latitude ought to be given in assessing whether the force was proportionate.[248] On its face, section 48 requires proportionality to be assessed in the circumstances as the defendant believes them to be. These circumstances would include the disparity in size and physical strength and belief that leaving will not protect the defendant against the threat.[249] There may, however, remain a risk that the disproportionality of the defendant's response to the threat is given undue emphasis by juries.[250]

243 Campbell, above n 133, at 81; Angelica Guz and Marilyn McMahon "Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia" (2011) 13 Flinders Law Journal 79 at 117.

244 Guz and McMahon, above n 243, at 119–120.

245 Law Commission, above n 73, at 14–15.

246 Victorian Law Reform Commission, above n 16, at 83; Law Reform Commission of Western Australia, above n 16, at 165; Law Commission of England and Wales, above n 225, at [4.20]; Law Reform Commission of Ireland, above n 132, at [2.204]; Campbell, above n 133, at 96–99; Kim, above n 26, at 7; Toole, above n 224, at 257; McKenzie, Kirkwood and Tyson, above n 224.

247 Victorian Law Reform Commission, above n 16, at 83.

248 Campbell, above n 133, at 96–99.

249 *R v Oakes*, above n 203, at 676.

250 Victorian Law Reform Commission, above n 16, at 83.

5.21 This was not considered in detail by the Law Commission in 2001. Since then, however, it has been the subject of review and reform in other jurisdictions.[251] Our own case analysis identifies that, in most cases, the defendant responds with a weapon against an unarmed predominant aggressor,[252] but even when it appears undisputed that the defendant was responding to an immediate and violent assault, a claim of self-defence is not always successful.[253] Accordingly, it cannot be ruled out that juries are assessing the proportionality of the force in the confines of the immediate confrontation and concluding that, as the deceased was unarmed, the defendant was acting disproportionately.

What is the case for legislative reform?

5.22 Our preliminary view is that the concepts of imminence, proportionality and lack of alternatives used by the courts to assess the reasonableness of the force have the potential to unfairly exclude victims of family violence – typically women – from successfully relying on self-defence in circumstances where they had no real alternative to the use of force.

5.23 However, the problem is not with the self-defence provision itself but rather with the way in which the courts have interpreted and applied section 48. Accordingly, we have considered whether the interpretation of "reasonable force" under section 48 should be left to the courts to continue to develop on a case-by-case basis. There are several points in favour of this approach.

5.24 First, we agree that section 48 is theoretically broad enough to accommodate self-defence in the context of family violence. This seems consistent with the views of the FVDRC (which noted New Zealand has one of the more generously worded self-defence provisions)[254] and the expectations of the Committee developing section 48.[255] This was recognised by the Tasmania Law Reform Institute[256] and the Law Reform Commission in Ireland as a reason for adopting an objective test that required the reasonableness of the force to be assessed in the circumstances of the defendant.[257]

5.25 Second, views on what is "reasonable" change over time in accordance with changing community values, particularly with reference to family violence. It is arguably preferable that the statute remain flexible enough to enable changes in community standards of reasonableness to be reflected in the cases.

5.26 Third, arguably there has already been some development in the cases since *R v Wang*, in the case of *R v Oakes,* where self-defence was put to the jury even when imminence was not suggested,[258] and in *R v Powell*, where the Court of Appeal confirmed that juries need not be directed to consider imminence.[259]

5.27 On the other hand, however, the relatively small number of cases, and even smaller number of appeals, suggests that future developments in case law will be slow. In 2003, one of the Ministry of Justice's main reasons for declining to adopt the Law Commission's 2001 recommendations

251 At 81–84; Law Reform Commission of Western Australia, above n 16, at 165–166; Tasmania Law Reform Institute *Review of the Law Relating to Self-defence: Final Report* (20 Tasmania Law Reform Institute 2015) at 56.

252 See paragraph 2.63 above.

253 Of the seven cases where the defendant was responding to a violent assault, three cases resulted in an acquittal, and four cases resulted in a manslaughter conviction.

254 Family Violence Death Review Committee, above n 2, at 116.

255 Criminal Law Reform Committee, above n 204.

256 Tasmania Law Reform Institute, above n 251, at 56.

257 Law Reform Commission of Ireland, above n 132, at 53.

258 Dawkins and Briggs, above n 234, at 349.

259 *R v Powell*, [2002] 1 NZLR 666 (CA), at [43].

was its expectation that the law would continue to develop on a case-by-case basis. However, to date that has not occurred.

5.28 Furthermore, there have been enough positive references by the courts to *Wang* and the concepts of imminence, lack of alternatives and proportionality, most recently by the Court of Appeal in *R v Vincent*, to suggest that a move away from those concepts is unlikely, at least in the near future.[260] In the meantime, uncertainty about the availability of self-defence at trial may lead victims of family violence to plead guilty to avoid trial, even in cases where legitimate claim of self-defence could be made out, particularly if there is no "back-stop" of a partial defence.

5.29 Accordingly, our preliminary view is that a case for legislative reform may be made out.

QUESTIONS FOR CONSULTATION

Q3 Should it be possible for a defendant who is a victim of family violence to be acquitted on the basis that he or she acted in self-defence where:

(a) the harm sought to be avoided was not imminent or immediate; and/or

(b) the fatal force was not proportionate to the force involved in the harm or threatened harm?

Q4 If the answer to question 3 is yes, do you consider that legislative reform is necessary to achieve that objective?

RECOGNISING REDUCED CULPABILITY WHEN SELF-DEFENCE DOES NOT APPLY

5.30 This section considers the situation where a victim of family violence commits homicide but their circumstances do not fit within the full defence of self-defence.

5.31 As the FVDRC notes, not every victim of family violence who kills their abuser will be using physical violence from a position of self-protection as opposed to reacting with anger to the abuse they have suffered.[261] Accordingly, even if the complete defence of self-defence is reformed to address the potential problems identified above, it will not necessarily always be available on the facts.

5.32 Our terms of reference require us to consider whether a partial defence for victims of family violence is justified. Partial defences (that reduce murder to manslaughter) are only one way in which the law might recognise the reduced culpability of such defendants. Reduced culpability can also be reflected in a lower sentence for murder (where the court has sentencing discretion) or through separate homicide offences with lower penalties.

5.33 Since the repeal of the partial defence of provocation in 2009, culpability for murder in all cases (except suicide pacts and infanticide)[262] is assessed during sentencing.

What is the perceived problem?

5.34 The issue is whether the current law appropriately recognises the culpability of victims of family violence who kill their abuser other than in self-defence.

5.35 As we apprehend it, there are two parts to this issue. First, the way New Zealand law has evolved since 2007 may mean that, following repeal of the partial defence of provocation,

260 *Vincent v R*, above n 143, at [27].

261 Family Violence Death Review Committee, above n 2, at 119.

262 Infanticide and killing pursuant to a suicide pact are subject to partial defences, in sections 187 and 180 of the Crimes Act 1961.

sentencing outcomes have been harsher than was intended for victims of family violence who kill their abusers. Despite its flaws, provocation was often claimed by victims of family violence, given the absence of any other relevant partial defence. Although New Zealand has abolished the mandatory life sentence for murder, there is a strong presumption in favour of that sentence, and sentencing guidelines, which may have softened the presumption or mandated lower finite terms of imprisonment, have not been pursued. The Commission's previous recommendations around the repeal of provocation and sentencing guidelines for murder are discussed in Chapter 4 above.

5.36 Second, even if the repeal of provocation has not resulted in harsher sentences in individual cases, there may nonetheless be a legitimate need for greater recognition of reduced culpability in these circumstances.

5.37 We also note that, since the previous Law Commission Reports, there has been a great deal of overseas law reform in this area. While that work discloses no best practice for partial defences, specific offences or sentencing, it demonstrates there is a range of avenues of reform and offers lessons on which may be most workable. The different approaches adopted in other countries are discussed in Chapter 6 below. We then go on to discuss the different options for reform in Chapters 8 and 9.

Are case outcomes harsher since the repeal of provocation?

5.38 We have considered convictions and sentences for homicides committed by primary victims of family violence to understand whether outcomes for these defendants are harsher than intended since the repeal of provocation. However, the small number of cases in New Zealand, particularly cases resulting in a murder conviction, makes it difficult to draw meaningful conclusions. Sheehy, Stubbs and Tolmie acknowledged this in their comparative review of Canadian, Australian and New Zealand cases.[263]

5.39 We have identified four relevant murder convictions out of 23 cases decided since 2001. In two of those cases, *R v Wihongi*[264] and *R v Rihia*,[265] the sentencing judge found the test for displacement of the presumption in favour of life imprisonment was met. That was upheld on a Solicitor-General's appeal in *Wihongi*, although the Court of Appeal increased the finite term of imprisonment from eight to 12 years.[266] In the other two cases, *R v Neale*[267] and *R v Reti*,[268] the defendant was convicted of murder and sentenced to life with a minimum term of 10 years.[269] In *Neale* and *Reti*, the defendants raised provocation but were unsuccessful. It does not appear that provocation was raised in *Wihongi*, notwithstanding that the offending took place before repeal of the defence. However the conduct of the deceased was considered and found to be relevant at sentencing.[270]

5.40 It seems *Rihia* is the only case where a victim of family violence has been convicted of murder since the repeal of provocation in 2009. The sentencing Judge found the defendant, who pleaded guilty to murdering her husband, "just snapp[ed]" when her daughter was removed

263 Sheehy, Stubbs and Tolmie, above n 163, at 385.

264 *R v Wihongi* HC Napier CRI 2009–041–002096, 30 August 2010.

265 *R v Rihia*, above n 126.

266 *R v Wihongi*, above n 84. *R v Wihongi* (2012) 12 NZSC.

267 *R v Neale* [2008] BCL 939.

268 *R v Reti*, above n 127.

269 The sentencing notes in *Neale* are spare, running to less than a page. It is apparent the Crown accepted the Court should not impose a minimum term of more than 10 years' imprisonment, but there is no discussion of the s 102 presumption in the sentencing notes; its application appears not to have been contested.

270 *R v Wihongi*, above n 84, at [88].

by Child, Youth and Family staff, responsibility for which she attributed to the deceased.[271] The sentencing Judge also considered her "extreme" reaction was "rooted firmly in the abuse [she] had suffered at the hands of Mr Rihia and others throughout [her] life, resulting in the psychological consequences which have been described".[272] A finite sentence of 10 years' imprisonment was imposed.

5.41 Based on the facts in *Rihia*, it is conceivable that, had provocation been available, the defendant could have been convicted of manslaughter rather than murder. However, that is not a certainty – and we note that provocation was available and relied on in the cases of *Reti* and *Neale*, but the jury rejected provocation and convicted the defendants of murder. *Rihia* is also of limited assistance given the defendant pleaded guilty to murder. Had the defendant gone to trial, she might have been convicted of manslaughter – albeit not by virtue of provocation.

5.42 The FVDRC suggests the sentence in *Wihongi* was out of step with comparable pre-2009 cases in which defendants were convicted of manslaughter, having contended at trial they were provoked.[273] However, given the offending in *Wihongi* (as well as in *Reti* and *Neale*) took place before provocation was repealed, we are wary of drawing a link between the abolition of the provocation defence and the sentences imposed.

5.43 What may be inferred is that the conduct of the deceased has less effect on the length of sentence now that there is no defence of provocation, compared to when provocation was available and successfully run. This is because, even if life imprisonment is no longer mandatory, a conviction for murder will still carry higher sentencing tariff than for manslaughter. That is not unexpected or objectionable per se.[274] However, it might be troubling if repeal of provocation has led to harsher sentences for defendants with "morally significant claims" in mitigation.[275]

5.44 We have also considered the outcomes in cases where the defendant was convicted of manslaughter. Our case review suggests that, in practice, a victim of family violence who commits homicide is likely to be convicted of manslaughter, even if they are charged with murder. This has remained the case following the repeal of provocation. Sentences for manslaughter convictions since 2009 varied from two years' imprisonment to five years' three months' imprisonment.[276]

5.45 We have compared case outcomes since the repeal of provocation with trends in other jurisdictions. The table below compares the trends identified in cases post-2009 in New Zealand with results of similar studies undertaken in Canada from 1990 to 2005 by Sheehy[277] and with

271 *R v Rihia*, above n 126, at [28].

272 At [30]. Although the Judge did not conclude that abuse was the only relevant factor, noting in addition the defendant's "years of alcohol abuse"; At [28].

273 The Committee contrasts the outcomes in *R v Wihongi*, above n 33, and *R v Rihia*, above n 45, with those in *R v Suluape*, above n 83, and *R v King*, above n 38 (Family Violence Death Review Committee, above n 2, at 121.).

274 The Commission considered this very issue in its 2007 Report, noting the Australian case of *Tyne v Tasmania* [2005] TASSC 119 at [18], in which the Court noted the sentencing Judge had properly opined that, given provocation had been repealed in Tasmania, "the accused [was] to be sentenced for murder, not manslaughter". The Commission considered "the *Tyne* approach is exactly what should occur. That is, if provocation is repealed on the policy basis that the defendants who rely on it are not inherently more deserving of favourable treatment than many others who are presently convicted of murder, then it would make no sense to endorse and take steps to ensure an ongoing lower tariff simply for provocation". Importantly, however, the Commission went on to observe that "[i]t may be that a more flexible approach to sentencing for murder ought to be taken to allow better recognition of the wide range of mitigating factors (including provocation) that can be present in cases of intentional killing, but that is a different issue" (Law Commission, above n 8, at [196].)

275 Horder, above n 130, at 214; The Law Commission acknowledged, in 2007, that, in some cases in which provocation is claimed, "the mitigating nature of the motive may be unalloyed", citing "battered defendants and the mentally ill or impaired" as paradigm examples. See: Law Commission, above n 8, at [107].

276 See paragraph 2.68 above.

277 Elizabeth Sheehy *Defending Battered Women on Trial: Lessons from the Transcripts* (University of British Columbia Press, Vancouver, 2014).

the Australian results from research conducted by Sheehy, Stubbs and Tolmie referred to at paragraph 3.26 above.[278]

OUTCOMES FOR VICTIMS OF FAMILY VIOLENCE DEFENDING HOMICIDE CHARGES IN NEW ZEALAND (SINCE 2009), AUSTRALIA (2000–2010) AND CANADA (1990–2005)			
	Murder	Manslaughter	Acquittal or other disposal
New Zealand	11%	56%	33%
Australia	3%	75%	22%[279]
Canada	4%	64%	32%[280]

5.46 However given the small number of cases in New Zealand, the statistics are skewed quite heavily by the presence of one murder conviction. Accordingly, this comparison is of little assistance other than indicating, in a very general way, that case outcomes in New Zealand are not grossly out of proportion with comparable jurisdictions. This does not, however, mean that there is no problem with the way in which the law operates, and we discuss in Chapter 3 the phenomenon of "jury nullification", which may explain manslaughter verdicts in some cases.

5.47 While our review of the cases demonstrates that the sentences imposed for murder convictions are, on the whole, significantly higher than the sentences imposed following a manslaughter verdict, it is not clear that the repeal of provocation has caused or is aggravating this differentiation. Three of the murder convictions identified occurred before provocation was repealed. The fourth murder conviction, *Rihia*, followed a guilty plea. In eight of the other nine cases since repeal of provocation, defendants have either pleaded guilty to manslaughter or, at trial, been convicted of manslaughter or acquitted altogether. In *Wihongi*, provocation was, as noted above, apparently available but not run.

Is there a need for reform?

5.48 The FVDRC considers that most victims of family violence who kill their abusers will have a case for self-defence.[281] This was also the view of the Justice and Electoral Committee that reviewed the Crimes (Provocation Repeal) Bill,[282] and in the 2007 Report, the Commission expressed its view that "[f]or the majority of battered defendants, self-defence will tactically offer a preferable alternative to provocation, because it results in an acquittal".[283] This appears to be borne out by the cases: in six of the eight trials we identified since the abolition of provocation, the defendant relied on self-defence.

5.49 However, as noted above, not every victim of family violence who kills their abuser will be acting in self-defence. Some will be acting out of anger in response to a long history of ongoing abuse. Other than the general guidance on mitigating factors in the Sentencing Act 2002 (discussed in Chapter 3), there is no explicit mechanism for recognising a defendant's culpability may be mitigated or reduced in such circumstances.

5.50 Thus, case outcomes aside, there may be a legitimate need for the law to provide for greater recognition of reduced culpability of defendants in these circumstances. That may be because

278 Sheehy, Stubbs and Tolmie, above n 163.

279 Including three per cent of cases resulting in a less serious offence.

280 Including one per cent of cases stayed.

281 Family Violence Death Review Committee, above n 2, at 119.

282 Noting the Law Commission's 2007 recommendation for repeal of provocation, the Committee stated: "We agree that such defendants [victims of family violence who kill their abusers] would not be unduly disadvantaged by the abolition of the defence. We consider that for the majority of such defendants it would be more appropriate for them to rely on self-defence, which would result in an acquittal rather than a manslaughter conviction" (Crimes (Provocation Repeal) Amendment Bill 2009 (64-2) (select committee report) at 3).

283 Law Commission, above n 8, at [121].

New Zealand's case sample is too small to offer reassurance that the repeal of provocation has not had unintended consequences or because, the repeal of provocation aside, victims of family violence may be convicted of murder for killing their abuser and receive a significantly longer sentence than victims of family violence convicted of manslaughter.

5.51 There are different ways the law can recognise reduced culpability. Our provisional view is that the Commission was on firm ground in concluding that appropriate sentencing reform reduced the case for partial defences. However, that reform has not occurred, and so the merits of partial defences and/or a specific homicide offence warrant review, especially given developments in other jurisdictions. We set out those developments in Chapter 6 below.

QUESTION

Q5 Do you consider there is a case for reform to recognise reduced culpability of victims of family violence who commit homicide (where self-defence does not apply)?

MISUNDERSTANDING THE DYNAMICS OF FAMILY VIOLENCE

5.52 A proper understanding of the dynamics of family violence in the criminal justice system, and by individuals operating within that system, is crucial to ensuring that victims of family violence who commit homicide are treated equitably before the law.

5.53 In Chapter 1, we identified, as a guiding principle, the need for the law of homicide to reflect the context in which homicides typically occur. Put simply, if the decision-maker (be it jury or judge) does not understand the social context of the homicide and the realities the defendant faced, they cannot accurately assess the defendant's actions.

5.54 How family violence is understood will be relevant to:

- how lawyers (the prosecutor and defence counsel) choose to run their case, including the evidence they introduce at trial;
- the issues and questions on which the trial judge directs the jury during the judge's summing up of the case;
- how juries assess the credibility of the defendant, their state of mind at the time and, in the case of self-defence, the nature of the threat the defendant faced and whether the defendant's actions were reasonable in the circumstances; and
- the sentencing judge's determination of the appropriate sentence to be imposed.

5.55 While community understanding of the nature and effect of family violence has improved over time, recent literature and research suggest that community misconceptions persist.[284] As we noted at paragraph 5.12 above, some commentators argue that it is this misunderstanding, rather than the law itself, that is currently causing injustice.[285]

284 The same conclusions in Australia have resulted in recent recommendations/legislative change aimed at improving community understanding of family violence when victims of family homicide commit homicide and claim self-defence (most recently Victoria, in 2014, and Tasmania, in 2015). These changes are discussed in Chapter 6 below See: Victorian Parliamentary Debates, Legislative Assembly, 20 August 2014, 2835. Tasmania Law Reform Institute, above n 251, at 58.

285 Toole, above n 224, at 252.

Myths and misconceptions about family violence

5.56 The FVDRC identifies the need for a conceptual shift to reframe family violence. It identifies a number of myths or misunderstandings about the nature of family violence, including that family violence:

- is limited to physical assaults;[286]
- is less serious than stranger violence;[287] and
- is comprised of a series of discrete incidents and that, in between these discrete incidents, there are opportunities to address the abuse and leave the relationship.[288]

5.57 Other common myths and misconceptions include the belief that the victim's fear of future violence or the consequences of leaving a violent relationship is irrational or unreasonable; a person's cultural background or language is no barrier to accessing help; if a victim stays in a relationship or returns to a relationship, the violence can't have been that bad or the victim must have been partly to blame; and if the victim was violent as well, their fear was not real.[289] On the last point, we note the importance of the predominant aggressor/primary victim analysis adopted by the FVDRC and discussed in Chapter 2 above.

Myth 1: Family violence is limited to physical assaults

5.58 The FVDRC identifies that intimate partner violence (IPV) is still often understood as physical assaults that occur within an intimate relationship. However, as we discuss in Chapter 2, family violence is not just a series of one-off incidents of physical or sexual abuse. It usually involves a combination of physical, psychological, emotional, social and financial abuse.[290]

5.59 The FVDRC argues that the tendency to focus on individual acts of physical assault overlooks the broader dynamics often involved in family violence and can minimise the seriousness of coercive control, discussed at paragraph 2.56.[291] It can also mean that some practitioners and members of the public are not attuned to the danger posed by possessive and controlling partners.

Myth 2: Family violence is less serious than stranger violence

5.60 The FVDRC found that some still viewed family violence as "just a domestic", minimising the serious impact of the abuse by relegating it to "household affairs".[292]

5.61 Not only does this normalisation of family violence seriously misunderstand the impact on victims, it also impacts on family and whānau members' perceptions of how serious the situation is and the need for intervention. Evidence suggests that beliefs held by family, friends and the wider society about violence and victimisation make it harder for victims to seek help and leave violent relationships.[293]

286 Family Violence Death Review Committee, above n 2, at 71.

287 At 77.

288 At 78–80.

289 Victorian Law Reform Commission, above n 16, at 161–169.

290 At 161.

291 Family Violence Death Review Committee, above n 2, at 71.

292 At 77.

293 Fleur McLaren *Attitudes, Values and Beliefs about Violence within Families: 2008 Survey Findings* (Ministry of Social Development, Wellington, 2010) at 14.

Myth 3: Family violence is a series of discrete incidents, and there are opportunities to address the abuse or leave the relationship between incidents

5.62 The FVDRC identifies that family violence is frequently understood and responded to as a series of incidents. In between these incidents, it is assumed that the victim is not being abused and that there are opportunities to address the abuse or leave the relationship.[294]

5.63 This misunderstands the fact that family violence is more likely to be a cumulative pattern of harm, as described at paragraphs 2.54–2.55, and that there is a corresponding cumulative and compounding impact of abuse on the victim – which in turn increases their vulnerability.[295]

5.64 In 2008, a survey on individual attitudes, values and beliefs about family violence was conducted for the Ministry of Social Development. While 98 per cent of respondents to that survey agreed that a woman can feel scared of a violent partner long after the last violent incident, 67 per cent of respondents also believed that a woman who is beaten by her partner just needs to leave the relationship to be safe.[296]

5.65 However, contrary to the common assumption, it is often very difficult for a primary victim to safely leave. Family violence can be an individual, structural and collective form of entrapment.[297] The FVDRC found evidence of many primary victims going to considerable lengths to try to protect themselves and their children, and yet many women experienced difficulties in leaving a violent relationship. Fifty per cent of IPV deaths took place in the context of a planned or actual separation.[298]

5.66 Understanding the limitations on a defendant's ability to seek help or leave a violent relationship will be of significant importance where self-defence is claimed. Jurors may find it difficult to understand why a person who has been subjected to abuse might have remained in an abusive relationship or resorted to lethal force without seeking outside help.

Adducing evidence of family violence

5.67 The social context of any homicide is communicated to the jury through the evidence that is introduced by the prosecution and the defence. This evidence can include:[299]

- evidence given by the defendant about the abuse;
- evidence of friends, family, neighbours, professionals or others who witnessed or heard the violence, saw evidence of it or were told about it by the defendant or the deceased;
- documentary evidence, including previous protection orders or criminal proceedings; and
- evidence given by expert witnesses.

5.68 Expert evidence is of particular importance in addressing any myths and misconceptions about family violence that may be held by jurors.

5.69 Section 7 of the Evidence Act 2006 provides that all relevant evidence is admissible except where it is expressly deemed inadmissible or excluded by statute. Section 25 of the Evidence Act provides that expert opinion evidence is admissible if the fact-finder is likely to obtain

294 Family Violence Death Review Committee, above n 2, at 78.

295 At 78–79.

296 Fleur McLaren, above n 293, at 14.

297 Family Violence Death Review Committee, above n 2, at 81.

298 At 80.

299 Victorian Law Reform Commission, above n 16, at 130.

substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence.

5.70 We are not aware of any serious concerns regarding the operation of the Evidence Act in these circumstances or the ability to have such evidence introduced. However, we are aware anecdotally that introducing expert evidence to address common myths and misconceptions about family violence is rare. A defendant's counsel may not identify the relevance of such family violence evidence, either because the defendant does not disclose the extent of the violence or because the counsel do not themselves appreciate the need for such evidence (for example, assuming the jury will have a common understanding of family violence, therefore seeing no need for expert evidence).[300] There may also be funding constraints on introducing expert evidence. We understand the vast majority of homicide defendants rely on legal aid funding, and we are aware anecdotally of issues with obtaining approval for funding for expert witness evidence through the legal aid system.[301] Finally, evidence may be excluded by the court if there is a risk of unduly extending the length of the trial, although we are not aware of any instances of this occurring in practice.

5.71 We would welcome feedback on this particular issue, including any personal experience of problems around these issues.

QUESTION

Q6 Do you consider there is a need to improve understanding of the dynamics of family violence by those operating in the criminal legal system?

Q7 Do you consider there are currently problems with introducing family violence evidence, including expert evidence, in criminal trials?

SUMMARY OF ISSUES

5.72 In summary, it appears that there is a risk that the criminal justice system is not adequately providing for victims of family violence who commit homicide, in three key respects:

(a) First, the self-defence concepts of imminence, proportionality and lack of alternatives have the potential to unfairly exclude victims of family violence – typically women – from successfully relying on self-defence in circumstances where they had no real alternative to the use of force.

(b) Second, while there is no clear evidence that the repeal of provocation is resulting in harsher outcomes for these defendants, there may nonetheless be a legitimate need for the law to provide for greater recognition of reduced culpability of defendants who kill their abusers other than in self-defence.

(c) Third, the existence of myths and misconceptions around family violence, including in particular the belief that, to stop the violence, the defendant needs only to leave the relationship, may result in inequitable treatment of such defendants.

300 At 181.

301 Underfunding is also identified as a challenge to counsel's effectiveness in challenging expert evidence. See: Emily Henderson and Fred Seymour *Expert Witnesses under examination in the New Zealand Criminal and Family Courts* (New Zealand Law Foundation, March 2013) at 20.

5.73 We conclude that some reform is needed to ensure that the law applies equitably to victims of family violence. There are a number of options for reform, many of which can be considered as a package of reforms, rather than alternative options. These options include:

(a) reform the law of self-defence, discussed in Chapter 7;

(b) the introduction of a partial defence or separate homicide offence, discussed in Chapter 8;

(c) changes to the current approach to sentencing, including the introduction of sentencing guidance for defendants who are victims of family violence, discussed in Chapter 9;

(d) amending the Prosecution Guidelines to encourage greater recognition of the impacts of family violence in charging practices and plea negotiations (Chapter 9); and

(e) reforms aimed at improving understanding of the social context and the dynamics of family violence (Chapter 9).

Chapter 6
Developments in other countries

INTRODUCTION

6.1 In the past decade, there has been significant attention in comparable jurisdictions on the matter of how the criminal justice system responds to victims of family violence who commit homicide. All jurisdictions that have examined this issue have recognised, to varying degrees, the difficulties faced by victims of family violence in successfully relying on self-defence (and, to a lesser extent, provocation). While no single "best practice" approach to reform has emerged, two distinct approaches appear to have taken shape.

6.2 The first approach, pioneered in Victoria, which was followed to some extent in Western Australia and recently recommended in Tasmania, is to focus on reform of the defence of self-defence. This approach aims to more accurately and thoroughly recognise and accommodate the circumstances of those who commit homicide in response to prolonged family violence.

6.3 The second approach focuses on partial defences, either by amending existing partial defences (most notably provocation) to make them more accessible to victims of family violence or to create a new partial defence that recognises the reduced culpability of victims of family violence who kill their abusers but who cannot rely on self-defence. This approach has been favoured in England and Wales, New South Wales, Australian Capital Territory (ACT) and Queensland and is generally adopted where partial defences already have a presence in that jurisdiction's legal system and/or where murder still attracts a mandatory life sentence.[302]

6.4 While these approaches address different aspects of homicide law, both are concerned with better recognising the experiences of victims of family violence who commit homicide. The Family Violence Death Review Committee (FVDRC) considers New Zealand is now out of step with similar international jurisdictions.[303]

6.5 We discuss below these different approaches taken in other countries. It is important to recognise that the reforms in each jurisdiction were intended, and must be considered, as a package of reforms and in the context of their existing criminal justice system.

6.6 Set out in Appendix C is a table summarising homicide law in the different jurisdictions and the approach taken to recognise victims of family violence who commit homicide.

SELF-DEFENCE IN OTHER COUNTRIES

6.7 Historically, self-defence in Australia and Canada required an imminent attack or threat. In Australia, this requirement was relaxed in common law states in *Zecevic v DPP*,[304] which

302 These approaches are not necessarily mutually exclusive. For example, in Western Australia, amendments to self-defence were accompanied with recommendations to re-establish the partial defence of excessive self-defence. Similarly, Victoria introduced a specific offence of defensive homicide in 2005 (which operated as a partial defence of excessive self-defence). However, it was subsequently repealed in 2014, and further reform was introduced, also aimed at improving the application of self-defence to victims of family violence.

303 Family Violence Death Review Committee, above n 2, at 102.

304 *Zecevic v DPP* (1987) 162 CLR 645 (HCA). The "common law states" refer to those states where the law of self-defence was derived from the common law rather than statute. They included Victoria, NSW, ACT, South Australia and Tasmania.

confirmed that imminence and proportionality were only factors relevant to whether the accused believed that it was necessary to act in self-defence and the reasonableness of that belief.[305] However, in the states that had codified self-defence (Northern Territory, Queensland and Western Australia), it remained complex and more restrictive.[306]

6.8 Case law in Canada has also relaxed the requirement of imminence in cases involving victims of family violence who kill their predominant aggressor.[307] The current self-defence provision in the Criminal Code now directs the court to consider, among other factors, the imminence of the force anticipated, and the nature and proportionality of the response, in determining whether the defendant's act was reasonable.[308]

6.9 In England and Wales, Ireland and in some states of the United States adopting the Model Penal Code,[309] self-defence continues to be available only if the attack is imminent.

6.10 While the continued requirement for imminence is recognised as a problem for victims of family violence in Queensland,[310] England and Wales,[311] and Ireland,[312] the preferred solution in those jurisdictions was to reform partial defences to make these more accessible to victims of family violence who kill in the absence of an imminent threat.[313] This is discussed from paragraph 6.39 below.

REFORM OF SELF-DEFENCE IN AUSTRALIA

6.11 Notwithstanding the broader approach in *Zecevic*, the operation of self-defence in the context of family violence has been reviewed in several Australian states, and legislative change has been introduced (or recommended) to better accommodate the experiences of victims of family violence.

6.12 The most notable changes to self-defence have occurred in Victoria. The approach in Victoria was subsequently partially adopted in Western Australia,[314] and very recently the Tasmania Law Reform Institute recommended reform based on the Victorian model.[315] These changes address the risk that self-defence would continue to be interpreted and applied in a way that was perceived to be unfair to victims of family violence, given the continued association of self-defence with a one-off confrontation rather than an ongoing threat of harm. The reforms

305 Victorian Law Reform Commission, above n 16, at 76–82; *Zecevic v DPP*, above n 304; Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at 623.

306 Kate Fitz-Gibbon and Julie Stubbs "Divergent directions in reforming legal responses to lethal violence" (2012) 45 Australian & New Zealand Journal of Criminology 318 at 325; Guz and McMahon, above n 243, at 89.

307 *R v Lavallee* (1990) 1 SCR 852; Campbell, above n 133, at 82–84.

308 Criminal Code RSC 1985 c C-46, s 34.

309 Joshua Dressler, in his article, "Feminist (Or 'Feminist') Reform Of Self-Defense Law: Some Critical Reflections" (2010) 93 Marquette Law Review 1475 at 1488, notes that the American Model Penal Code proposes a more limited extension of "imminence", so that the use of deadly force by the innocent party need only be "immediately necessary... on the present occasion". The intent of the change is that the innocent party need not wait until the attack is about to take place. They can act prior to the attack but only in circumstances where the primary aggressor poses an immediate threat. In this context, it would mean victims of serious family violence could take action to defend themselves when they face immediate danger, even if the attack was not actually taking place, such as where the predominant aggressor makes a move towards a weapon indicating that he intends to use it against the primary victim. However, the victim could not take pre-emptive action if the predominant aggressor was not actually taking any steps to commit aggression, for example, if he was sleeping or intoxicated. The Model Penal Code has been adopted by a number of states in the United States.

310 Queensland Law Reform Commission, above n 182.

311 Law Commission of England and Wales, above n 225, at [3.65].

312 Law Reform Commission of Ireland, above n 132, at 48.

313 At 8; Law Commission of England and Wales, above n 225.

314 Criminal Code Act Compilation Act 1913 (WA) s 248(4).

315 Tasmania Law Reform Institute, above n 251, at [5.4.13].

also recognised ongoing concerns that the nature and dynamics of family violence may not be generally understood.[316]

The Victorian model

6.13 In 2004, following a three-year review of the law of homicide, the Victorian Law Reform Commission (VLRC) made a number of recommendations aimed at making self-defence more accessible to people who kill in response to family violence. Recommendations addressed both the substantive law of self-defence – in particular, the concepts of imminence and proportionality – as well as the operational aspects of the defence, to ensure that decisions by judges, juries, lawyers and police are informed by a proper understanding of the nature of family violence.[317]

6.14 The VLRC's recommendations resulted in significant changes to the law in 2005. Further changes were introduced in 2014, following a review by the Victorian Department of Justice as part of a broader investigation into the offence of defensive homicide, also recommended by VLRC in 2004 and discussed at paragraphs 6.64–6.67 below.

Addressing imminence and proportionality

6.15 The VLRC recommended that the statutory provision on self-defence should specify that the use of force may be reasonable even though:

(a) the person believes the harm is not immediate;[318] and

(b) the force used by that person exceeds the force used against him or her.[319]

6.16 By giving these matters special mention in the substantive provision on self-defence, the VLRC hoped it would encourage a more careful analysis by jurors of circumstances in which a person may reasonably believe his or her life is in danger, even where that person is not under immediate attack or at risk of immediate harm.[320] It was also intended to discourage juries from placing undue emphasis on the issue of the proportionality of the response to the force used, or threatened, against the defendant in determining whether their actions were reasonable.[321]

6.17 The VLRC's recommendations were enacted in 2005, in section 9AH of the Crimes Act 1958 (Vic), now section 322M of that Act. This is reproduced in Appendix D of this Issues Paper. Despite the VLRC's recommendation to the contrary, these provisions are engaged only where family violence is in issue.

6.18 In 2013, the Victorian Department of Justice recommended further reforms to self-defence, including changing the objective test from whether the defendant's *belief* was reasonable to whether their *conduct* was reasonable in the circumstances as perceived by the defendant.[322] This is consistent with the objective test in section 48 of the New Zealand Crimes Act and with self-defence in New South Wales, Northern Territory, and Tasmania. The Department of Justice considered this may assist a defendant where they kill in response to family violence.[323]

316 Victorian Law Reform Commission, above n 16, at 68; Law Reform Commission of Western Australia, above n 16, at 168; Tasmania Law Reform Institute, above n 251, at 59–69.

317 Victorian Law Reform Commission, above n 16, at xxxii.

318 At 80.

319 At 84.

320 At 80.

321 At 83.

322 Victoria Department of Justice *Defensive Homicide: Proposals for Legislative Reform - Consultation Paper* (September 2013).

323 At 41.

6.19 In September 2013, the Department of Justice noted that the changes to self-defence, although untested, appeared to have made a difference.[324] Since then, it appears that self-defence has been successfully relied on in at least one case where a victim of family violence (in that case, the male de facto partner of the deceased) killed his abuser in circumstances where there was no imminent threat and with what could be described as "excessive force".[325]

Adducing evidence of family violence

6.20 According to the VLRC:[326]

> Changes to the substantive law will only ever provide a partial solution to ensuring defences to homicide operate fairly for those who kill in response to family violence. It is equally important to ensure juries are provided with information which allows them to understand, and take into account, the broader context of violence. Decisions made by judges, juries, lawyers, and police must also be informed by a proper understanding of the complex nature of family violence.

6.21 While the VLRC recognised that evidence of prior abuse was generally accepted by the courts as relevant and admissible, it concluded that the importance of this evidence in supporting a plea of self-defence "persuaded us that its status should be clarified in legislation."[327]

6.22 The VLRC recommended the introduction of a specific evidence provision relating to the admissibility of family violence evidence where self-defence is claimed. These provisions specify the range of evidence that can be adduced about the history of the relationship and the nature of violence in the relationship to prove both the subjective and objective elements of the self-defence test. They also allow for the introduction of social framework evidence, which permits evidence of the nature and dynamics of family violence to be introduced to dispel myths about family violence that exist within the community.[328] Provisions were introduced into the Crimes Act 1958 (Vic) in 2005, and those provisions are now contained in sections 322J and 322M of that Act. These are reproduced in Appendix D.

Jury directions on relevance of family violence when self-defence is raised

6.23 The VLRC also recognised that the trial judge has a crucial role to play in addressing misconceptions about family violence by assisting juries to recognise the significance of prior violence and to make the necessary connections between expert evidence about family violence and the issues at trial.[329] It identified the need for clear jury directions on self-defence to guard against the risk of "compromise verdicts". That is where an acquittal is available, but the jury has difficulty in understanding and applying the elements of self-defence and therefore convict of manslaughter.[330]

6.24 However, the VLRC did not recommend a standard jury direction requirement:[331]

> The Commission does not favour legislating to require a set jury direction to be delivered when a history of violence is raised. The Commission accepts that a 'one size fits all' approach to jury directions will not allow sufficiently flexibility. Moreover, we think that a standard charge suffers from the fundamental difficulty of the trial judge intruding into territory which belongs exclusively to the jury. But it is in many

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324 At vii–viii.

325 *DPP v Bracken*, above n 221.

326 Victorian Law Reform Commission, above n 16, at xxxii.

327 At 140.

328 At [4.96].

329 At [44]; Tasmania Law Reform Institute *Review of the Law Relating to Self-defence: Issues Paper* (IP20, Tasmania Law Reform Institute, 2014) at 27.

330 Victorian Law Reform Commission, above n 16, at 102–103.

331 At 192.

> cases vital, if the trial is to be fair, that relevant matters be brought to the jury's attention. In our view, this should be the role of social framework evidence, and of the experts who are appropriately qualified to give it. The trial judge will play an important role in highlighting the relevance of a history of abuse, and of the social framework evidence, to the particular facts in issue in the case.

6.25 However, in 2014, a standard jury direction on family violence was introduced as part of a package of amendments to improve the availability of self-defence to victims of family violence and abolish the defensive homicide offence, discussed at paragraphs 6.64–6.67 below.[332] The jury direction is aimed at countering community misunderstandings about how the dynamics of family violence may impact on the behaviour of family violence victims, such as why victims of family violence remain in abusive relationships.[333] During the second reading of the Crimes Amendment (Abolition of Defensive Homicide) Bill, the Attorney-General explained:[334]

> During the past year, there has been increasing community concern about the prevalence of family violence in Victoria. This is an extremely serious issue and the government is committed to preventing violence, holding offenders to account and providing support to victims.
>
> One area of concern relates to women who have suffered long-term family violence by a partner, and who kill their partner when defending themselves from this abuse.
>
> Research indicates that many members of the community do not fully understand the dynamics of family violence. Research also indicates that jury directions can play an important role in addressing juror misconceptions. The bill will introduce new provisions into the Jury Directions Act 2013 to address common misconceptions about family violence. When a direction on family violence is requested by defence counsel, the judge will explain to the jury (among other things) that family violence is not limited to physical abuse and may include sexual and psychological abuse, and that it is not uncommon for victims of family violence to stay with their abusive partner, rather than leave or seek help. The directions will also explain to jurors that family violence may be relevant to their assessment of whether the woman was acting in self-defence.
>
> These directions may be given early in the trial before any evidence is heard. This will ensure that any misconceptions about family violence are dispelled early on. These jury directions will provide greater context for assessing claims of self-defence and assist to ensure that jurors in relevant cases have a better understanding of the dynamics of family violence. They will also assist to educate the community and legal profession about family violence. These reforms are an important measure for providing support to victims of family violence.

6.26 The current jury direction provisions are set out in Appendix D.

Reform in other Australian states and territories

Western Australia

6.27 In 2007, the Law Reform Commission of Western Australia completed its review of the law of homicide and took a similar view to the VLRC in relation to the availability of self-defence to victims of family violence. It recommended:[335]

> That a new section be inserted into the *Evidence Act 1906* (WA) to provide that when the defence of self-defence is raised under s 248 of the *Criminal Code* (WA) the judge shall inform the jury that:
>
> (a) an act may be carried out in self-defence even though there was no immediate threat of harm, provided that the threat of harm was inevitable; and

332 Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic).

333 Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) (explanatory memorandum), at 21–23.

334 Victorian Parliamentary Debates, Legislative Assembly, 20 August 2014, above n 284, at 2834.

335 Law Reform Commission of Western Australia, above n 16, at 168–169.

(b) that a response may be a reasonable response for the purpose of self-defence… even though it is not a proportionate response.

6.28 However, these recommendations were only partly adopted and, like in Victoria, were adopted by way of an amendment in the Criminal Code rather than as a new section in the Evidence Act. The self-defence provision now reads that a person is acting in self-defence if the person "believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent".[336] However, unlike the Victorian model, this is of general application rather than specific to victims of family violence. The recommendation regarding "proportionate response" does not appear to have been adopted.

6.29 The Law Reform Commission of Western Australia also made recommendations that sought to provide guidance on the application of self-defence in the context of family violence. It recommended that the Evidence Act 1906 (WA) be amended to provide that the defendant can put forward opinion evidence about domestic violence. This aimed to assist in determining the reasonableness of the accused's belief that it was necessary to use force to defend themselves or another and whether the act was a reasonable response to the circumstances as the accused perceived them to be.[337] However, it does not appear that these recommendations were adopted.

Tasmania

6.30 The Tasmania Law Reform Institute has recently reviewed the law of self-defence. Tasmania's self-defence provision is almost identical to section 48, and like New Zealand, Tasmania has no partial defences to murder. The Law Reform Institute has recommended changes to allow self-defence to better accommodate victims of family violence through legislative change to:[338]

(a) specify that self-defence may apply even if the person is responding to a harm that is not immediate or that appears to be trivial (based on the Victorian model);

(b) facilitate the reception of evidence of family violence by the court where a victim of family violence kills their abuser (based on sections 322J and 322M of the Crimes Act 1958 (Vic) discussed above at paragraphs 6.20–6.22); and

(c) provide for jury directions where self-defence is raised in the context of family violence (similar to the provisions of the Jury Directions Act 2015 (Vic), discussed above at paragraphs 6.23–6.26).

6.31 The Tasmania Law Reform Institute did not recommend the introduction of a partial defence.

New South Wales

6.32 In New South Wales, the adequacy of self-defence to take account of the circumstances of victims of family violence who kill their abuser was considered by a Parliamentary Select Committee established in 2012 to inquire into the partial defence of provocation.[339] The Select Committee noted the significant concerns regarding the adequacy of self-defence for victims of family violence who kill their abuser, and the need to "strengthen" the defence. However, as it was not provided with "strong arguments on what methods could effectively be used to do so", it was unable to make a firm recommendation on the issue.[340] Accordingly, the concern regarding

336 Criminal Code 1913 (WA), s 248(4)(a).

337 Law Reform Commission of Western Australia, above n 16, at 293.

338 Tasmania Law Reform Institute, above n 251.

339 Select Committee on the Partial Defence of Provocation *The partial defence of provocation* (Legislative Council, 2013) at [17]. The Select Committee's reference required consideration of the adequacy of self-defence for victims of prolonged domestic and sexual violence. However, the Committee considered that was limited to the adequacy of self-defence "in the event that the partial defence of provocation were to be abolished"

340 At 82.

the adequacy of self-defence for victims of family violence was a reason for recommending retention of provocation.[341] However, recognising that the law serves an important educative function to the broader community, the Select Committee did recommend:[342]

> That the NSW Government introduce an amendment similar to section 9AH of the Victorian *Crimes Act 1958*, to explicitly provide that evidence of family violence may be adduced in homicide matters.

6.33 It does not appear that recommendation has been enacted. However, the Government of New South Wales has committed to a review of the law of homicide by the New South Wales Law Reform Commission in the next five years.[343]

Other states and territories

6.34 The only Australian jurisdiction to retain an imminence requirement for self-defence is Queensland. Indeed, the Queensland self-defence provision is much narrower than the Australian common law test and requires acts of self-defence to be undertaken in response to an unlawful assault.[344]

6.35 However, Queensland also has a provision that addresses the admissibility of evidence of family violence. Section 132B of the Evidence Act 1977 (Qld) makes admissible "relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed". This section applies to all criminal proceedings for homicide, assault and other offences endangering life or health.

6.36 The only Australian jurisdiction retaining a direct reference to proportionality in the self-defence provision is South Australia, but that is qualified by a clear statement that the requirement for proportionality "does not imply that the force used by the defendant cannot exceed the force used against him or her".[345]

6.37 In 2010, the Australian Law Reform Commission and New South Wales Law Reform Commission published a joint report: *Family Violence – A National Legal Response.* That report considered whether the current defences to homicide available to victims of family violence were adequate across the different Australian jurisdictions.[346] Without making specific recommendations as to what defences should be available, they concluded:[347]

> In the Commissions' view, the circumstances of family violence ought to be recognised in both complete and partial defences, given the different purposes served by each form of defence. In recognising circumstances of family violence for the purposes of an acquittal, complete defences are intended to remove all criminal liability associated with fatal responses to family violence. However, partial defences recognise the circumstances of family violence only for the purposes of avoiding a murder conviction. An exclusive focus on partial defences falls short of accommodating the circumstances of family violence because it 'leaves untouched' limitations in complete defences.

6.38 The Australian and New South Wales Law Reform Commissions did, however, recommend that states and territories adopt evidential provisions along the lines of the Victorian provisions:[348]

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341 At 87.

342 Select Committee on the Partial Defence of Provocation, above n 339.

343 Government of New South Wales *Government response to the report of the Legislative Council Select Committee on the Partial Defence of Provocation* (2013).

344 Criminal Code (Qld) s 271.

345 Criminal Law Consolidation Act 1935 (SA), s 15B.

346 Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at ch 14.

347 At 644.

348 At 652.

> The Commissions maintain their view expressed in the Consultation Paper that state and territory criminal legislation should provide express guidance about the potential relevance of family-violence related evidence in the context of homicide defences, in similar terms to s 9AH of the Crimes Act 1958 (Vic)….
>
> The Commissions consider that there is considerable merit in focusing attention on the potential relevance of such evidence in homicide defences, given its importance in these circumstances. The Commissions endorse the views of the VLRC that such a provision would assist in avoiding 'unnecessary arguments concerning… relevance and ensure the range of factors which may be necessary to represent the reality of the accused's situation are readily identified'

REFORM OF PARTIAL DEFENCES AND SEPARATE HOMICIDE OFFENCES

6.39 A number of jurisdictions, while recognising that self-defence may be inaccessible for some victims of family violence who commit homicide, have preferred to pursue reform in the area of partial defences (and some have pursued reform of partial defences concurrently with reforms to self-defence). Such reform has come in the form of amendment to existing partial defences (most notably provocation) or the introduction of new partial defences, either specific to victims of family violence or of general effect.

6.40 The different partial defences that exist in other jurisdictions, and recent reforms to improve their application to victims of family violence, are discussed below.

Reform of provocation

6.41 Provocation is the most notorious, and only, partial defence that has at some time been a part of the law in all of New Zealand, Australia, England and Wales, Ireland and Canada. Each jurisdiction has, however, reviewed and, with the exception of Ireland, reformed or repealed the defence. While not all jurisdictions that retain provocation have a mandatory life sentence for murder, that sentence remains in England and Wales, Canada and Ireland, as well as in Queensland, ACT, Northern Territory and South Australia.

6.42 Provocation in the context of family violence is widely regarded as problematic for two reasons. First, because provocation requires a sudden loss of control, it is often argued that provocation does not truly reflect the reality of the experiences of victims of family violence, who are responding to prolonged and serious violence,[349] and may not be available at all where a victim of family violence kills their abuser some time after the provocation has been endured.[350] In that way, it is argued that provocation fails to apply equitably to victims of family violence. Second, provocation can operate to partially excuse perpetrators of family violence who kill their victims in circumstances that are unexceptional, for example, where relationships break down.[351]

6.43 In Australia, provocation was first abolished in Tasmania, in 2003.[352] Victoria followed suit in 2005 (following the recommendation of the VLRC)[353] and Western Australia in 2008 (on the recommendation of the Law Reform Commission of Western Australia).[354]

6.44 In the remaining Australian states, provocation has been retained but modified. In New South Wales, provocation was amended in 2014 following an inquiry by a Parliamentary Select

349 Victorian Law Reform Commission, above n 16, at 58.

350 Queensland Law Reform Commission, above n 10, at 298. See also: Law Commission, above n 73, at 28–29.

351 Family Violence Death Review Committee, above n 2, at 118.

352 Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas).

353 Crimes (Homicide) Act 2005 (Vic).

354 Criminal Law Amendment (Homicide) Act 2008 (WA).

Committee established to inquire into provocation.[355] Amendments were introduced to make provocation more accessible to victims of family violence by providing that the provocative conduct need not have occurred immediately before the killing. Changes were also made to limit the partial defence to "gross provocation".

6.45 The Queensland Law Reform Commission, during a review of the defence of provocation in 2008, concluded that "there can be no doubt that the law of provocation, as it presently works in Queensland does not satisfy the test of substantive gender equality".[356] However, the Commission nonetheless recommended retention of provocation on the basis that the mandatory life sentence for murder would remain.[357] Rather than amending provocation to better accommodate victims of family violence who kill their abusers, the Commission recommended the creation of a specific partial defence, discussed at paragraphs 6.52–6.60 below. It did, however, recommend reform of provocation to ensure it was not available to those who kill out of sexual possessiveness or jealousy.[358]

6.46 In Northern Territory and ACT, the defence was amended to exclude cases where the "provocative" conduct was a non-violent sexual advance.[359] In Northern Territory, provocation was also amended to make it more accessible to victims of family violence by removing the requirement for a "sudden" response.[360]

6.47 Most recently, the Attorney-General of South Australia has ordered an inquiry into provocation, and the state's Green Party has introduced a Bill to exclude the defence in non-violent homosexual advance cases.[361]

6.48 In Ireland, following a review of homicide defences, the Law Reform Commission of Ireland recommended retention of provocation subject to reform.[362] The Commission noted that the traditional requirements of the defence are based on "male norms and male emotions" and elevate male modes of retaliation.[363] That is despite the fact that, in some cases, notably domestic violence, "a provocative act may produce a delayed action effect".[364] Thus, the Commission recommended provocation should not be excluded just because the act causing death did not occur immediately after provocation. However, that recommendation is yet to receive a legislative response.

6.49 In Canada, while provocation has not been the subject of any law reform activity, it has been the subject of more than 30 years of debate and attention in case law. Commentators have proposed varying approaches to reform.[365] As early as 1984, the former Law Reform Commission of Canada recommended the national abolition of provocation, arguing that it would be more appropriately dealt with in sentencing for second-degree murder. However provocation remains, as described by one commentator, as "distinctly traditional and masculine".[366]

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355 Select Committee on the Partial Defence of Provocation, above n 339.

356 Queensland Law Reform Commission, above n 182, at [19.12].

357 At [21.49].

358 See: *LA Debates* (QLD) (24/1/2010) 4241, discussing the Criminal Code and Other Legislation Bill 2010 (QLD).

359 See: Crimes Act 1990 (ACT), s 13 (amended by the Sexual Discrimination Legislation Amendment Act 2004); and Criminal Code Act (NT), s 158 (amended by the Criminal Reform Amendment Act 2006).

360 Law Reform Committee of the Northern Territory *Self Defence and Provocation* (October 2000); Criminal Code Act (NT) s 158(4).

361 Criminal Law Consolidation (Provocation) Amendment Bill 2015 (SA).

362 Law Reform Commission of Ireland, above n 132.

363 At 147.

364 At 147.

365 Kate Fitz-Gibbon *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014) at 105.

366 At 105.

Recasting provocation as "loss of control" – the English experience

6.50 In 2010, England and Wales abolished provocation but replaced it with a similar-but-different defence of "loss of control".[367] The amendments followed a review by the Law Commission for England and Wales of partial defences to murder in 2004. The partial defence of loss of control is restricted to cases in which the defendant is responding to a "qualifying trigger" that constitutes "circumstances of an extremely grave character", which "caused [the defendant] to have a justifiable sense of being seriously wronged".[368] The fact a thing "said or done constituted sexual infidelity" is *not* a qualifying trigger,[369] but losses of self-control "attributable to [a defendant's] fear of serious violence from [the victim] against [the defendant] or another identified person" may be.[370] The defence is:[371]

> … designed to make a formal statement of symbolic value, in this instance by turning on its head the law's former implicit endorsement of male violence against unfaithful wives in the way that it shaped the categories of admissible provocation ("qualifying triggers").

6.51 However, commentators have criticised this approach as being overly complicated, adding to the increasingly complex role now required of the jury in homicide trials.[372] The VLRC considered but rejected this model on the basis that:[373]

> In our view, the provision proposed by the Law Commission [for England and Wales] does not overcome the very real concerns we have about provocation providing a proper basis for a defence. In particular… it remains an overly subjective assessment of what constitutes sufficient provocation, and involves speculation about how a person *might have* reacted in the circumstances. While recognising anger as a possible motivator, the provision explicitly excludes actions carried out "in premeditated desire for revenge".

A specific partial defence for victims of family violence – the Queensland approach

6.52 In 2010, Queensland introduced a new partial defence in respect of "killing for preservation in an abusive domestic relationship". If successfully argued, it reduces murder to manslaughter where:[374]

> (a) (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
>
> (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
>
> (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

6.53 Few cases have considered this new defence. In the first that did so, *R v Falls*, the defendant was acquitted on the basis of self-defence.[375]

6.54 The introduction of a specific partial defence was (and remains) a novel approach, and to understand the motivations behind it, it is important to comprehend the circumstances that led to its introduction.

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367 Coroners and Justice Act 2009 (UK), s 54.

368 Section 55(4).

369 Section 55(6)(c).

370 Section 55(3).

371 Horder, above n 130, at 210–211.

372 Fitz-Gibbon, above n 365, at 226.

373 Victorian Law Reform Commission, above n 16, at 91.

374 Criminal Code 1899 (Qld), s 304B.

375 *R v Falls* (Unreported, Supreme Court of Queensland, 3 June 2010).

The Queensland Law Reform Commission's review of provocation

6.55 The specific partial defence was introduced following a review of provocation by the Queensland Law Reform Commission.[376] As noted at paragraph 6.45, during that review the Commission recognised the challenges in relying on provocation where a victim of family violence kills sometime after the provocation has been endured.

6.56 The Commission recommended that priority consideration be given to "development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific".[377] That recommendation was made in the context of the following:

(a) Limited terms of reference. The Commission did not review the law of homicide and defences to homicide in full, and accordingly, it did not review the position of a victim of family violence who kills in circumstances in which provocation cannot apply.[378]

(b) A substantially narrower defence of self-defence compared to other Australian jurisdictions. In Queensland, self-defence requires a reasonable apprehension of death or grievous bodily harm caused by an unlawful and unprovoked assault.[379] It is therefore extremely difficult, if not impossible, to apply self-defence to a victim of family violence who kills in the absence of an imminent threat.[380]

(c) The existence of a mandatory life sentence for murder in Queensland and a clear direction of "the Government's intention not to change law in this regard".[381]

6.57 The Commission considered amending provocation to meet the reality of victims of family violence. However, unlike other Australian jurisdictions, it considered that this would unduly distort the defence to such a degree that it could no longer be understood as provocation.[382] Accordingly, the Commission recommended a separate, tailored offence, motivated by the concern:[383]

> … that the battered person who intentionally kills his or her abuser, in circumstances in which the partial defence of provocation cannot apply, is unable to have his or her situation taken into account in mitigation of the mandatory life penalty of murder.

Criticisms of the Queensland approach

6.58 Some commentators have criticised the Queensland approach on the basis that it may jeopardise a claim to self-defence[384] and thus leave defendants in an "invidious position as compared to their interstate counterparts".[385] That is because the partial defence echoes the Australian

376 Queensland Law Reform Commission, above n 182.

377 At 11.

378 At 490.

379 Criminal Code (Qld), s 271.

380 Queensland Law Reform Commission, above n 182, at 313.

381 At 521.

382 At 490–491.

383 At 489.

384 Thomas Crofts and Danielle Tyson "Homicide Law Reform in Australia: Improving Access to Defences for Women Who Kill their Abusers" (2013) 39 Monash University Law Review 864 at 890. See also Hopkins and Easteal, above n 224; Michelle Edgely and Elena Marchetti, "Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality" (2011) 13 Flinders Law Journal 125; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand" (2012) 34 Sydney L Rev 467; Horder, above n 130. Horder notes the English Law Commission made a similar observation in its 2006 report, when it noted that a defendant may not wish to run a partial defence (in that case, provocation) if they do "not want the jury to be side-tracked by a partial defence if his or her main claim is for a complete acquittal".

385 Hopkins and Easteal, above n 224, at 136.

common law test for self-defence, but unlike self-defence, which results in an acquittal, Queensland's partial defence only reduces murder to manslaughter.

6.59 These concerns were noted by the Australian and New South Wales Law Reform Commissions in their 2010 report on family violence and homicide defences.[386] The Commissions also noted that Victoria, Western Australia and New Zealand have all considered and recommended against a specific partial defence. Each of those jurisdictions preferred that attention be directed to ensuring self-defence reflects the experiences of primary victims of family violence.[387] The Australian Law Reform Commission, in a submission on the NSW Select Committee's review of provocation, argued against specific offences to cater for the family violence situation.[388]

6.60 Most recently, the Law Reform Institute of Tasmania considered the Queensland approach, but concluded:[389]

> After considering the submissions received and the literature in relation to specific defences for family violence, the Institute's view is that a partial defence should not be introduced. It is unnecessary in a jurisdiction, which unlike Queensland, has a broad and flexible self-defence test and discretionary sentencing for murder. Similarly, the Institute does not support a separate, complete defence for self-defence in cases of family violence but considers that procedural changes should be made to allow the current defence to more accurately and thoroughly recognise the circumstances of those who use violence in response to prolonged family violence.

Excessive self-defence and defensive homicide

6.61 Excessive self-defence applies to actions that are defensive in nature but where the force used is not reasonable but disproportionate.[390] It was historically a part of the Australian common law, but it was abolished by the High Court in *Zecevic*.[391] In recent years, it has been reintroduced by Victoria (in the form of a separate offence of "defensive homicide", discussed below), New South Wales, South Australia and Western Australia.

6.62 New South Wales and Western Australia reintroduced excessive self-defence in 2002[392] and 2008[393] respectively. Western Australia did so in conjunction with reforms to self-defence (discussed at paragraphs 6.27–6.29 above) and the abolition of provocation and the mandatory life sentence for murder. As in Victoria, a key rationale for Western Australia's introduction of excessive self-defence was the accommodation of primary victims of family violence who committed homicide but who could not successfully rely on self-defence. There was a concern that, without a partial defence, "some women may be unjustly convicted of murder if the extremity of their circumstances was not recognised in a trial".[394]

6.63 Excessive self-defence is not recognised in Canada, and it has been resisted by women's groups on the ground it might "normalise" manslaughter as the appropriate legal outcome in cases where battered women should be acquitted on the basis of self-defence.[395]

386 Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at 638–642.

387 At 642.

388 Select Committee on the Partial Defence of Provocation, above n 339, at 80.

389 Tasmania Law Reform Institute, above n 251, at 71.

390 See, Crofts and Tyson, above n 384, at 885.

391 *Zecevic v DPP*, above n 304.

392 Crimes Act 1900 (NSW), s 421

393 Criminal Code Compilation Act 1913 (WA), s 248(3).

394 Stella Tarrant "Self-defence in the Western Australia Criminal Code: Two Proposals for Reform" (2015) 38 UWA Law Review 1 at 6.

395 Sheehy, Stubbs and Tolmie, above n 384, at 479; Kate Fitz-Gibbon and Sharon Pickering "Homicide law reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond" (2012) 52 British Journal of Criminology 159; Fitz-Gibbon and Stubbs, above n 306, at 17.

Defensive homicide in Victoria

6.64 In Victoria, while reforms to improve the accessibility of defences to victims of family violence primarily focused on self-defence, the VLRC also recommended the introduction of a partial defence of excessive self-defence. This was intended to act as a "halfway house" between acquittal on the basis of self-defence and conviction for murder for victims of family violence who could not rely on self-defence.[396]

6.65 The VLRC's recommendation was adopted in 2005 in the form of an *offence* of "defensive homicide". However, while it was intended to provide for victims of family violence who could not rely on self-defence, it was not limited in such a way. Fairly quickly, concern arose that defensive homicide was producing perverse results. As with provocation, it tended to be the refuge of violent men. In 2013, the Department of Justice reported on the operation of the offence and found almost all cases in which it had been invoked involved violent confrontations between males.[397]

6.66 In that review, the Department of Justice considered whether the offence should be amended to apply only to family violence cases but ultimately recommended outright repeal. It considered limiting the offence would "treat those who act in excessive self-defence differently" whereas "the law should apply equally to people who have the same state of mind".[398] It further concluded that defensive homicide was undesirably complex (especially for juries) and may have "distorted the legal landscape" insofar as:[399]

> [t]he focus of debate concerning women who kill in response to family violence has become about defensive homicide, not self-defence. It should be the other way around.

6.67 The offence was abolished in late 2014.

Diminished responsibility

6.68 Diminished responsibility has its origins in Scottish common law.[400] It was introduced to England by statute in the 1950s and is a partial defence in Canada and, as of 2008, Ireland.[401] In Australia, it is provided for in statute in Queensland,[402] New South Wales,[403] Northern Territory[404] and ACT.[405]

6.69 Diminished responsibility was considered, but rejected, by the VLRC and the Law Reform Commission of Western Australia.[406] The VLRC noted that it had been argued that introducing diminished responsibility would only serve to entrench misleading stereotypes of women, by attributing the homicide to a psychological disturbance rather than a defensive reaction to ongoing and severe family violence.[407]

396 Victorian Law Reform Commission, above n 16, at 102.

397 Victoria Department of Justice, above n 322, at 8.

398 At 11.

399 At 25.

400 Law Commission, above n 7, at 43.

401 Criminal Law (Insanity) Act 2008.

402 Criminal Code Act 1899 (Qld), s 304A.

403 New South Wales reformed its version – "substantially impaired capacity" – in 1997. See: Crimes Act 1900 (NSW), s 23A.

404 Criminal Code (NT), s 37.

405 Crimes Act 1900 (ACT), s 14.

406 Victorian Law Reform Commission, above n 16, at 239; Law Reform Commission of Western Australia, above n 16, at 259.

407 Victorian Law Reform Commission, above n 16, at 239.

NON-LEGISLATIVE REFORM

6.70 Many of the reviews undertaken by law reform bodies in other jurisdictions emphasised the need to support statutory reforms with other measures.

6.71 In their joint report, the Australian and New South Wales Law Reform Commissions recommended guidance, and judicial and legal professional education and training, focused on improving the application and effectiveness of defences in the family violence context.[408]

6.72 The VLRC also made recommendations on judicial and professional legal education. This was to promote a better understanding by judges, jurors and legal representatives of the circumstances and range of reactions people might have in response to family violence.[409]

6.73 The Western Australian Law Reform Commission recommended including a section on the nature and dynamics of family violence in a "bench book" that was being commissioned to provide the state's judiciary with reference material to assist them to deal with social and cultural issues.[410]

6.74 In New South Wales, the Select Committee on the Partial Defence of Provocation was concerned by prosecutorial practice in charging defendants with murder where there was a history of family violence against the defendant and there were defensive elements to the homicide. It recommended that the Director of Public Prosecutions include a specific guideline in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions* to provide clear direction to assist prosecutors to determine the appropriate charge to lay against defendants in circumstances where there is a history of violence towards the defendant.[411]

408 Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at 649–650.

409 Victorian Law Reform Commission, above n 16, at 92.

410 Law Reform Commission of Western Australia, above n 16, at 295.

411 Select Committee on the Partial Defence of Provocation, above n 339, at 167–168.

Chapter 7
Options for reform of self-defence

SUBSTANTIVE REFORM OF THE LAW OF SELF-DEFENCE

7.1 We consider, provisionally, that there is a case for law reform to modify the strictures of the current judge-made test for assessing the reasonableness of the force used for the purposes of self-defence. The objective of any reform is to ensure that the concepts of imminence, proportionality and lack of alternatives do not unfairly exclude victims of family violence – typically women – from successfully relying on self-defence in circumstances where they had no real alternative to the use of force.

7.2 While not every victim of family violence who commits homicide will be acting in self-defence, the defence should be sufficiently flexible to take into account the range of circumstances in which a person may be reasonably acting to protect himself, herself or another. This is consistent with the Law Commission's findings in 2001:[412]

> The Commission considers that self-defence should not be excluded where the defendant is using force against a danger that is not imminent but is inevitable. In many, perhaps most, situations, the use of force will be reasonable only if the danger is imminent because the defendant will have an opportunity to avoid the danger or seek effective help. However, this is not invariably the case. In particular, it may not be the case where the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows that further assaults are inevitable, even if help is sought and the immediate danger avoided.

7.3 We have identified several possible options for achieving this objective, which are discussed below.

Option 1: Clarify that imminence and proportionality of force are relevant factors, not thresholds, to relying on self-defence

7.4 The first option is to essentially adopt the approach taken in Victoria, which has recently been recommended in Tasmania. This would require introducing a new provision in the Crimes Act 1961 to confirm that self-defence is not *excluded* if the threat is not imminent or the force is disproportionate to the threat. These elements would remain relevant to the assessment of reasonable force but would not act as a threshold or barrier if they are not met.

7.5 An advantage of this approach is that it avoids altering the self-defence test itself and simply provides a "for the avoidance of doubt" direction on the judicial interpretation and application of section 48.

7.6 In Victoria, this provision applies only where family violence is in issue, although we note a similar clarification to self-defence was made in Western Australia, which has general application. As we explain in Chapter 1, our terms of reference are limited to the law as it applies to victims of family violence who commit homicide. If we recommend reform, we intend to limit it to victims of family violence only, except where we can be satisfied that there are strong reasons for recommending general reform and that the risk of unintended consequences

412 Law Commission, above n 7, at 12.

is low. This option is one area where, given the nature of section 48, general rather than specific reform may be warranted. We would welcome views on this issue.

7.7 There is limited evidence in Victoria of these changes having an impact on the operation of self-defence in respect of victims of family violence.[413] Those amendments were reviewed and endorsed by the Victorian Department of Justice seven years after their commencement.

7.8 Such a provision, similar to section 322M of the Crimes Act 1958 (Vic), could be as follows:

> Without limiting section 48, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—
>
> (a) the person is responding to a harm that is not immediate; or
>
> (b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

Option 2: Replace imminence by including express reference to inevitability

7.9 The second option is to replace by statute the *Wang* concept of imminence with inevitability. This reflects the Law Commission's recommendation in 2001. This could be done by amending section 48 to state that it applies where the danger sought to be avoided is "inevitable".

7.10 As this option would amend the substantive self-defence provision, which is a general defence, it would be of general effect rather than specific to victims of family violence.

7.11 Since 2001, several concerns have been identified with this approach. First, inclusion of a *substantive* requirement of "inevitability" (rather than a question of fact and degree regarding the imminence of the danger) would extend the current judicially determined parameters of self-defence and could see an increase in offenders other than victims of family violence claiming self-defence,[414] perhaps making it too easy for pre-emptive strikes by those with a sociopathic view of appropriate dispute resolution.[415] For example, considering the dangerous nature of prison environments or gangs, changing the test from imminence to inevitability might allow prisoners and gang members to justify pre-emptive strikes on the basis of inevitable future harm from other prisoners or rival gang members.[416]

7.12 Second, a defence based on fear of the "inevitable" is less readily objectively ascertainable than "imminent" danger.[417] Indeed, objective inevitability is almost impossible to establish, but subjective inevitability would open self-defence to those of paranoid disposition or those with an inability to conceive of non-violent options.[418] How would a jury assess the inevitability of future violence? When, for example, would fear of an attack assume the quality of inevitability? Will there be some limit on just how far in advance the defendant is justified in acting pre-emptively? A judge may need to give detailed directions to a jury to ensure they are aware of the difference between imminence and inevitability. Some consider that an inevitability standard may necessarily involve speculation and dangerously raise the level of error when predicting inevitable violence at some future but unspecified time.[419]

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413 There is one case where a victim of family violence successfully relied on self-defence in a non-confrontational situation with excessive force – *DPP v Bracken*, above n 221.

414 Dawkins and Briggs, above n 234, at 348–350.

415 Campbell, above n 133, at 95.

416 Guz and McMahon, above n 243, at 104.

417 Dawkins and Briggs, above n 234, at 348–349; Simester and Brookbanks, above n 129, at 528.

418 Campbell, above n 133, at 93.

419 Guz and McMahon, above n 243, at 103–104.

7.13 Finally, some argue that inevitability potentially blurs the justificatory underpinnings of self-defence and may edge closer to excusing the defendant's behaviour in acting out of a sense of fear or terror rather than in genuine defence.[420]

Option 3: Insert new self-defence provision where the defendant is a victim of family violence and acts out of necessity

7.14 A third option is a new, complete defence that applies only where a defendant is responding to family violence and focuses on the underlying principle of necessity. As noted above, the test of necessity prescribes the outer limits of a plea of self-defence,[421] yet in New Zealand, the imminence requirement has arguably acted as a threshold.[422]

7.15 A test focused on necessity, rather than the imminence of the threat and the degree of force used, would have the effect of removing the requirement for a response to an immediate threat. However, it would still require the person claiming the defence to show they had no reasonable alternative. In other words, the imminence of the threat would remain relevant but not determinative to a defendant's reliance on self-defence.

7.16 Some commentators argue that a separate defence would be preferable to removing the temporal requirement of "imminence" from self-defence, as this would potentially blur the underlying rationale for the defence.[423] Self-defence operates as a "justification", which implies that the conduct of the accused was morally right and acceptable, whereas an "excuse-based" defence, such as provocation, implies that the conduct of the accused is wrong but, either in full or in part, forgiven.[424] Some commentators argue that the underlying rationale of a defence without a temporal connection "edges closer to *excusing* the accused's behaviour in acting out of a sense of fear or terror as an understandable human frailty."[425] That is, although what the defendant did was a crime, we do not want to hold the defendant morally blameworthy for that crime.

7.17 A separate provision may also be preferable to recognise or accommodate the complexities in scenarios involving self-defence where there is no imminent or immediate threat to the defendant.

7.18 However, others argue self-defence can and should accommodate the diverse situational and psychological circumstances of family violence victims[426] and that having a separate defence for victims of family violence could result in different treatment.[427]

420 Dawkins and Briggs, above n 234, at 348.

421 The Victorian case of *Osland* involved a severely beaten and raped defendant who mixed sedatives in the food of her husband and, when he was unconscious, hit him on the head with a pipe. She was convicted of murder, and her conviction was upheld by the High Court. Kirby J did not consider that the actions were "reasonably necessary to remove further violence threatening her with death or really serious injury" (*Osland v R*, above n 133, at 342.).

422 Campbell, above n 133.

423 Dawkins and Briggs, above n 234, at 348.

424 Law Reform Commission of Ireland, above n 132, at 5.

425 Dawkins and Briggs, above n 234, at 348.

426 Victorian Law Reform Commission, above n 16; Law Reform Commission of Western Australia, above n 16.

427 Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at 649–650.

QUESTIONS FOR CONSULTATION

Q8 Which is one of the three options for reform of self-defence would you prefer, and why?

- *Option 1: Introduce a new provision that clarifies that, under section 48, the force used by the defendant may be reasonable even though the defendant is responding to a harm that is not immediate or uses force in excess of that involved in the harm or threatened harm.*
- *Option 2: Amend section 48 to replace by statute the Wang concept of "imminence" with inevitability.*
- *Option 3: Introduce a new complete defence to extend the concept of self-defence to victims of family violence who act out of necessity.*

Q9 Should Option 1 be limited to situations where family violence is in issue or apply generally?

OTHER LEGISLATIVE REFORMS TO SUPPORT SELF-DEFENCE

7.19 A review of the literature on this topic identifies a need for any substantive reform of self-defence to be supported by a wider cultural shift in community understanding of family violence. As we identified in Chapter 5, myths and misconceptions around dynamics of family violence persist. In the context of victims of family violence who commit homicide, perhaps the greatest challenge for jurors is in understanding the defendant's reality and the alternative non-violent options (or lack of options) open to them. Accordingly, reforms related to self-defence rely on juries being able to hear and understand the defendant's story.[428]

7.20 We have identified two options for legislative reform that address the wider problems around community understanding of family violence in the context of self-defence relating to evidential provisions and jury directions. These options could be considered as part of a package of reform alongside substantive reform of self-defence.

Facilitating the reception of evidence of family violence

7.21 In Chapter 6, we identified that several Australian jurisdictions have accepted that, in order to ensure the domestic violence context for homicide is properly taken into account, it is necessary to have specific rules of evidence about what information the court can receive in a homicide trial where self-defence is claimed.[429] The intent of such rules would be that the defendant could adduce evidence of family violence so that the jury could take such evidence into account when reaching its verdict. Such rules would include the type of evidence that constitutes evidence of family violence and its admissibility where self-defence is raised in the context of family violence. The first jurisdiction to introduce specific evidence provisions was Victoria, in 2005. The Victorian provisions (sections 322J and 322M of the Crimes Act 1958 (Vic)) are reproduced in Appendix D of this Issues Paper.

7.22 As noted at paragraph 5.70, it is not clear to us that there is a problem in New Zealand in admitting evidence of family violence and/or expert opinion evidence about family violence under the provisions of the Evidence Act 2006.

428 Fitz-Gibbon and Stubbs, above n 306, at 324.

429 Law Reform Commission of Western Australia, above n 16, at 291; Tasmania Law Reform Institute, above n 251, at 63–64; Select Committee on the Partial Defence of Provocation, above n 339, at 185.

7.23 However, even if this is not a problem in practice, there may still be a strong case for reform.[430] The Tasmania Law Reform Institute recently recommended similar provisions, stating that, while such evidence is already admissible under Tasmania's evidence laws:[431]

> This would have an important declaratory function and also validate the experiences of victims of family violence. It also serves an educative function for the legal profession in relation to the breadth of evidence that may be available to provide a foundation for self-defence.

7.24 Evidential provisions could be provided for by an amendment to the Crimes Act 1961, as Victoria has done, or by amending the Evidence Act 2006. Such an approach was recommended (although not adopted) by the Law Reform Commission of Western Australia.

7.25 An amendment to the Evidence Act would normally be most appropriate where the subject of the amendment is the admissibility of evidence, and the Evidence Act already has specific provisions on the nature of evidence that may or may not be adduced in respect of sexual offences. Section 44 sets out the limits on the nature of evidence that can be given and the questions that can be put relating to sexual cases. The purpose of the provision is to ensure that juries are not influenced by irrelevant issues in considering whether the defendant is guilty of the offence that they have been charged with.

7.26 It would be consistent with the intent of section 44 to include provisions in the Evidence Act that would allow defendants to adduce evidence that indicates the effect of family violence upon victims who commit homicide. Such a provision could also require the jury to consider such evidence when assessing the defendant's belief that their actions were a justifiable use of force to protect themselves or another person. However, if there is a wider declaratory and educative function to the provision, as recognised in Tasmania, an amendment to the Crimes Act may be more appropriate.

QUESTIONS FOR CONSULTATION

Q10 Should reforms be introduced to provide specific guidance on the admissibility of family violence evidence where self-defence is raised in the context of family violence?

Q11 Should such guidance be contained in the Crimes Act 1961 or the Evidence Act 2006?

Jury directions where self-defence is raised in the context of family violence

7.27 Another option is to legislate for a standard jury direction on family violence where self-defence is raised. Jury directions recognise the role trial judges have to play in "assisting juries to recognise the significance of prior violence and to make the necessary connections between expert evidence and the issues at trial."[432]

7.28 Jury directions are a relatively novel approach, although there is precedent in New Zealand in the context of sexual cases in the Evidence Act 2006:

430 Victorian Law Reform Commission, above n 16, at [4.29].

431 Tasmania Law Reform Institute, above n 251, at 63.

432 Victorian Law Reform Commission, above n 16, at [4.140].

127 Delayed complaints or failure to complain in sexual cases

(1) Subsection (2) applies if, in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence.

(2) If this subsection applies, the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence.

7.29 The advantage of a jury direction is that it addresses the problem of community misunderstandings around family violence without altering the substantive law of self-defence.

7.30 A potential downside of requiring a standard jury direction in all cases is the risk that, if the direction does not relate to the facts, it may lose any real meaning, or worse, jurors may look for some deeper meaning. We also note that there is limited evidence of the effectiveness of jury directions. In the context of sexual offending, it is noted that there is little evidence that jury directions aimed at addressing stereotypical and biased expectations of witness behaviour are effective.[433] While there is some evidence to suggest that directions given early during a court case are more effective in preventing preconceptions, directions given later (when jurors may have already made up their minds) have little or no effect on verdicts.[434]

7.31 There are several forms a jury direction could take. It could refer specifically to imminence and proportionality, similar to the recommendation of the Law Commission in Western Australia, set out at paragraph 6.27 above. This option could be adopted in addition to or instead of any of the options addressing the substantive law of self-defence discussed above.

7.32 Alternatively, a jury direction could focus on addressing some of the key community misconceptions around the dynamics of family violence, similar to the jury direction provisions in Victoria, which have recently been endorsed by the Law Reform Institute of Tasmania. These are reproduced in Appendix D. As we noted in Chapter 6, the Victorian Law Reform Commission recommended against standard jury directions, noting that a "one size fits all" approach would not allow sufficient flexibility.[435] The Victorian provisions subsequently introduced in 2014 do, however, allow the judge to tailor the direction to the circumstances of a particular case.[436]

QUESTIONS FOR CONSULTATION

Q12 Should reforms be introduced to provide for jury direction where self-defence is raised in the context of family violence?

Q13 Should any jury direction be focused on addressing common misunderstandings of family violence (the Victorian model) or on directing a jury on how the concepts of imminence and proportionality apply in each individual case?

433 Elisabeth McDonald and Yvette Tinsley "Chapter 8: Evidence Issues" in *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, NZ, 2011) at 372.

434 At 372.

435 Victorian Law Reform Commission, above n 16, at 192.

436 Tasmania Law Reform Institute, above n 251, at 69.

Chapter 8
Partial defences and separate homicide offences

INTRODUCTION

8.1 We noted in Chapter 5 that there may be a legitimate need for the law to provide for greater recognition that the circumstances in which a victim of family violence kills their abuser mitigate the defendant's culpability or blameworthiness for using violence. This could be done through a partial defence or separate homicide offence that operates to reduce a murder charge to a lesser conviction or through more flexible sentencing. Sentencing options are discussed in Chapter 9.

8.2 In this chapter, we examine the options for partial defences and for a new separate homicide offence. These options recognise that, in certain circumstances, it is not appropriate that the defendant be convicted of murder. Instead, they should be convicted of a lesser crime that better reflects their culpability for the homicide.

8.3 As noted in Chapter 1, our terms reference are limited to reviewing the law as it applies to victims of family violence who commit homicide. Thus, our consideration of any partial defence or separate homicide offence is limited to how it would apply to circumstances where a victim of family violence has killed their abuser. However, we recognise that the issues that are raised by any discussion of partial defences or separate homicide offences may have wider application.

ARGUMENTS FOR AND AGAINST PARTIAL DEFENCES AND SEPARATE HOMICIDE OFFENCES

8.4 If there is a legitimate need for law reform to recognise the reduced culpability of victims of family violence who commit homicide, careful consideration must be given to whether a partial defence or separate homicide offence is the best vehicle for achieving this objective.

8.5 There are several arguments that support a partial defence or separate homicide offence.[437] First, a partial defence avoids the stigma of a murder conviction. Even if courts consider mitigating factors at sentencing, a person still bears the label of "murderer". If labels applied by the law have a symbolic function and a stigmatic effect, it may be proper for the law to permit a lesser conviction than murder in cases of culpable, but mitigated, homicide.[438]

8.6 Second, partial defences give juries a route to avoid a binary choice between acquittal and conviction for murder for intentional killings, and separate homicide offences avoid the arguable bluntness of a manslaughter verdict for all culpable homicides that are not murder. In some cases, a manslaughter conviction or a specific homicide conviction may better correspond with the jury's view of justice than a conviction for murder or a complete acquittal. Juries may convict of murder or acquit altogether, where they would have convicted of manslaughter or a specific homicide offence had those options been available. However, as we noted in Chapter

437 These arguments were canvassed in the 2007 Report: Law Commission, above n 8, at 51–52.

438 See, for example, Andrew Ashworth *Principles of Criminal Law* (Oxford University Press, Oxford, 2009) at 250.

3, at present, juries often acquit of murder and convict of manslaughter in the absence of any partial defence. Some such verdicts may result from the prosecution not discharging its burden of proof; others may reflect juror sympathy – so-called "jury nullification". If that is the case, a partial defence or specific homicide offence may legitimise what juries are, in effect, already doing.

8.7 Third, some argue that an assessment of the defendant's culpability should not be concentrated in the hands of judges at sentencing. The law should permit the jury to make decisions, and send signals to judges and the community, about degrees of culpability. Such signals may also provide a factual basis for sentencing. We note that, while there is no minimum sentence for murder and judges can, and do, take into account the presence of family violence and the conduct of the deceased in sentencing for murder, nonetheless, sentences in the cases we have identified are significantly higher compared to manslaughter convictions.

8.8 A partial defence may also influence current charging practices and pre-trial plea discussions by encouraging charging of and/or guilty pleas to manslaughter or a lesser specific offence. As noted above, while most defendants are currently charged with murder, very few are ultimately convicted of murder. A clear recognition of reduced culpability in certain circumstances (through either a partial defence or specific offence) may both encourage guilty pleas and avoid unnecessary trials (where a defendant does not claim self-defence) and encourage defendants with an arguable case in self-defence to proceed to trial, knowing a partial defence is available as a back-stop if the complete defence fails.

8.9 However, the philosophical difficulties of traditional partial defences and separate homicide offences are well rehearsed and were canvassed in the Commission's previous reports, discussed in Chapter 4. They have historically – and, as the Victorian experience demonstrates, recently – tended to be the refuge of people whose actions attract little, if any, moral sympathy.

8.10 Partial defences may also operate against defendants who have been victims of family violence. As noted at paragraph 6.23, partial defences may encourage juries to enter "compromise" verdicts and demur from properly considering or applying self-defence, or they may "normalise", as culpable, homicide by victims of family violence.[439] Further, the availability of a partial defence may result in unjust pressure to plead guilty to manslaughter in circumstances where there is a legitimate case for self-defence.[440] The effect is that the prospect of self-defence-based acquittals will be less than it should be based on a proper assessment of the facts.

8.11 Notwithstanding their difficulties, partial defences remain a favoured means of recognising reduced culpability for homicide in most comparable jurisdictions. This means that the jury can make a specific choice about the culpability of the defendant, based on the legal tests for murder and either a partial defence or separate homicide offence. They will not be left with the opaqueness of a conviction for murder or for manslaughter. At present, the choice between murder and manslaughter is the only option the jury has to distinguish between different levels of culpability. Either a partial defence or a separate homicide offence will enable the jury to more finely determine the different level of culpability that a defendant may have.

439 Sheehy, Stubbs and Tolmie, above n 163, at 395.

440 Select Committee on the Partial Defence of Provocation, above n 339, at 75.

THE OPTIONS

8.12 The key reform options appear to be:

(a) traditional-style partial defences (like provocation or loss of control, excessive self-defence and diminished responsibility);

(b) tailored partial defences, like Queensland's killing for preservation in an abusive relationship;[441] and

(c) a separate homicide offence, like Victoria's now-repealed defensive homicide[442] or New Zealand's infanticide,[443] which is an example of a "dual role" provision that can be both charged as an offence or pleaded as a defence to murder or manslaughter.

8.13 There may be little practical distinction to be drawn between partial defences and separate homicide offences, since both will yield a conviction for homicide that is less culpable than murder. However, partial defences reduce murder to manslaughter in all cases and are, thus, something of a blunt instrument.

8.14 A separate homicide offence may more accurately reflect a defendant's culpability and, therefore, be preferable from a "labelling" perspective.[444] They allow a charge to be laid for the separate offence when the prosecution considers that such a charge more accurately reflects the offender's culpability.

PARTIAL DEFENCES

8.15 Jurisdictions comparable to New Zealand have used a range of partial defences to reflect culpability for homicide that is considered to be less than murder, and several of these could apply where a victim of family violence kills their abuser.

8.16 The most notorious of these partial defences is provocation, which was developed to reflect the social norms that existed at the time of its enactment.[445] As it was the only partial defence available in New Zealand, it was relied on by victims of family violence who had killed the primary perpetrator of the violence.[446] In essence, that required the defendant to claim that they had "snapped" as a result of sustained and repeated violence from the deceased.

8.17 However, in practice, the primary users of the partial defence of provocation were men who had a disposition to violence and who reacted to a slight or insult or unwanted advance by striking out with lethal force. As a consequence, the Law Commission recommended the abolition of the defence in 2001 and 2007.[447] We do not consider there is good reason to revisit the decision of Parliament to abolish the partial defence of provocation, although we do consider the option of "loss of control" below. There are several other partial defences that have developed in other jurisdictions, which we are seeking feedback on.

441 Criminal Code Act 1899 (Qld), s 304B.

442 Crimes Act 1958 (Vic), s 9AD (repealed).

443 Crimes Act 1961, s 178.

444 This was the rationale for Victoria's introduction of "defensive homicide" rather than "excessive self-defence"; a specific offence would mean the basis for reduced culpability would be clear when the jury returned a verdict for the lesser offence. See Toole, above n 26, at 479.

445 Law Commission, above n 8, at [24].

446 See: *R v Erstich*, above n 20; *R v Suluape*, above n 165; *R v King*, above n 273; *R v Neale*, above n 127; *R v Reti* (2009) 271 NZCA.

447 Law Commission, above n 8, at [183].

Excessive self-defence

8.18 Excessive self-defence would apply when a person uses excessive force to defend themselves or another. Defendants in this category would satisfy the first limb of self-defence in that they would have been acting to defend themselves or another. However, they would fail to meet the second limb because they used a level of force that was not reasonable. At present, a person who uses excessive force in response to a threat is at risk of conviction for murder unless they lacked the necessary murderous intent.

8.19 Excessive self-defence as a partial defence exists in the jurisdictions of New South Wales,[448] South Australia[449] and Western Australia.[450] The separate offence of "defensive homicide", in force in Victoria from 2005 to 2014, was also, in essence, a partial defence to murder based on excessive self-defence. That is discussed in more detail below.

8.20 In 2001, the Law Commission concluded that, of all the partial defences it considered, this was the one it would most favour introducing into New Zealand law:[451]

> In provocation and diminished responsibility, the defendant intends to do something that is unlawful. In excessive self-defence, the defendant intends to do something that is lawful within limits. Being closely aligned with the elements of self-defence, it would not involve completely new concepts. Excessive self-defence would only arise when self-defence is a jury issue and would fit easily and naturally into jury directions on self-defence. We do not think that the New Zealand version of the defence would entail the complexities that were associated with the defence in Australia. Further, the link between self-defence and excessive self-defence means it is more appropriate to the circumstances that are typical of the cases involving battered defendants than provocation or diminished responsibility.

8.21 However, the Commission ultimately preferred to rely on a sentencing discretion for murder to accommodate the many and various situations when a lesser culpability in intentional homicide should be recognised.[452]

Loss of control

8.22 This partial defence would be modelled on the English legislation that came into force in 2010,[453] discussed in Chapter 6 at paragraphs 6.50–6.51. The loss of control defence replaced the defence of provocation. While the two defences have similar elements in that they both envisage a reasonable person acting as a result of being seriously wronged by a "qualifying trigger", the new defence is limited to "gross provocation" and specifically excludes sexual infidelity as a reason to invoke the defence.

8.23 The Law Commission for England and Wales considered that the new defence would be of more value to victims of family violence than the defence of provocation. It applies where a defendant's loss of self-control is attributable to the defendant's fear of serious violence from the deceased (against the defendant or another identified person).[454] There is no need for the defendant's loss of self-control to be sudden and overwhelming; it could be a result of sustained violence or fear of violence occurring over a long period of time.

448 Crimes Act 1900 (NSW), s 421.

449 Criminal Law Consolidation Act 1935 (SA), s 15(2).

450 Criminal Code Act Compilation Act 1913 (WA), s 248(3).

451 Law Commission, above n 7, at [67].

452 At [68].

453 Coroners and Justice Act 2009 (UK), s 54.

454 Section 55(3).

8.24 The partial defence of loss of control, as enacted in the United Kingdom, is a general defence. Confining such a defence to victims of family violence would be a challenging exercise of legislative drafting.

Diminished responsibility

8.25 Diminished responsibility is a well-established defence in a number of jurisdictions, identified at paragraph 6.68 above. The principal requirement for the defence is that a person has a "substantial impairment" from being able to act in the manner as a person without such impairment would act.

8.26 The Law Commission recommended against introduction of the defence in 2001. It considered diminished responsibility was a "difficult concept to define clearly"[455] and may be inapt for victims of family violence since it seeks "the reason for the defendant's actions in her mental abnormality, rather than in the desperation of her circumstances".[456] As noted at paragraph 6.69, diminished responsibility was considered, but not recommended, by the Victorian Law Reform Commission for similar reasons.

8.27 We note that a partial defence of diminished responsibility has particular conceptual problems, especially if it is confined to the circumstances of family violence. Such a defence is regarded as more appropriate if it has general application. In any event, a partial defence of diminished responsibility may be an unhelpful lens through which to assess the actions of victims of family violence who kill their abusers. It implies that victims of family violence have lost their ability to make reasonable judgements about their situation.

Killing for preservation in an abusive domestic relationship

8.28 Another option is a specific partial defence for victims of family violence who commit homicide. As discussed in Chapter 6, Queensland has established a specific partial defence in respect of "killing for preservation in an abusive domestic relationship". The partial defence requires that the deceased has committed acts of serious domestic violence in the course of an abusive domestic relationship, that the person believed it was necessary to kill for the person's preservation from death or grievous bodily harm and that the person had reasonable grounds for that belief.[457]

8.29 The specific defence was introduced in response to a recommendation from the Queensland Law Reform Commission (QLRC).[458] In essence, the QLRC identified problems with victims of family violence relying on provocation and recommended a separate tailored defence rather than amending provocation. However, as we discussed at paragraph 6.56, the circumstances that gave rise to the QLRC's recommendation for a specific partial defence were unique to Queensland and arguably do not apply in New Zealand. In particular, Queensland has a substantially narrower version of self-defence that requires an unlawful and unprovoked assault. In New Zealand, it could be argued that, if the defendant satisfied the requirements identified in paragraph 8.26 above, they would have a legitimate case for self-defence (and complete acquittal) under section 48. Further, Queensland, unlike New Zealand, retains a mandatory life sentence for murder. The QLRC's reference was also limited to considering provocation rather than the law of homicide (and self-defence) as a whole.

455 Law Commission, above n 7, at 47.

456 At 47.

457 Criminal Code 1899 (Qld), s 304B.

458 Queensland Law Reform Commission, above n 182.

8.30 Nonetheless, there could be room for a partial defence of "excusable self-preservation" in New Zealand, although the elements of such a defence would need to be carefully crafted. It would be intended to capture cases where the defendant is responding to a long history of family violence, and those circumstances mean they should not be fully culpable for the offence. Such a specific partial defence has some support from New Zealand commentators.[459] In 2001 the Law Commission considered a partial defence that would apply to:[460]

> . . . any woman causing the death of a person:
>
> (a) with whom she has, or had, a familial or intimate relationship; and
>
> (b) who has subjected her to racial, sexual and/or physical abuse and intimidation to the extent that she:
>
> (i) honestly believes there is no protection nor safety from the abuse; and
>
> (ii) is convinced the killing is necessary for her self preservation.

8.31 However, the majority of submitters in 2001 did not favour a specific defence, and the Commission concluded sentencing discretion for murder was preferable.[461]

A SEPARATE HOMICIDE OFFENCE

8.32 An alternative to a partial defence to murder is a separate homicide offence. While both options share the same purpose – to recognise the reduced culpability of a defendant who might otherwise be charged and convicted of murder – a separate homicide offence is structurally different in that it would create a separate offence in the Crimes Act. That means a person would be able to be charged with the separate homicide offence instead of murder if the circumstances of the offending reflected the elements of the offence.

8.33 A separate homicide offence would be more specific than the general offence of manslaughter, which covers a wide range of unlawful actions from the relatively minor that nevertheless cause the death of another through to actions that stop just short of murder. It could be limited to victims of family violence, along the lines of the offence of infanticide, in section 178 of the Crimes Act, or of general application, akin to the Victorian experience of defensive homicide.

8.34 Infanticide is provided for in section 178 of the Crimes Act, which states that a woman can be charged with infanticide if she causes the death of her child in a manner that amounts to culpable homicide and where, at the time of the offence, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or some other consequent disorder.[462] Section 178(2) also provides that, where a defendant is charged with murder or manslaughter, the jury may alternatively return a verdict of infanticide. The maximum penalty for infanticide is three years' imprisonment.

8.35 In Victoria, a separate offence of "defensive homicide" existed between 2005 and 2014 and reduced culpability from murder to manslaughter. It essentially applied in cases of "excessive self-defence". Although it had been introduced to provide for victims of family violence who commit homicide, it was of general application, and as we discuss at paragraphs 6.64–6.66 above, this quickly proved to be a problem, as it was primarily used by male offenders with a

459 Simester and Brookbanks, above n 129, at 525–526.

460 Law Commission, above n 7, at 27.

461 At 30.

462 Or by reason of the effect of lactation or any disorder consequent upon lactation. Crimes Act 1961, s 178.

violent disposition.[463] It was subsequently repealed in 2014.[464] The Victorian experience suggests that, if such an offence is to be publicly acceptable, it should be limited to victims of family violence who commit homicide.

8.36 A separate homicide offence, as we envisage it, would be limited to victims of family violence who kill their abuser. The key elements of the offence would be:

(a) the defendant was a victim of family violence perpetrated by the deceased;

(b) as a result of the family violence, the defendant considered they had no option other than to seriously injure or kill the deceased – that is, the defendant was acting to defend themselves or another in the circumstances as they perceived them to be; but

(c) the force used by the defendant was not reasonable in the circumstances as the defendant believed them to be.

8.37 This would not affect the operation of self-defence in section 48 of the Crimes Act, which, as a general defence, could also be argued where a defendant is charged with this offence.

8.38 The statute would prescribe a maximum sentence for this offence. Since the offence is envisaged to be less culpable than murder, the maximum sentence would not be life imprisonment. Our preliminary view is that a maximum sentence should be no more than 10 years. This would be consistent with the minimum non-parole period for life imprisonment.[465] Other offences with a maximum term of imprisonment of 10 years include being a party to murder outside New Zealand,[466] conspiracy to commit murder[467] and injuring with intent.[468] However, we note that the statutory maximum penalty for infanticide is three years' imprisonment.[469]

SUMMARY

8.39 As we noted in Chapter 1 and at the beginning of this chapter, our terms of reference are limited to reviewing the law as it applies to victims of family violence who commit homicide. Our general approach is to limit any reform to victims of family violence only unless we can be satisfied that there are strong reasons for recommending general reform and that the risk of unintended consequences is low.

8.40 Broader reform of the criminal law to generally introduce partial defences is arguably beyond the scope of this reference. There are also significant risks of unintended consequences of such broad reforms. This problem was very evident with the 2005 reforms in Victoria, as discussed above. Accordingly, we are currently minded to limit our consideration of a partial defence or separate offence specific to victims of family violence, notwithstanding the challenges of doing so. However, we would welcome submissions on this issue.

8.41 We note that none of the options considered above would capture all scenarios involving victims of family violence who commit homicide. Each option focuses on different elements of the offending. Excessive self-defence, killing for preservation, and a separate homicide offence as described above all require an honest belief that the defendant's actions were necessary to defend him or herself or another. Provocation or "loss of control", in contrast, requires a loss

463 Victoria Department of Justice, above n 322, at 8.

464 Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), s 3.

465 Sentencing Act 2002, s 103.

466 Crimes Act 1961, s 68.

467 Ibid, s 175.

468 Ibid, s 189.

469 Crimes Act 1961, s 178.

of control by the defendant, triggered by the deceased's "provocative conduct". Diminished responsibility requires the defendant to argue they were suffering from an abnormality of the mind.

8.42 We recognise that there are significant challenges with partial defences and, to a lesser extent, separate homicide offences. There are practical and theoretical difficulties in introducing a defence or offence restricted to particular categories of defendant or circumstances of offending, and definition issues will inevitably arise.

8.43 We also note the criticism that a focus on partial defences and separate homicide offences may detract attention from meaningful reform of self-defence and sentencing, and put defendants, like victims of family violence, in an invidious position. The Commission made this point in its 2007 Report.[470] Queensland's "killing for preservation" defence has also attracted the same criticism.[471] We are also concerned partial defences are, in general, a less than effective labelling solution.

Issues for public feedback

8.44 This Issues Paper seeks feedback on the merits of partial defences or a separate homicide offence. We are particularly interested in views on the application of such options in practice. We consider that it is important that we receive feedback from both those with direct experience of cases involving victims of family violence who commit homicide and from the legal profession and members of the public generally.

8.45 We invite views on the option of partial defences. A partial defence could have advantages and disadvantages over the existing choice juries have to find a person charged with murder guilty of manslaughter.[472] It would effectively make plain the reasoning of the jury, which is currently opaque, when a person is convicted of manslaughter instead of murder.

8.46 The second option – enactment of a separate homicide offence – would be novel if it applied only to victims of family violence. However, there is some precedent for a separate offence in the offence of infanticide. A separate homicide offence, limited to circumstances of family violence, would be capable of more precisely reflecting culpability than a generic manslaughter verdict. As a discrete offence, it would have a tailored maximum penalty that reflected the gravity of the crime.

8.47 We invite views on the workability and merit in principle of a separate homicide offence and what might be the most appropriate penalty for such an offence. We also invite discussion of principled or practical objections to confining any separate homicide offence to victims of family violence.

470 Law Commission, above n 8, at 82.

471 Edgely and Marchetti, above n 384.

472 Criminal Procedure Act 2011, s 110.

QUESTIONS FOR CONSULTATION

Q14 Should a new partial defence (or separate homicide offence) – whether of general application or specific to victims of family violence – be introduced in New Zealand?

Q15 Would you support the introduction of a new partial defence or separate homicide offence if it applied only in circumstances where victims of family violence commit homicide?

Q16 If a new partial defence is introduced, would you favour a partial defence based on one of the traditional defences of excessive self-defence, loss of control or diminished responsibility, or a specific defence of self-preservation in the context of an abusive relationship?

Q17 As an alternative, would you prefer the introduction of a separate homicide offence in circumstances where the defendant was acting defensively but with excessive force?

Chapter 9
Other options for reform

GREATER FLEXIBILITY IN MURDER SENTENCING

9.1 Along with verdicts on guilt, sentencing is a part of the criminal justice process that permits assessment of a defendant's culpability. Unlike verdicts, which are "black and white",[473] however, sentencing is better suited to nuanced evaluation of culpability. The Commission emphasised this in its 2007 Report when it concluded sentencing is the best forum for consideration of matters otherwise addressed by partial defences. By partial defences, it considered, "the law… treats as black and white issues that are more appropriately graded along a continuum".[474]

9.2 Murder sentencing is more flexible now than before, due to the abolition of the mandatory sentence of life imprisonment, but there remains a strong presumption in favour of that sentence. Currently, a defendant convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, such sentence would be manifestly unjust.[475] In *R v Rapira*, the Court of Appeal confirmed the threshold for rebutting the section 102 presumption is high and likely to be met only in exceptional cases.[476] Cases involving evidence of "severe and prolonged abuse" may, however, qualify.[477]

9.3 As noted above, we have identified four cases where a victim of family violence has been convicted of murder since 2001, three of which pre-dated the repeal of provocation. In two of those cases (*Wihongi* (2009) and *Rihia* (2010)), the presumption of life imprisonment was displaced, but the finite terms imposed were substantially higher than those in earlier cases where a victim of family violence was convicted of manslaughter.[478]

9.4 Further flexibility in murder sentencing could be achieved in a number of ways. One option is to lower the section 102 threshold for imposition of a sentence of less than life imprisonment. Another is to provide guidance on the application and displacement of section 102 where family violence is at issue.

9.5 A third possibility is to expand on the mitigating factors listed in section 9 and/or provide guidance on sentence tariffs for cases of this kind. Young and King have noted that, although the inclusion of aggravating and mitigating factors in the Sentencing Act largely only codified the approach already being taken by the courts, the Act's inclusion of a list of particular factors is significant because it "demonstrates Parliament's view that the specification of aggravating and mitigating factors is primarily a legislative rather than a judicial responsibility".[479] Inclusion of further legislative guidance on the potentially mitigating effect of family violence would, therefore, seem to be consistent with the principles of the Sentencing Act.

473 Law Commission, above n 8, at 82.

474 At 56–57 and 72.

475 Sentencing Act 2002, s 102(1).

476 *R v Rapira*, above n 152, at [120].

477 At [121].

478 In *R v Wihongi*, above n 84, the defendant received 12 years' imprisonment. In *R v Rihia*, above n 126, the defendant received 10 years' imprisonment.

479 Warren Young and Andrea King "Sentencing Practice and Guidance in New Zealand" (2010) 22 Federal Sentencing Reporter 254 at 255.

QUESTIONS FOR CONSULTATION

Q18 Do you think there should be any changes to sentencing law (for example, the introduction of further mitigating factors, or guidance on displacement of the threshold in section 102 of the Sentencing Act 2002) to better provide for victims of family violence who commit homicide?

IMPROVING THE PROSECUTION GUIDELINES

9.6 As discussed in Chapter 3, Sheehy, Stubbs and Tolmie argue that prosecutors in Australia, Canada and New Zealand are excessively inclined to charge victims of family violence who have committed homicide with murder:[480]

> The data raise the question of whether prosecutors are exercising their public office in a manner which serves the interests of justice. In making this point we recognise that charging of murder may be standard prosecutorial practise in some of the jurisdictions under examination and thus may also operate unfairly in respect to other classes of defendants.

9.7 They identify a "pressing need" for the development of appropriate guidelines governing the prosecutorial charging practices in, and conduct of, such cases.[481] Prosecutors in New Zealand are governed by the *Solicitor-General's Prosecution Guidelines*.[482] These Guidelines set out the criteria for determining the circumstances under which charges are laid. The Guidelines are of general application. There are no specific guidelines as to when murder or manslaughter charges should be laid against victims of family violence.

9.8 The most relevant is *Guideline 5: The Decision to Prosecute.* This Guideline covers all the factors to be taken into account in the prosecution decision. In essence, the test is whether there is sufficient evidence to provide a reasonable prospect of conviction and whether it is in the public interest to prosecute.

9.9 The latter element is not so relevant in the case of serious assaults or homicides, as the seriousness of the offence will usually make prosecution in the public interest. We understand that such cases will usually be determined on the evidential tests. However, there is a caveat to this point. The prosecutor must properly assess whether self-defence can be legitimately pleaded and its prospects of success. If it is probable that self-defence will succeed, a prosecution should not be undertaken.

9.10 *Guideline 8. The Choice of Charges* is also relevant. Guideline 8.1 states that the nature of the charge "should adequately reflect the criminality of the defendant's conduct as disclosed by the facts to be alleged at trial". Thus, a prosecutor ought to make an informed judgement as to whether the proper charge should be murder or manslaughter. The prosecutor ought not to take a default position that the jury can determine this question.

9.11 Guideline 8.2 also provides that a prosecutor should not inflate the seriousness of the charge in order to increase the likelihood that the defendant will offer to plead guilty to a lesser charge.

9.12 As noted at paragraph 3.28 above and while mindful of the small size of the case analysis, the rate of murder conviction in the cases we have identified could suggest the Prosecution

480 Sheehy, Stubbs and Tolmie, above n 163, at 395.

481 At 399.

482 Crown Law, above n 155.

Guidelines (which comprise an evidential sufficiency test and a public interest inquiry) are not being properly applied or that alternative considerations should apply in these cases.

9.13 In New South Wales, the data compiled by Sheehy et al[483] concerned the Select Committee on the Partial Defence of Provocation to such extent that it recommended that the Director of Public Prosecutions give serious consideration to the adequacy of the existing Prosecution Guidelines as they relate to homicides occurring in a domestic context.[484] The Select Committee was of the view that specific guidelines were required to assist prosecutors to determine the appropriate charge to lay against defendants in circumstances where there is a history of violence towards the defendant.[485]

9.14 One option could be to recommend the Solicitor General considers including guidance in the Prosecution Guidelines on prosecutorial consideration of the circumstances of victims of family violence. This could be included in Guideline 5.4 and in the public interest considerations for prosecution in Guideline 5.8.

QUESTIONS FOR CONSULTATION

Q19 Do you consider the Prosecution Guidelines should include specific guidance on charging and/or plea discussions where family violence against a defendant accused of committing homicide is in issue?

IMPROVING UNDERSTANDING OF THE DYNAMICS OF FAMILY VIOLENCE

9.15 Many argue that effective change cannot be achieved through reform to homicide defences and/or sentencing provisions alone.[486] Community understanding of the dynamics of family violence, and the realities faced by victims of family violence who commit homicide, need to improve. The FVDRC identifies a wider concern about how family violence is conceptualised within professional practice, and calls for a conceptual shift that needs to inform professional education and training, policy development, assessment frameworks and processes within and between organisations.[487]

9.16 Law reform bodies in Australia have recognised that a focus on the "doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice".[488] Specific evidential provisions, that set out that family violence evidence is relevant and admissible to a self-defence claim, aim to improve the jury's understanding of the violence the defendant was subjected to. Jury directions are also intended to address some common community misunderstandings around family violence. These options for reform are discussed in Chapter 7.

9.17 As noted in Chapter 6, several Australian law reform bodies have also recommended non-doctrinal legal reforms, such as professional legal and judicial education, and a family violence bench book to provide guidance to the judiciary. Such lateral reforms are intended to precipitate cultural change within the legal system.

483 That data indicated that prosecutors were charging murder in matters involving "battered women type defendants", in circumstances where there were defensive elements and where a plea to manslaughter was subsequently accepted in exchange for the murder charge being dropped. As noted above, there are few cases in New Zealand that are resolved by way of manslaughter plea, but a much larger number result in a manslaughter verdict at trial.

484 Select Committee on the Partial Defence of Provocation, above n 339, at 167.

485 At 167–168.

486 Fitz-Gibbon and Stubbs, above n 306, at 331.

487 Family Violence Death Review Committee, above n 2, at 17.

488 Australian Law Reform Commission and NSW Law Reform Commission, above n 10, at 651.

Educating the judiciary and legal profession

9.18 Given the extent of the problem of family violence in New Zealand, our preliminary view is that there is room to improve the understanding of the judiciary and legal profession of the social context, nature and dynamics of family violence.

9.19 However, we are also conscious that, given the low number of homicides committed by victims of family violence in New Zealand, any education or training would have to be carefully constructed so that it is relevant and effective.

9.20 We note that the issue of education is part of a wider identified need for professional education and training about family violence, recommended for example by the FVDRC.[489] A similar finding was also made following a 2008 survey of attitudes about family violence conducted for the Ministry of Social Development:[490]

> There may be a need to dispel myths around violence within families, such as why women stay, barriers to leaving, the cycle of violence, the negative effects of both witnessing and experiencing violence, the trauma caused by non-physical violence, and negative outcomes of violence.
>
> Such education may help people understand the real truths to violence within families and may also help to strengthen attitudes that support victim safety, perpetrator accountability and personal relevance to take action.
>
> Responses also highlight the possible need for education about safety for women leaving abusive relationships. While it is important that family, friends and communities support women to leave abusive relationships, safety at the time of separation is not assured.
>
> …
>
> Educating New Zealanders about supporting victims to leave and making sure victims are safe is essential. Education on why women stay in violent relationships, and barriers to leaving, may help people understand the dynamics of living with violence and the level of support victims need before and during the leaving process.
>
> Such education may also help to strengthen attitudes that support victim safety, perpetrator accountability and personal relevance to take action.

QUESTIONS FOR CONSULTATION

Q20 Would you support further education or training on the dynamics of family violence for those operating within the criminal justice system, including lawyers, judges, police and jurors?

489 Family Violence Death Review Committee, above n 2, at 105.

490 Fleur McLaren, above n 293, at 26.

Appendix A
Terms of Reference

The Law Commission will re-consider whether the law in respect of a victim of family violence who commits homicide can be improved. As part of this review the Law Commission shall consider:

(a) Should the test for self-defence, in section 48 of the Crimes Act 1961, be modified so that it is more readily assessable to defendants charged with murder who are victims of family violence; and

(b) Whether a partial defence for victims of family violence who are charged with murder is justified and if so in what particular circumstances; and

(c) Whether current sentencing principles properly reflect the circumstances of victims of family violence who are convicted of murder?

Context of the review

In 2001 the Law Commission published a Report examining the legal defences available to protect those who commit criminal offences as a reaction to domestic violence: "*Some Criminal Defences with Particular Reference to Battered Defendants*".[491] Of particular note the Report recommended repeal of the partial defence to murder of provocation, an amendment to the defence of self-defence and abolition of the mandatory sentence of life imprisonment for murder.

In 2002 Parliament introduced discretionary sentencing in murder cases, subject to a presumption in favour of life imprisonment.

In 2007 the Law Commission published a second Report: *"The Partial Defence of Provocation"* LCR98.[492] The Report again recommended repeal of this partial defence. The Commission concluded that its major deficiency was that the partial defence of provocation had been primarily used by violent offenders in respect of unwelcome advances or slights against their honour. It was seldom available to victims of family violence. Given this conclusion, the Commission re-examined whether the defence of self-defence should be amended to ensure that it is available to victims of family violence in appropriate cases. In answering this question the Commission noted the work undertaken as part of the Government Response to the Commission's 2001 Report. That work concluded that amendment to section 48 of the Crimes Act 1961 (self-defence and defence of another) was not required to meet the needs of battered defendants, and might be undesirable in light of the fact that the section is generally regarded as working well. The Ministry reviewed recent case law, which tended to suggest that problems previously encountered were being ironed out in the courts; it thus concluded that the real problem previously was one of social awareness, rather than of law. The Ministry found that overwhelmingly stakeholders were comfortable with letting matters take their course. The Commission stated: "we are content at this stage to concur with the Ministry's conclusions".

In 2009 Parliament repealed section 169 of the Crimes Act 1961, which had provided for the partial defence to murder of provocation.

491 Law Commission, above n 7.

492 Law Commission, above n 8.

Since the 2009 repeal, the Family Violence Death Review Committee has been gathering data on all family violence homicides in New Zealand. In its Fourth Annual Report published in 2014, the Committee concluded that New Zealand is out of step in how the criminal justice system responds to victims of family violence when they face criminal charges for killing their abusive partners. To address this, the Committee recommended that the Government re-examine the options for amending the defence of self-defence and introducing a targeted partial defence to murder.

The Government has asked the Law Commission to conduct the re-examination recommended by the Family Violence Death Review Committee.

Scope of review

The reference forms part of a broader range of initiatives relating to family violence being undertaken by the Ministry of Justice. It also forms part of two other projects being undertaken by the Law Commission, being alternative trial processes with particular focus on sexual offence cases and whether a separate offence of non-fatal strangulation is desirable.

Appendix B
Summary of New Zealand cases since 2001

CASES INVOLVING VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE BEFORE THE COURTS BETWEEN 2001–2015									
Case	**Year of trial/ plea**	**Year of homicide**	**Original charge**	**Guilty plea?**	**Outcome**	**Act that led to death**	**Self-defence claimed?**	**Provocation claimed?**	**Sentence**
R v Suluape[493]	2001	1999	Murder	No	Manslaughter	Defendant struck the deceased several times on the head with the blunt end of an axe after deceased told the defendant he was leaving her for another woman.	No	Yes	Seven and a half years' imprisonment, reduced on appeal to five years' imprisonment
R v Erstich[494]	2002	2001	Murder	No	Manslaughter	Visit from deceased (father) the day prior caused defendant (son) to expect violence. Defendant walked into house of deceased and shot him in chest with shotgun.	No	Yes	Two years' supervision, uplifted on appeal to two years' imprisonment, suspended for two years and to two years' supervision with special conditions
R v Stephens[495]	2002	2001	Murder	No	Acquittal	Defendant stabbed deceased in the chest in response to a physical assault that was witnessed by others (during which deceased strangled and punched the defendant).	Yes	No	N/A

493 *R v S* HC Auckland T.001252, 12 September 2000 (evidence application); *R v Suluape* (2002) 19 CRNZ 492 (CA) (appeal of sentence).

494 *R v Erstich* (2002) 19 CRNZ 419 (CA) (appeal of sentence).

495 No reported judgment. See: Bridget Carter "Jury accepts battered-wife defence in murder trial" *The New Zealand Herald* (online ed, Auckland, 24 April 2002); and Bridget Carter "He didn't deserve to die insists abuser's mother" *The New Zealand Herald* (online ed, Auckland, 25 April 2002).

CASES INVOLVING VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE BEFORE THE COURTS BETWEEN 2001–2015									
Case	**Year of trial/ plea**	**Year of homicide**	**Original charge**	**Guilty plea?**	**Outcome**	**Act that led to death**	**Self-defence claimed?**	**Provocation claimed?**	**Sentence**
R v Raivaru[496]	2005	2004	Manslaughter	Yes	Manslaughter	Killed step-father with single stab with knife after intervening in physical assault between mother and defendant. Both defendant and deceased had consumed alcohol.	N/A	N/A	Four years' imprisonment
R v Stone[497]	2005	2005	Manslaughter	Yes	Manslaughter	Single stab wound to the leg following physical assault. Both had consumed alcohol and drugs.	N/A	N/A	Three years' imprisonment
R v King[498]	2005	1988	Murder	No	Manslaughter	Defendant put 30+ sleeping pills in deceased's food following verbal confrontation in which the deceased threatened the defendant and caused her to expect violence.	No	Yes	Four years, three months' imprisonment
R v Mahari[499]	2007	2006	Murder	No	Manslaughter	Defendant stabbed deceased once, to shoulder area behind neck in response to multiple physical assaults and the deceased then forcing his way into the cabin. Both had consumed alcohol.	Yes	No	Three years, six months' imprisonment
R v Reti[500]	2008	2007	Murder	No	Murder	Defendant stabbed deceased twice, several hours apart. Defendant claimed she grabbed the knife, the deceased kicked her in the stomach and she retaliated by attacking him with the knife. Both had consumed alcohol.	No	Yes	Life imprisonment with minimum non-parole period of 10 years (murder); five years' imprisonment (wounding with intent)
R v Brown[501]	2009	2008	Murder	Yes	Manslaughter	Defendant stabbed deceased once in the chest following argument. Both had consumed alcohol.	N/A	N/A	Five years, six months' imprisonment

496 *R v Raivaru* HC Rotorua CRI-2004-077-1667, 5 August 2005 (sentencing notes).

497 *R v Stone* HC Wellington CRI-2005-078-1802, 9 December 2005 (sentencing notes).

498 *R v King* CA71/06, 11 August 2006 (appeal of sentence).

499 *R v Mahari* HC Rotorua CRI-2006-070-8179, 14 November 2007 (sentencing notes).

500 *R v Reti* HC Whangarei CRI-2007-027-002103, 9 December 2008 (sentencing notes); *R v Reti* [2009] NZCA 271 (appeal of verdict).

CASES INVOLVING VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE BEFORE THE COURTS BETWEEN 2001–2015									
Case	**Year of trial/ plea**	**Year of homicide**	**Original charge**	**Guilty plea?**	**Outcome**	**Act that led to death**	**Self-defence claimed?**	**Provocation claimed?**	**Sentence**
R v Neale[502]	2009	2007	Murder	No	Murder	Defendant stabbed the deceased nine times as deceased got out of shower following argument. Unknown if confrontation was violent. Defence argued deceased's emotional and physical abuse drove her to stab him.	Yes	Yes	Life imprisonment with minimum-non parole period of10 years
R v Tamati[503]	2009	2009	Manslaughter	Yes	Manslaughter	Defendant stabbed deceased once behind left knee in response to physical assault.	N/A	N/A	Two years' imprisonment
R v Fairburn[504]	2009	2007	Murder	No	Manslaughter	Defendant suspected deceased of sexually abusing daughter. Following argument the defendant got in her car, the deceased jumped on bonnet. Defendant drove 13km before crashing car, killing deceased. Deceased had consumed alcohol.	Yes	No	Life imprisonment with minimum non-parole period of 10 years (first trial); four years' imprisonment (second trial)
R v Wickham[505]	2010	2009	Murder	No	Manslaughter	Defendant shot victim in chest with shotgun in response to physical assault.	Yes	No	12 months' home detention (W had multiple sclerosis)
R v Wihongi[506]	2010	2009	Murder	No	Murder	Defendant stabbed deceased twice following argument in which deceased demanded sex. Both had consumed alcohol.	No	No	Eight years' imprisonment, uplifted on appeal to 12 years' imprisonment
R v Ford[507]	2011	2010	Murder	No	Acquittal	Single stab wound in response to physical assault that was witnessed by others. Deceased had consumed alcohol.	Yes	No	N/A

501 *R v Brown* HC Napier CRI-2008-020-003130, 24 November 2009 (sentencing notes).

502 *R v Neale* [2008] BCL 939 (evidence application); *R v Neale* HC Auckland CRI-2007-004-3059, 12 June 2009 (sentencing notes); *Neale v R* [2013] NZCA 167 (application for directions on appeal).

503 *R v Tamati* HC Tauranga CRI-2009-087-1868, 27 October 2009 (sentencing notes).

504 *R v Fairburn* [2010] NZCA 44 (appeal of verdict and admission of further evidence); *Fairburn v R* [2010] NZSC 159 (admission of further evidence); *R v Fairburn* [2012] NZHC 28 (sentencing notes).

505 No reported judgment. Discussed in Midson, above n 172, at 231; See also: Victoria Robinson "Home detention for killing husband" (20 December 2010) Stuff < www.stuff.co.nz >; and "Murder-accused lived in fear", above n 171.

506 *R v Wihongi* HC Napier CRI 2009-041-002096, 30 August 2010 (sentencing notes); *R v Wihongi* [2012] NZCA 592, [2012] 1 NZLR 775 (appeal of sentence); *R v Wihongi* [2012] NZSC 12 (appeal of sentence).

CASES INVOLVING VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE BEFORE THE COURTS BETWEEN 2001–2015									
Case	**Year of trial/ plea**	**Year of homicide**	**Original charge**	**Guilty plea?**	**Outcome**	**Act that led to death**	**Self-defence claimed?**	**Provocation claimed?**	**Sentence**
R v Woods[508]	2011	2010	Murder	Yes	Manslaughter	Defendant stabbed deceased twice following a physical assault. Both had consumed alcohol.	N/A	N/A	Four years' imprisonment
R v Hu[509]	2011	2010	Manslaughter	Yes	Manslaughter	Defendant stabbed deceased once following argument.	N/A	N/A	Two years, seven months' imprisonment
R v Rihia[510]	2012	2010	Murder	Yes	Murder	Defendant stabbed deceased once following argument. Both had consumed alcohol.	N/A	N/A	10 years' imprisonment, no MPI
R v Rakete[511]	2013	2011	Manslaughter	No	Manslaughter	Defendant hit deceased over head with pepper grinder, causing him to hit his head on the kitchen bench, following argument during which deceased was acting threatening. Both had consumed alcohol.	Yes	No	Two years' imprisonment
R v Paton[512]	2013	2012	Murder	No	Manslaughter	Defendant stabbed deceased once in the neck in response to physical assault. Both had consumed alcohol.	Yes	No	Five years, three months' imprisonment
R v Gerbes[513]	2014	2012	Manslaughter	No	Acquittal	Defendant stabbed deceased multiple times in response to physical assault.	No	No	N/A

507 *R v Ford* HC Auckland CRI-2010-044-000132, 22 July 2011 (evidence application).

508 *R v Woods* HC Gisborne CRI-2011-016-000048, 10 June 2011(sentencing notes).

509 *R v Hu* [2012] NZHC 54 (sentencing notes).

510 *R v Rihia* [2012] NZHC 2720 (sentencing notes).

511 *R v Rakete* [2013] NZHC 1230 (sentencing notes).

512 *R v Paton* [2013] NZHC 21 (sentencing notes).

513 No reported judgment. See: "Hung jury in manslaughter trial" (13 February 2014) Stuff < www.stuff.co.nz > ; Tracey Chatterton "Accused 'just needed to call out'" (12 February 2014) Stuff < www.stuff.co.nz > .

CASES INVOLVING VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE BEFORE THE COURTS BETWEEN 2001–2015									
Case	**Year of trial/ plea**	**Year of homicide**	**Original charge**	**Guilty plea?**	**Outcome**	**Act that led to death**	**Self-defence claimed?**	**Provocation claimed?**	**Sentence**
R v Keefe[514]	2014	2013	Murder	No	Acquittal	Defendant stabbed deceased once in response to physical assault that was witnessed by others. Both had consumed alcohol.	Yes	No	N/A
R v Whararau[515]	2014	2012	Murder	No	Manslaughter	Defendant stabbed deceased once in the chest in response to physical assault.	Yes	No	Three years, two months' imprisonment, upheld on appeal

514 No reported judgment. See: "Jessica Keefe not guilty of murder", above n 64; "Murder charge unwarranted - lawyer", above n 64.

515 *R v Whararau* [2014] NZHC 1857 (interlocutory decision); *R v Whararau* [2014] NZHC 2535 (sentencing notes); *R v Whararau* [2015] NZCA 299 (appeal of sentence).

Appendix C
Homicide defences in other countries

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
Victoria *Crimes Act 1958 (Vic)*	(a) D believes that the conduct is necessary to defend D or another person from the infliction of death or really serious injury; and (b) the conduct is a reasonable response in the circumstances as D perceives them (section 322K). Where family violence is in issue, D may believe that their conduct is necessary, and the conduct may be reasonable, even if D is responding to a harm that is not immediate, or the response involves the use of force in excess of the force involved in the harm or threatened harm (section 322M).	**Duress** – complete defence, applies only if threat is to inflict death or really serious injury (section 322O). Where family violence is in issue, evidence of family violence may be relevant in determining whether a person has carried out conduct under duress (section 322P). **Sudden or extraordinary emergency** – complete defence (section 322R).	Life imprisonment or for such other term as the court determines (section 3(1)). *Sentencing guidelines contained in Sentencing Act 1991 (Vic) sections 5 and 5A.*	Significant reforms were introduced in 2005 following a review of homicide law by the Victorian Law Reform Commission. Reforms included amending self-defence, abolishing provocation and introducing defensive homicide (substantially similar to partial defence of excessive self-defence). Further reforms introduced in 2014, including repeal of defensive homicide and additional changes to self-defence (including introduction of a jury direction on relevance of family violence where self-defence is in issue).

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
Western Australia *Criminal Code Act Compilation Act 1913 (WA)*	(a) D believes the act is necessary to defend D or another from a harmful act, *including a harmful act that is not imminent;* and (b) D's harmful act is a reasonable response in the circumstances as D believes them to be; and (c) there are reasonable grounds for those beliefs (section 248(4)).	**Excessive self-defence** – partial defence engaged where the second limb of self-defence is not met (section 248(3)). **Duress** – complete defence (section 32). **Emergency** – complete defence (section 25). **Unwilled conduct** – complete defence (section 23A). **Accident** – complete defence (section 23B).	Presumptive life sentence unless: (a) that sentence would be clearly unjust given the circumstances of the offence and D; and (b) D is unlikely to be a threat to the safety of the community when released from imprisonment; in which case D is liable to 20 years' imprisonment (section 279(4)).	Reforms introduced in 2008 following review of the law of homicide by the Law Reform Commission of Western Australia. Reforms included changes to self-defence, abolition of provocation and introduction of excessive self-defence.
New South Wales *Crimes Act 1900 No 40 (NSW)*	(a) D believes conduct is necessary: (i) to defend D or another; or (ii) to prevent or terminate the unlawful deprivation of D's liberty or the liberty of another person; and (b) the conduct is a reasonable response in the circumstances as D perceives them (section 418).	**Extreme provocation** – partial defence (section 23). **Excessive self-defence** – partial defence, engaged when second limb of self-defence not met (section 421). **Substantial impairment by abnormality of mind** – partial defence (section 23A).	Liable to life imprisonment or such term as the court determines (section 19A). *See also: Crimes (Sentencing Procedure) Act 1999*	Provocation amended in 2014 following an inquiry by the Select Committee on the Partial Defence of Provocation. Provocation amended to make it more accessible to victims of family violence (by providing that the provocative conduct need not have occurred immediately before the killing), and to provide that certain kinds of conduct may not constitute provocation. Select Committee recommended new evidential provisions for self-defence where family violence is in issue, based on the Victorian amendments, but this has not yet resulted in legislative reform. Government has agreed to a review of the law of homicide by the Law Reform Commission in five years' time, as recommended by the Select Committee.

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
Queensland *Criminal Code 1899 (Qld)*	Self-defence against unprovoked assaults (s 271(2)): (a) the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and (b) D believes, on reasonable grounds, that D cannot otherwise preserve the person defended from death or grievous bodily harm, (c) it is lawful for D to use any such force to the assailant as is necessary for defence. Self-defence against provoked assaults (s 272): (a) When D has unlawfully assaulted another or has provoked an assault from another, and (b) that other assaults D with such violence as to cause reasonable apprehension of death or grievous bodily harm, and (c) that assault induced D to believe, on reasonable grounds, that it is necessary for D's preservation from death or grievous bodily harm to use force in self-defence, (c) D is not criminally responsible for using any such force as is reasonably necessary for such preservation. Does not apply where D first began the assault with the intent to kill or do grievous bodily harm.	**Killing for preservation in an abusive domestic relationship** – partial defence (section 304B), applies if: (a) deceased committed acts of serious domestic violence against D in the course of an abusive domestic violence; (b) D believes it necessary for their preservation from death or grievous bodily harm to do the act or make the omission that causes death; and (c) D has reasonable grounds for the belief having regard to the abusive relationship and all circumstances of the case. **Provocation** – partial defence (section 304). **Diminished responsibility** – partial defence (section 304A).	Mandatory life sentence (section 305).	Provocation restricted in 2010 following review by Queensland Law Reform Commission in 2008. Defence of killing for preservation in an abusive domestic relationship was introduced in 2012, in response to a recommendation of the Law Reform Commission to consider a specific partial defence to address the problems faced by victims of family violence in relying on the partial defence of provocation.

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
ACT *Crimes Act 1900 (ACT)* *Criminal Code 2002 (ACT)*	(a) D believes the conduct is necessary (i) to defend D or another; or (ii) to prevent or end the unlawful imprisonment of himself or herself or another; and (b) the conduct is a reasonable response in the circumstances as D perceives them (Criminal Code, s 42).	**Provocation** – partial defence (Crimes Act, section 13). **Diminished responsibility –** partial defence (Crimes Act, section 14). **Duress** – complete defence (Criminal Code, section 40). **Sudden or extraordinary emergency** – complete defence (Criminal Code, section 41). **Mistake of fact** – complete defence (Criminal Code, sections 35–36).	Mandatory life sentence (Crimes Act, section 12(2)).	Provocation restricted in 2004 to exclude non-violent sexual advances.
South Australia *Criminal Law Consolidation Act 1935 (SA)*	(a) D genuinely believes the conduct is necessary and reasonable for a defensive purpose; and (b) the conduct was, in the circumstances as D genuinely believed them to be, reasonably proportionate to the threat that D genuinely believed to exist (s 15(1)).	**Provocation –** partial defence (common law). **Excessive self-defence –** partial defence, engaged where the second limb of self-defence is not met (section 15(2)).	Mandatory life sentence (section 11)	The Attorney-General of South Australia has ordered an inquiry into the partial defence of provocation, and the Green Party has introduced the Criminal Law Consolidation (Provocation) Amendment Bill 2015, which would bar conduct of a sexual nature constituting provocation merely because the person was the same sex as D.
Northern Territory *Criminal Code Act (NT)*	(a) D believes the conduct is necessary- (i) to defend D or another; or (ii) to prevent or terminate the unlawful imprisonment of himself or herself or another; and (b) the conduct is a reasonable response in the circumstances as D perceives them (section 43BD).	**Provocation** – partial defence (section 158). **Diminished responsibility** – partial defence (section 159). **Duress** – complete defence (section 43BB).	Mandatory life sentence (section 157).	Provocation amended to make it more accessible to victims of family violence following review by Law Reform Committee of the Northern Territory in 2000. Provocation restricted 2006.

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
		Sudden and extraordinary emergency – complete defence (sections 33 and 43BC). **Unwilled act and accident** – complete defence (section 31). **Mistake of fact** – complete defence (sections 43W–43AX).		
Tasmania *Criminal Code Act 1924 (Tas)*	D is justified in using, in the defence of D or another, such force as, in the circumstances as D believes them to be, it is reasonable to use (section 46).	No other statutory defences to murder.	Life imprisonment or such other term as the Court determines (section 158).	Provocation abolished in 2003. The Tasmanian Law Reform Institute recently reviewed operation of self-defence and recommended legislative change consistent with Victorian reforms – including clarifying that self-defence available where threatened harm is not immediate or appears to be trivial. Also recommends evidential provisions and jury directions similar to those adopted in Victoria. Recommended against introducing a new partial defence.
England and Wales (including Northern Ireland) *Criminal Justice Act 2003 (UK)* *Coroners and Justice Act 2009 (UK)*	(a) act performed in defence of D or another from what D perceives as an actual or imminent unlawful assault; and (b) force used is reasonable in circumstances as D believes them to be (Common law[516] , s 76 Criminal Justice and Immigration Act)	**Loss of control** – partial defence, engaged in the presence of a "qualifying trigger", such as fear of serious violence from deceased; things said or done of extremely grave character that caused D to have justifiable sense of being wronged (sections 54–55 Coroners and Justice Act).	Mandatory life sentence (section 1, Murder (Abolition of Death Penalty) Act 1965).	Law Commission for England and Wales reviewed partial defences to murder in 2004 and the laws of murder, manslaughter and infanticide in 2006. Loss of control replaced provocation in 2010 to cater for victims of family violence and to exclude sexual infidelity and other inappropriate "triggers".

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
Criminal Justice and Immigration Act 2008 (UK) *Murder (Abolition of Death Penalty) Act 1965 (UK)*		**Diminished responsibility** – partial defence (sections 52–53 Coroners and Justice Act).		
Ireland *Criminal Justice Act 1964* *Criminal Law (Defence and the Dwelling) Act 2011* *Criminal Law (Insanity) Act 2006*	(a) D acted in defence of D or another from what D perceives as an actual or imminent unlawful assault; and (b) force is reasonable and necessary in the circumstances as D believes them to be (common law).	**Provocation** – partial defence (common law). **Diminished responsibility** – partial defence (Criminal Law (Insanity) Act, section 6). **Defence in a dwelling** – complete defence, applies where a defendant uses reasonable force in their dwelling against a person who trespasses for the purpose of committing a crime (Criminal Law (Defence and the Dwelling) Act, section 2).	Mandatory life sentence (section 2, Criminal Justice Act)	Law Commission of Ireland reviewed all criminal law defences in 2009 and recommended codification. Recommendations not implemented.
Canada *Criminal Code RSC 1985 c C-46*	(a) D believes on reasonable grounds that force is being used against D or another or that a threat of force is being made against D or another; (b) the act that constitutes the offence is committed for the purpose of defending or protecting D or another from that use or threat of force; and	**Provocation** – partial defence (section 232(1)).	Mandatory life sentence (first or second degree murder) (section 235).	

516 Discussed in Law Commission of England Wales *Partial Defences to Murder* (Law Com No 290, 2004) at [4.6].

HOMICIDE DEFENCES: APPROACHES IN OTHER JURISDICTIONS				
Jurisdiction	**Elements of self-defence (for homicide) (D=defendant)**	**Other relevant defences**	**Murder sentencing**	**Reforms specific to victims of family violence?**
	(c) the act committed is reasonable in the circumstances (section 34). Section 34 also lists a number of factors for determining reasonableness, including nature of force or threat; imminence; size, age gender and physical capabilities of the parties; nature, history and duration of the relationship between the parties; nature and proportionality of the response.			

Appendix D
Relevant legislative provisions in Victoria

Extracts from the Crimes Act 1958 (Vic)

322J Evidence of family violence

(1) Evidence of family violence, in relation to a person, includes evidence of any of the following—

(a) the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member or by the family member or the person in relation to any other family member;

(b) the cumulative effect, including psychological effect, on the person or a family member of that violence;

(c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;

(d) the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;

(e) the psychological effect of violence on people who are or have been in a relationship affected by family violence;

(f) social or economic factors that impact on people who are or have been in a relationship affected by family violence.

(2) In this section—

"child "means a person who is under the age of 18 years;
"family member", in relation to a person, includes—

(a) a person who is or has been married to the person; or

(b) a person who has or has had an intimate personal relationship with the person; or

(c) a person who is or has been the father, mother, step-father or step-mother of the person; or

(d) a child who normally or regularly resides with the person; or

(e) a guardian of the person; or

(f) another person who is or has been ordinarily a member of the household of the person;

"family violence", in relation to a person, means violence against that person by a family member;

"violence" means—

(a) physical abuse; or

(b) sexual abuse; or

(c) psychological abuse (which need not involve actual or threatened physical or sexual abuse), including but not limited to the following—

(i) intimidation;

(ii) harassment;

(iii) damage to property;

(iv) threats of physical abuse, sexual abuse or psychological abuse;

(v) in relation to a child—

(A) causing or allowing the child to see or hear the physical, sexual or psychological abuse of a person by a family member; or

(B) putting the child, or allowing the child to be put, at real risk of seeing or hearing that abuse occurring.

(3) Without limiting the definition of violence in subsection (2)—

(a) a single act may amount to abuse for the purposes of that definition; and

(b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

322M Family violence and self-defence

(1) Without limiting section 322K, for the purposes of an offence in circumstances where self-defence in the context of family violence is in issue, a person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if—

(a) the person is responding to a harm that is not immediate; or

(b) the response involves the use of force in excess of the force involved in the harm or threatened harm.

(2) Without limiting the evidence that may be adduced, in circumstances where self-defence in the context of family violence is in issue, evidence of family violence may be relevant in determining whether—

(a) a person has carried out conduct while believing it to be necessary in self-defence; or

(b) the conduct is a reasonable response in the circumstances as a person perceives them.

Extracts from the Jury Directions Act 2015 (Vic)

58 Request for direction on family violence

(1) Defence counsel (or, if the accused is unrepresented, the accused) may request at any time that the trial judge direct the jury on family violence in accordance with section 59 and all or specified parts of section 60.

(2) The trial judge must give the jury a requested direction on family violence, including all or specified parts of section 60 if so requested, unless there are good reasons for not doing so.

(3) If the accused is unrepresented and does not request a direction on family violence, the trial judge may give the direction in accordance with this Part if the trial judge considers that it is in the interests of justice to do so.

(4) The trial judge—

(a) must give the direction as soon as practicable after the request is made; and

(b) may give the direction before any evidence is adduced in the trial.

(5) The trial judge may repeat a direction under this Part at any time in the trial.

(6) This Part does not limit any direction that the trial judge may give the jury in relation to evidence given by an expert witness.

59 Content of direction on family violence

In giving a direction under section 58, the trial judge must inform the jury that—

(a) self-defence or duress (as the case requires) is, or is likely to be, in issue in the trial; and

(b) as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence or under duress (as the case requires); and

(c) in the case of self-defence, evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending; and

(d) in the case of duress, evidence in the trial is likely to include evidence of family violence committed by another person against the accused or a third person.

60 Additional matters for direction on family violence

In giving a direction requested under section 58, the trial judge may include any of the following matters in the direction—

(a) that family violence—

(i) is not limited to physical abuse and may include sexual abuse and psychological abuse;

(ii) may involve intimidation, harassment and threats of abuse;

(iii) may consist of a single act;

(iv) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;

(b) if relevant, that experience shows that—

(i) people may react differently to family violence and there is no typical, proper or normal response to family violence;

(ii) it is not uncommon for a person who has been subjected to family violence—

(A) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;

(B) not to report family violence to police or seek assistance to stop family violence;

(iii) decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by—

(A) family violence itself;

(B) cultural, social, economic and personal factors;

(c) that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence or under duress (as the case requires) in relation to the offence charged.