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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

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UNDERSTANDING FAMILY VIOLENCE

REFORMING THE CRIMINAL LAW RELATING TO HOMICIDE

Summary

INTRODUCTION

1 One of gravest situations a person can face is killing another person in order to protect their own life, or the life of another. This is even more so if the person they are protecting themselves from is a family member.

2 Yet this is the unfortunate reality for some New Zealanders. On average each year in this country, among the large number of households affected by family violence, a small number of victims of family violence will kill their abusers.

3 When a victim of family violence kills their abuser, they will usually be charged with murder. In only some of these cases, however, will the defendant be able to successfully rely on self-defence under the Crimes Act 1961. In reality these defendants are more likely to be convicted of the lesser crime of manslaughter, than be convicted of murder or acquitted on the basis of self-defence.

4 This situation raises the fundamental question of what is the most appropriate legal response to victims of family violence who commit homicide. It is with this question that this Report is concerned.

5 Our terms of reference from the Minister of Justice arose from the *Fourth Annual Report* of the Family Violence Death Review Committee (FVDRC). The FVDRC considers that at present the defences available to homicide in New Zealand do not cater adequately for victims of family violence who kill their abusers. The FVDRC recommended the Government consider modifying the test for self-defence so that it is more readily accessible to victims of family violence who kill their abusers, and introducing a partial defence to murder that can be relied on by victims of family violence who kill abusers other than in self-defence.

6 The Law Commission's terms of reference are as follows:

> 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, be modified so that it is more readily accessible 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?

7 In November 2015, the Commission published an Issues Paper, *Victims of Family Violence Who Commit Homicide*.[1] There was a call for public submissions and a number were received. The Commission also benefited considerably from meetings with individuals and stakeholders, and the expertise and advice of a panel of members of the legal profession, current and former judges, academics, victim advocates and Police.

1 Law Commission *Victims of Family Violence Who Commit Homicide* (NZLC IP39, 2015).

8 This Report is in three parts. The first Part sets the scene by describing the social and legal context of this review. It examines the myths about the nature of family violence and the circumstances that drive victims of family violence to kill their abusers. The second Part deals with the law of self-defence and the difficulties posed by the leading case in this context, *R v Wang*.[2] In that case the Court of Appeal confirmed that, for a person to be acting in self-defence, they must be responding to a threat of "imminent" harm. The third Part of this Report examines whether the reduced culpability of victims of family violence who kill their abusers could be better recognised through a partial defence to murder and/or amended sentencing laws.

9 Our review is limited to the specific category of victims of family violence who have killed their abusers. There is a question around whether there should be a broader review of the law of homicide, as has occurred in a number of comparable jurisdictions. We consider that is worthy of further consideration.

Previous law reform activity in New Zealand and elsewhere

10 The Law Commission has examined the situation of victims of family violence who commit homicide on two previous occasions. In 2001 the Commission published *Some Criminal Defences with Particular Reference to Battered Defendants*,[3] which recommended that the Crimes Act be amended to ensure self-defence was not excluded just because the threat the defendant faced was not imminent. The Commission at the time also recommended the abolition of the partial defence of provocation and that the mandatory life sentence for murder should be replaced with a sentencing discretion. In 2007, *The Partial Defence of Provocation* was published,[4] and, as in 2001, the Commission again recommended that provocation be abolished.

11 Many of the recommendations of those two reports were adopted by the Government. In particular, the partial defence of provocation was repealed in 2009. There is now some judicial discretion in respect of murder sentencing, although there remains a presumption in favour of a sentence of life imprisonment, rebuttable only if that sentence would be "manifestly unjust".

12 Importantly, however, there has been no change to the law of self-defence. Imminence remains a central requirement for self-defence in New Zealand, albeit one that has been judicially imposed rather than specified in legislation.

13 The legal response to victims of family violence who commit homicide has also been a focus of recent law reform activity in a number of comparable jurisdictions. Despite this concentration of activity, however, a range of approaches has emerged to address the common problem of accommodating the experiences of victims of family violence who kill their abusers. Some jurisdictions have reformed self-defence, while others have focused on partial defences with victims of family violence in mind. The findings and experiences of this law reform work are considered throughout this Report.

A BETTER UNDERSTANDING OF FAMILY VIOLENCE

14 New Zealand has the highest reported rate of intimate partner violence in the developed world.[5] Intimate partner homicides are all too common. Most of the time, they are committed in the context of an ongoing abusive relationship, by the person who, in the history of that relationship, has been the abuser (the "predominant aggressor"). However, in a small number of

2 *R v Wang* [1990] 2 NZLR 529 (CA).

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

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

5 Ministry of Justice *Strengthening New Zealand's legislative response to family violence: A public discussion document* (Wellington, August 2015) at 4–5.

intimate partner homicides, it is the primary victim of the past abuse who kills the predominant aggressor.

15 According to the FVDRC, cases where the primary victim kills their abuser account for 18 per cent of intimate partner homicides with a history of family violence,[6] or less than five per cent of all homicides in New Zealand.[7] These homicides are the focus of our Report.

16 Gender is a significant risk factor for family violence victimisation and harm across all forms of family violence, and in intimate relationships women are more likely than men to experience severe physical and psychological harm.[8] Three-quarters of all intimate partner homicides in New Zealand are committed by men, while three-quarters of the victims are women.[9] However, where the homicide offender is the primary victim of family violence, they are overwhelmingly women.

17 When a primary victim of family violence kills their abuser, their action is normally preceded by an extensive history of suffering trauma and abuse at the hands of their abuser as well as others. In the cases we reviewed for the purposes of this Report, we identified many examples of previous physical abuse, sexual assaults, and the use of controlling or intimidating tactics to undermine the autonomy of the victim and to make them fear for their safety or the safety of others.

18 A meaningful analysis of cases in which a victim of family violence kills their abuser requires a proper understanding of the nature and dynamics of family violence. Otherwise it can be difficult for a person not experiencing family violence themselves to appreciate why victims, typically women, may be driven to the point of killing their abusers. Essential to contemporary understandings of the dynamics of family violence, and especially intimate partner violence, is an understanding of family violence as a pattern of ongoing harmful behaviour, with a cumulative and compounding effect on the victim. Viewed in isolation, incidents of family violence may appear "low-level", however viewed as a part of a pattern of behaviour they may well identify an escalating spiral of violence, which can leave victims entrapped.[10] It is often difficult for victims to seek help, as the use of coercive and controlling tactics by the abuser can leave them in social and financial isolation.

19 How the criminal law, and those who operate within the criminal justice system, understand family violence and its ongoing effects is of great importance to ensuring victims of family violence who commit homicide are treated equitably before the law. It has been observed in Australia that if criminal law reform focused on family violence is not supported by efforts to improve understandings, then any legislative reform may have only symbolic effect and may not achieve changes in practice.[11] In this context, without an accurate understanding of the social context of the homicide and the reality of the defendant's situation, their actions cannot be accurately assessed. The pervasiveness and complexity of this kind of violence is not as well understood as it might be within the legal, judicial and wider community. The Commission

6 The Family Violence Death Review Committee reported that between 2009 and 2014 there were 85 intimate partner homicides, 71 of which had a known abuse history. Of those 71 homicides, 13 (18 per cent) of offenders were primary/suspected primary victims, and 58 (82 per cent) were predominant/suspected predominant aggressors. Family Violence Death Review Committee submission at 9. All 13 primary/suspected primary victim homicide offenders were women.

7 Or less than 10 per cent of all family violence homicides. This is based on the Family Violence Death Review Committee's identification, in the period 2009–2012, of nine cases where a primary victim killed a predominant aggressor and one further suspected case, out of a total of 126 family violence homicides and 297 total homicides. Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 34 and 75.

8 Ministry of Justice, above n 5, at 13.

9 Family Violence Death Review Committee, above n 7, at 39.

10 Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission, February 2016) at 36.

11 State of Victoria *Royal Commission into Family Violence: Summary and recommendations* (Parl Paper No 132, March 2016) at 27.

therefore recommends (continued) education to improve understanding within the criminal justice system of the dynamics of family violence.

RECOMMENDATIONS

R1 Judges should continue to receive education, including through the Institute of Judicial Legal Studies, on the dynamics of family violence.

R2 Regular and ongoing education courses on the dynamics of family violence should be made available to all criminal lawyers, including Crown prosecutors and defence counsel.

R3 Police should receive regular education on the dynamics of family violence.

R4 Education recommended above should:

- reflect contemporary social science understanding of family violence and victims' responses;
- explain the primary victim/predominant aggressor analysis in intimate partner violence; and
- identify common misconceptions of family violence that persist today and their implications in the criminal justice system.

A CHANGE TO THE LAW OF SELF-DEFENCE

20 The central inquiry of Part 2 of this Report is whether the law of self-defence in section 48 of the Crimes Act accommodates the circumstances of victims of family violence who kill their abusers. Self-defence is often claimed in this context, but is not usually successful.

21 It should be noted that section 48 applies to all occasions when recourse is made to self-defence; the section is not limited to homicide. It states:

> Every one is justified in using, in 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.

22 The problems encountered by victims of family violence who kill their abusers in claiming self-defence has been the focus of much academic comment and law reform activity in New Zealand and overseas. It has, as one commentator puts it, become "trite" to point out that defences to murder do not equitably accommodate the circumstances in which victims of family violence, typically women, tend to kill their abusers.[12]

23 The inequity is said to arise because the law of self-defence was developed primarily in response to the "stereotypical" scenario of a one-off violent confrontation between two male strangers of relatively equal strength. Therefore, the immediacy of the threat and the proportionality of the response have emerged as central concepts. However, these concepts can fail to accommodate the very different experiences of women, who, the research tells us, typically claim self-defence in the context of ongoing intimate partner violence. Due to physical disparities, women in such circumstances will typically use a weapon to defend themselves against a stronger male aggressor. Some women will respond with considerable force to an apparently minor assault, because the real threat is one of an ongoing nature. Conversely, other women may not respond immediately when attacked, but will rather wait for a time when their response is more likely to be effective. These realities tend to preclude any claim of self-defence from being successful.

12 Julia Tolmie "Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas" (2002) 10 Wai L Rev 91 at 91.

24 Section 48 has also been the subject of much judicial inquiry. The aspect of self-defence that is said to be of greatest concern for victims of family violence is the requirement for a defendant to be responding to an immediate or imminent threat with no alternatives available. This requirement was confirmed by the Court of Appeal in the case of *R v Wang*,[13] in which the defendant had stabbed and killed her abusive partner when he was in a drunken stupor. He had, earlier that evening, threatened to kill the defendant and her sister unless the defendant's family in China sent him money. This decision has been applied by the Court of Appeal subsequently, although not in the context of family violence.[14]

25 The requirement for an imminent threat in claims of self-defence requires the judge and jury to focus on danger that is close at hand, and can limit the inquiry to the discrete incident of violence or threat immediately preceding the defendant's use of force. This is difficult to reconcile with contemporary understandings of family violence. More often than not there is a cumulative pattern of harmful behaviour, rather than any one violent incident. Tactics of coercion and control can mean there is a constant and ongoing threat. Accordingly, the danger faced by the victim of family violence is not from one isolated attack, or even a series of attacks, but from an ongoing life of abuse and fear.[15]

26 Despite this, the law as it stands means that unless the victim of family violence is responding to an imminent threat, self-defence may not be available. The Commission considers that imminence should not be a strict requirement where a victim of family violence claims self-defence. The focus should instead be on whether, in the words of section 48, the use of force was, in all the circumstances as the defendant believed them to be, "reasonable".

27 The Commission considered three options to substantively reform section 48. The first option was to introduce a provision that would clarify that self-defence is available even if the threat is not imminent, with further consideration required as to whether such a clarification should be limited to the family violence context. The second would allow self-defence if the threat was inevitable. The third option would introduce a new defence specifically applicable for victims of family violence who kill their abusers.

28 The Commission adopts the first option and recommends that a new provision be introduced into the Crimes Act 1961 to clarify that, where a person is responding to family violence, section 48 may apply even if that person is responding to a threat that is not imminent, provided that the defendant believed their actions to be necessary, and the response was otherwise reasonable. This would apply where a victim of intimate partner violence kills their abusive partner, as well as in other family violence contexts, such as where a person kills a parent or partner of their parent in response to family violence. To avoid the unintended consequence of violent offenders being able to take advantage of the change of law, this amendment is only made available to victims of family violence. It applies in all circumstances where self-defence is relevant and would not be limited to charges of homicide.

29 Our review of section 48 found other issues that can also make it difficult in cases of family violence for a defendant to run a successful plea of not guilty on the basis of self-defence. In particular, the traditional focus on the immediate circumstances of the alleged offending means a jury is less likely to hear evidence on the history of the relationship, or if the jury does hear such evidence, it may only be for the limited purpose of understanding the circumstances of the immediate event. Such evidence may not be sufficient to enable a jury to

13 *R v Wang*, above n 2.

14 *Afamasaga v R* [2015] NZCA 615. See also the observations of the Supreme Court in declining leave to appeal in *Vincent v R* [2016] NZSC 15.

15 Stella Tarrant "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws" (1990) 20 UWAL Rev 573 at 598.

gain a proper understanding of all of the circumstances of the alleged offending. We therefore make a recommendation to identify in legislation the full range of evidence of prior family violence and expert evidence that may be relevant to a jury's assessment of whether a defendant who is a victim of family violence was impelled to act in the way they did. Expert evidence is likely to assist by explaining the social context of the homicide rather than by focusing on the outdated and much criticised battered woman syndrome.

RECOMMENDATIONS

R5 A new provision should be inserted into the Crimes Act 1961 to ensure that, where a person is responding to family violence, section 48 may apply even if that person is responding to a threat that is not imminent.

R6 The Ministry of Justice should consider whether the term "family violence" should be consistent with the definition of domestic violence in the Domestic Violence Act 1995, incorporating any amendments that may be made following the Ministry of Justice's current review of domestic violence legislation, or whether an inclusive definition of family violence is preferred, including, but not limited to, the definition of domestic violence in the Domestic Violence Act 1995.

R7 The Evidence Act 2006 should be amended to include provisions based on sections 322J and 322M(2) of the Crimes Act 1958 (Vic) to provide for a broad range of family violence evidence to be admitted in support of claims of self-defence and to make it clear that such evidence may be relevant to both the subjective and objective elements in section 48 of the Crimes Act 1961.

GREATER RECOGNITION OF REDUCED CULPABILITY

30 Part 3 considers how the law and the legal system should take into account the "reduced culpability", or lesser blameworthiness, of victims of family violence who kill their abusers. Some homicides by victims of family violence will not fit the criteria for self-defence – however reformed. Such cases may, however, involve significant mitigating factors, such as a lengthy and severe history of abuse. In the main, reduced culpability for homicide is recognised through the charge filed by the prosecutor or accepted by the jury as proved – murder, manslaughter or some lesser offence – and/or through sentencing.

31 Part 3 canvasses a range of reform options for better recognising reduced culpability for homicide. This includes the introduction of a partial defence to murder (which if successfully raised results in a manslaughter conviction); the creation of a specific homicide offence (which arguably has advantages in terms of "fair labelling");[16] and changes to sentencing laws and practice.

16 The concern of the principle of "fair labelling", Ashworth and Horder explain, is "to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking": Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 77.

32 In addition to these legislative reform options, Part 3 also examines "softer" options, such as charging practice and guidelines. In this context, we recommend that, when the *Solicitor-General's Prosecution Guidelines* are next reviewed, the Solicitor-General give consideration as to whether they should include reference to the potential relevance of a defendant's history as a victim of family violence.

RECOMMENDATION

R8 The Solicitor-General should, when next reviewing the *Solicitor-General's Prosecution Guidelines*, consider whether they should include express reference to the potential relevance of a defendant's history as a victim of family violence.

NO PARTIAL DEFENCE TO MURDER

33 Partial defences are controversial. Supporters argue that they promote "fair labelling", enhance the role of the jury, and have the potential to positively impact on charging practices and sentencing. Detractors emphasise that partial defences are anomalous in the criminal law, tend to go hand-in-hand with mandatory sentencing for murder (which has been abolished in New Zealand), and can have undesirable or perverse effects. We review these general arguments and explore the possible formulations for a partial defence targeted at victims of family violence. We look at three broad categories of partial defences, although there is some overlap:

- "Defence-based" partial defences, which normally require an honest belief that the defendant's actions were necessary to defend or preserve him or herself or another.
- "Provocation-based" partial defences, which require a loss of control, triggered by provocation sufficient to deprive a person of ordinary tolerance, in a similar position, of the power of self-control.
- "Diminished capacity-based" partial defences, which require an abnormality of mental function that impaired the defendant's capacity to understand events and to judge whether their actions are right or wrong, or to exercise self-control.

34 The most common formulation of a "defence-based" partial defence is "excessive self-defence", which was recommended by both the Victorian Law Reform Commission and the Law Reform Commission of Western Australia. Excessive self-defence has, however, since been disavowed in Victoria and other Australian states, and by courts in the United Kingdom, New Zealand and Canada.

35 The second broad category of partial defences is based around provocation, which is the only partial defence that has previously been part of the law in both New Zealand and comparable jurisdictions. We found no empirical evidence from our case review to conclude that repeal of provocation in New Zealand has in practice adversely affected the position of victims of family violence who kill their abusers.

36 Provocation has been subject to some notable recent reform in England and Wales, with the remodelled "loss of control" formulation. Loss of control focuses on a "qualifying trigger", which may include the defendant's fear of serious violence. Inclusion of fear of serious violence as a qualifying trigger was intended to better accommodate the position of victims of family violence who kill their abusers. Its effectiveness in this regard has, however, been subject to considerable debate.

37 Those who favour a provocation-based partial defence consider that it could appropriately accommodate conduct that was responsive to abuse, but not defensive. Others are opposed to reintroduction of any provocation-based defence in New Zealand.

38 The third broad category of partial defences focuses on a defendant's capacity, and looks into the mind of the defendant to see if he or she should be judged by some lower standard than the ordinary person. These defences do not share provocation's objective requirement (that the provocation have a similar effect on a similar person), and are intended to fill the gap where a person would not be able to plead insanity.

39 A significant problem with diminished capacity defences is that they tend to entrench misleading stereotypes of primary victims of family violence – who are mainly women. Further, in New Zealand, the Sentencing Act 2002 already provides scope to take into account the diminished intellectual capacity of the defendant as a mitigating factor in sentencing.

40 Based primarily on the experiences of comparable jurisdictions, we conclude that none of these options for a partial defence would be appropriate for victims of family violence in New Zealand.

41 Finally, we consider the merits of a new type of partial defence, which does not fit discretely into the above three broader categories, but is "trauma-based". This would be a bespoke defence tailored to victims of family violence who kill their abusers. We conclude that introducing a context or victim-specific defence would be inconsistent with New Zealand criminal law principles and legislation unless there is a specific and compelling rationale.[17] For the reasons set out in Part 2 of the Report, we are satisfied there is such a rationale in connection with the application of self-defence to victims of family violence who kill their abusers, which warrants our recommended clarification to section 48. We did not, however, find this test to be met for a new partial defence or specific homicide offence in this context.

42 Ultimately we recommend against the introduction of any new partial defence or separate homicide offence in New Zealand. We consider the case is not made out for such an approach and that any reform in this area would carry an unacceptable risk of unintended consequences.

RECOMMENDATION

R9 No new partial defence or separate homicide offence should be introduced in New Zealand.

CHANGES TO SENTENCING FOR HOMICIDE

43 A key policy aim in sentencing law, reflected in the Sentencing Act, is to ensure that sentences respond to the particular facts of the offending and the offender's personal circumstances, while also promoting consistency with other cases of a similar nature. To that end, the Act sets out principles and purposes of sentencing, and a list of aggravating and mitigating factors that must be taken into account in determining a sentence.[18]

44 Two mitigating factors are particularly relevant in the present context. The first is "the conduct of the victim" (who, in homicide cases, will be the deceased). The second is the offender's "diminished intellectual capacity or understanding". The conduct of the deceased will be the most obvious mitigating factor where a victim of family violence kills their abuser. Where

17 We adopt the same conclusions as the Law Commission did in *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at 30–31. See also Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2015) at [1.17].

18 See Simon France (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Thomson Reuters) at [SA9.01]–[SA9.28].

relevant, however, the offender's diminished intellectual capacity or understanding of the situation will also be taken into account and the Court of Appeal has accepted that the psychological effects of sustained abuse may justify a sentencing discount.[19]

45 Our case review suggested there is some variation in the courts' approaches to sentencing in this area. In connection with mitigating factors on which evidence may be required, such as psychological disturbances suffered by defendants, issues around awareness of, access to and the cost of relevant expert evidence may also arise.

46 To ensure consistency across cases, we recommend some amendment to section 9 of Sentencing Act regarding the mitigating factors of the conduct of the victim and the diminished intellectual capacity or understanding of the defendant.

47 Our recommended sentencing reforms complement our approach to self-defence. We envisage they will contribute to ensuring that the experiences of victims of family violence are brought to the attention of judges. They will also prompt defence lawyers to consider the need for submissions, supported by expect witnesses and evidence, targeted at these issues. Due to the pervasive nature of family violence, we do not suggest restricting these reforms to homicide.

48 There are three other aspects of our analysis of the Sentencing Act which require particular mention. These are, first, the presumption in favour of life imprisonment for murder (section 102); second, finite sentences for murder; and third, the so-called three strikes regime (provided for in sections 86A–86I).

49 Section 102 of the Sentencing Act provides for a presumption of life imprisonment for murder, and section 103 prescribes a minimum period of imprisonment of 10 years. The presumption of life imprisonment for murder can only be departed from when that sentence would be "manifestly unjust".

50 Case law demonstrates that the "manifestly unjust" threshold will be met only in special circumstances. It is notable that in the two murder cases we reviewed in which the presumption of life imprisonment was considered – *Wihongi*[20] and *Rihia*[21] – the "manifestly unjust" threshold was found to be met due to the family violence circumstances.

51 The sentences imposed in *Wihongi* and *Rihia* are among the lowest sentences ever imposed for murder in New Zealand,[22] and no minimum period of imprisonment was imposed in either case. Although the lengths of the sentences in these cases were highlighted by the FVDRC, we have not been persuaded they are problematic. In both cases the relevant family violence context, and its effect on the defendant, was taken into account at sentencing. Following *Wihongi,* there appears to be an emerging trend in the case law for a finding that a life sentence will be "manifestly unjust" for victims of family violence convicted of murdering their abusers after severe and prolonged abuse.

52 The last issue we consider in connection with sentencing is the three strikes regime.[23] Both *Wihongi* and *Rihia* were decided before the three strikes regime was introduced, in 2010, and the three strikes provisions have significantly fettered sentencing discretion for violent offences, including the homicide cases covered by this review. The range of offences which qualify as

19 *R v Whiu* [2007] NZCA 591.

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

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

22 The only case in which a shorter sentence was imposed is *R v Law* (2002) 19 CRNZ 500 (HC), a euthanasia case.

23 Prescribed by ss 86A–86I of the Sentencing Act 2002.

strike offences include sexual offences, most violent offences and offences against property where a weapon is used. These offences range in seriousness.

53 Under the three strikes provisions a court is required to impose a life sentence if a person is convicted of murder as a second or third strike offence, or if a person is convicted of manslaughter as a third strike offence. In all cases, the most lenient result possible is a life sentence with a minimum period of 10 years' imprisonment, provided the threshold of manifest injustice is met. If imposed on a victim of family violence who had killed their abuser, such a sentence would sit at the very highest end of the range of sentences imposed in the cases we reviewed. We identified three cases which, if they had been caught by the three strikes provisions, would have resulted in very different, and more punitive, sentencing outcomes under those provisions.[24]

54 We consider the three strikes provisions may disproportionately disadvantage victims of family violence who kill their abusers. It is outside of the scope of our review to consider the position of other offenders who may also be disproportionately affected by the three strikes law.

55 In these circumstances, and noting that two cases decided under the three strikes provisions are currently awaiting hearing at the Court of Appeal,[25] we recommend that the Ministry of Justice undertake further policy work to address the effect of the three strikes provisions as they apply to homicide offenders in exceptional circumstances.

RECOMMENDATIONS

R10 The Sentencing Act 2002 should be amended as follows:

- amending section 9(2)(c) to clarify that "conduct of the victim" includes prior family violence against the offender; and
- amending section 9(2)(e) to clarify that "diminished intellectual capacity or understanding" includes any impairment resulting from being subject to family violence.

R11 The Ministry of Justice should undertake further policy work to address the issues noted in this Report in relation to sections 86D(4) and 86E of the Sentencing Act 2002 as they apply to homicide offenders in exceptional circumstances and specifically:

- consider the position of victims of family violence who kill their abusers in situations where the three strikes regime would mandate a life sentence; and
- consider how to amend the legislation to allow judges to impose a finite sentence in deserving cases.

CONCLUSION

56 It became clear in reviewing and reflecting on the abuse suffered by victims of family violence who kill their abusers that, in many cases, the final acts of homicide were acts of desperation – whether or not the defendants were acting in self-defence – in circumstances most of us do not fully understand and will never experience. This Report recommends changes to the law

24 Those cases are *R v Brown* HC Napier CRI-2008-020-3130, 24 November 2009; *R v Stone* HC Wellington CRI-2005-078-1802, 9 December 2005; and *R v Rihia*, above n 21.

25 We understand that the Court of Appeal is scheduled to hear appeals by the Solicitor-General against the sentences imposed in *R v Harrison* [2014] NZHC 2705 (in which the offender's first strike offence was an indecent assault) and *R v Turner* [2015] NZHC 189 (in which the offender's first strike offence was wounding with intent), on 9 and 10 June 2016.

and measures to improve understandings of family violence, appreciating that legal reform is meaningful only when accompanied by shifts in thinking.

57 As Julia Tolmie has recently written:[26]

> If there is a lesson to be learned from the repeal of the provocation defence it may be that legal rules, and therefore law reform, make less of a difference than we might expect in the resolution of criminal cases – or certainly criminal cases that involve the "wicked" problem of family violence ... [I]f the same unexamined assumptions that are typically made in these kinds of cases continue to be made (that women's use of violence in intimate partnership simply mirrors what we know about men's use of violence; that help is readily available to those victims who are facing dangerous and potentially lethal violence who seek it; and that leaving a violent relationship is always an option and is an effective means of addressing the violence) and if we fail to understand the manner in which coercive control, social marginalisation and structural exclusion entrap victims of family violence, then it is unlikely that reforms to the legal requirements of self-defence will effect much substantive change either.

58 It is anticipated that the recommendations in this Report will ensure that those who act in genuine self-defence will not be deprived of access to that defence in law. Others, who kill not in self-defence but nonetheless in extenuating or mitigated circumstances, may have the abuse they have suffered, and its effects, fully and sensitively taken into account by the law and people who administer the criminal justice system. For defendants in both categories, family violence should be seen, understood and treated in a way that reflects the true nature and dynamics of this particular and insidious form of abuse.

26 Julia Tolmie "Defending Battered Defendants on Homicide Charges in New Zealand: The Impact of Abolishing the Partial Defences to Murder" [2015] NZ L Rev 649 at 681 (footnote omitted).