



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 73

Some Criminal Defences
with Particular Reference to
Battered Defendants

May 2001
Wellington, New Zealand

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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22 May 2001

Dear Ministers

I am pleased to present to you Report 73 of the Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* which we submit to you under section 16 of the Law Commission Act 1985.

Yours sincerely

DF Dugdale
Commissioner

The Hon Phil Goff MP
Minister of Justice
Parliament Buildings
Wellington

The Hon Margaret Wilson
Associate Minister of Justice and Attorney General
Parliament Buildings
Wellington

Preface

IN RESPONSE TO CRITICISM that the existing legal defences are failing to protect those who commit criminal offences as a reaction to domestic violence, the Law Commission in 1999 began a project to review the substance and application of these defences. Last year we published a discussion paper¹ (referred to here as *PP41*) and called for submissions. Consideration of these submissions and further consultation have resulted in the recommendations made in this report.

Domestic violence is broadly defined in section 3 of the Domestic Violence Act 1995 as meaning physical, sexual, and psychological abuse, the last of which includes but is not limited to intimidation, harassment, damage to property, threats of violence, and committing acts of violence in front of the children.² In both *PP41* and this report, the term “battering” is used to refer to physical violence at the higher end of the scale (for example, using or threatening with a

¹ New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend*, NZLC PP41 (Wellington, 2000) [PP41].

² Domestic violence is defined in s 3 of the Domestic Violence Act 1995 as:

- (1) In this Act, domestic violence, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.
- (2) In this section, violence means—
 - (a) Physical abuse:
 - (b) Sexual abuse:
 - (c) Psychological abuse, including, but not limited to,—
 - (i) Intimidation:
 - (ii) Harassment:
 - (iii) Damage to property:
 - (iv) Threats of physical abuse, sexual abuse, or psychological abuse:
 - (v) In relation to a child, abuse of the kind set out in subsection (3) of this section.
- (3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—
 - (a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
 - (b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—

gun or knife, choking or strangling, sexual violation, kicking and punching) typically occurring in tandem with psychological abuse which together allow the abuser to gain power and control over the victim. Battering relationships are relationships dominated by this type of violence. This report examines a number of legal defences with particular reference to victims of battering.

The approach throughout this project has been gender neutral. It is incontestable, however, that the large majority of adult victims of serious domestic violence have been women and their abusers have been men.³ In response to criticisms of our failure to deal with domestic violence perpetrated by women on men and domestic violence in same-sex relationships, we have collated the results of some studies of domestic violence in these relationships. Our findings appear in Appendix A and in the main justify our treatment of the topic as being concerned essentially with men's abuse of women. Although some studies have reported that the incidence of female violence is as high as that of male violence, further investigation reveals significant differences in the reasons for and effects of the violence. One study was significant in its account of what women *did not do* (but which constituted tactics frequently employed by violent men):⁴

. . . no woman punched her husband about the head and shoulders, or in the stomach. Punches were aimed at the chest. No husband was attacked in the groin. No wife directed punches so injuries would not show; nor did wives say this is what they would do . . . No husband was threatened with a gun, or chased with guns, knives, axes, broken bottles

but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

- (4) Without limiting subsection (2) of this section,—
- (a) A single act may amount to abuse for the purposes of that subsection:
 - (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.

Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse.

³ See the discussion in Appendix A.

⁴ J Scutt *Even in the Best of Homes* (Penguin, Victoria, 1983) cited by Kerri James "Truth or Fiction: Men as Victims of Domestic Violence" in Jan Breckenridge and Lesley Laing (eds) *Challenging Silence* (Allen & Unwin, New South Wales, 1999) 156.

or by a car. Husbands were not kicked or stamped on with steel capped boots or heavy work boots; no husband was “driven furiously” in the family car, nor was any tossed out at traffic lights. None was pushed against a wall or flung across a room; they were not held down in threatening positions, or against the wall unable to move. Strangling and choking were not used. No wife attempted suffocation with a pillow. Husbands were not locked out, confined to particular areas of the house, or isolated from friends, nor were any given ultimatums about time spent away from home shopping . . . No husband had arms twisted and fingers bent, none was frog marched out to the garden to hose, dig or mow the lawn. None was ordered to weed the garden whilst being kicked from the rear. Nor was any husband dragged out of bed at midnight to change the washer on the kitchen tap.

Chapter 1 summarises the submissions on “Battered Woman Syndrome”, the name given to a theory attributed to Dr Leonore Walker to explain why battered women do not leave their abusive relationships. Chapter 1 advocates referring instead to the nature and dynamics of battering relationships and the effects of battering. It suggests ways juries can be assisted, in appropriate cases involving battered defendants, by the calling of expert evidence and more focussed judicial directions.

Chapter 2 examines how the law has dealt with victims of domestic violence who claimed to have acted in self-defence, and recommends changes to section 48 of the Crimes Act 1961 to better recognise the exigencies of threatened violence in the context of battering relationships. It also suggests ways in which expert evidence could assist the fact-finder in cases involving battered defendants.

Chapter 3 canvasses the various formulations of excessive self-defence which exist or have been proposed as a partial defence to murder, and recommends against introducing such a defence in New Zealand.

Chapter 4 discusses a number of proposed defences specifically tailored to meet the situation of the battered defendant but concludes that none of them should be adopted.

Chapter 5 discusses the intractable problems associated with the partial defence of provocation and recommends its abolition. It further recommends that a sentencing discretion for murder be introduced to take account of the mitigating circumstances encompassed in the partial defences, including provocation.

Chapter 6 discusses the advantages and disadvantages of a partial defence of diminished responsibility but does not recommend its adoption in New Zealand.

Chapter 7 summarises views expressed in submissions for and against a sentencing discretion for murder, and for and against retention of the partial defences. It does not favour the retention or introduction of partial defences, but recommends that judges should have a limited discretion to impose a sentence of less than life imprisonment for murder in exceptional cases. It announces that the Law Commission will embark on a supplementary project to look at the onus and standard of proof for the purpose of establishing a factual basis for sentencing.

Chapters 8 and 9 discuss the defences available to those who find themselves in situations not of their choosing where they commit a criminal offence under threat of death or serious injury if they fail to do as demanded (compulsion), or where they are compelled by circumstances of emergency to commit a criminal offence in order to avoid death or serious injury (duress of circumstances). In chapter 8 we recommend the replacement of section 24 of the Crimes Act 1961 with a new provision. In chapter 9 we recommend codification of the defence of duress of circumstances.

It is now generally accepted that domestic violence is a major problem in New Zealand. What is less well known is the fact that New Zealand seems to have a much higher prevalence rate of domestic violence than America, Canada, Finland, Sweden, Australia and England. The authors of the first study of national prevalence rates of men's abuse of women partners in New Zealand concluded that:⁵

. . . our twelve month rate is almost double that of other studies, and our life time rate is one and a half times as high.

The study, which was based on the responses of a nationally representative sample of 2000 men, found that one in five men committed at least one physically abusive act in the past year and one in three men at least one such act during their lifetime.⁶ Further, half of the men committed at least one psychologically abusive act in the past year and three out of five men at least one such act during their lifetime.⁷ Although the men in the study

⁵ Julie Leibrich, Judy Paulin and Robin Ransom *Hitting Home: Men Speak About Abuse of Women Partners* (Department of Justice in association with AGB McNair, Wellington, 1995) 87.

⁶ Leibrich, above n 5, 17.

⁷ Leibrich, above n 5, 17.

mostly blamed men for hitting women, 65 percent of them found at least one suggested circumstance in which they said the woman alone was to blame for being hit.⁸

There is little cause for optimism. What we have sought to do in this report is to try, by means of recommendations for legislative changes, to provide a more level playing field for those who, sometimes after long years of suffering and brutalisation, arrive at the courtroom door to face criminal charges which have their genesis in the abuse meted out by their intimate partners. It is but a response after the event. The causes of domestic violence must be dealt with at their source.

The Commissioner responsible for advancing this project was Judge Margaret Lee. The research was undertaken by Karen Belt to whom the Commission expresses its appreciation.

This report is available in hard copy and also through our website: <<http://www.lawcom.govt.nz>>.

⁸ Leibrich, above n 5, 16.

1

Nature and effect of domestic violence

INTRODUCTION

1 **I**N *PP41* we said:⁹

There are two principal aspects to the debate on battered defendants. The first is whether battering may induce a psychological state, known as battered woman syndrome, which causes battered women to have beliefs and exhibit behaviour different from those of the ordinary non-battered person. This aspect is important because, while battered woman syndrome is not in itself a defence, evidence about the syndrome has been admitted at criminal trials both to explain the behaviour of battered defendants and to support their claims to one or other of the legal defences.

2 In practice, evidence on “battered woman syndrome” has included expert evidence concerning the psychological, social and economic aspects of domestic violence. This has led to confusion over what the term “battered woman syndrome” means. In this report we refer to the broader type of expert evidence as “expert evidence on battering relationships” and reserve the term “battered woman syndrome” to refer to the theory advanced by Dr Walker in *The Battered Woman Syndrome*.¹⁰

BATTERED WOMAN SYNDROME

3 The theory of “battered woman syndrome” is based on the theory of the cycle of violence in battering relationships and the application of the theory of learned helplessness to battered women.

⁹ *PP41*, above n 1, para 3.

¹⁰ Lenore E Walker *The Battered Woman Syndrome* (Springer, New York, 1984) [*The Battered Woman Syndrome*].

The cycle of violence

- 4 According to the cycle of violence theory, battering in domestic relationships is neither random nor constant, but rather occurs in repeated cycles, each having three phases. The first phase is a period of tension building that leads up to the second phase, an acute battering incident. This is followed by the third phase, which consists of kind, loving, contrite behaviour displayed by the batterer to the woman. The third phase provides positive reinforcement for women to remain in the relationship.

Learned helplessness

- 5 The theory of learned helplessness was originally developed by Martin Seligman¹¹ to explain the effects of depression and was adapted by Walker in an attempt to explain why women find it difficult to leave a battering relationship. Seligman showed that laboratory animals that were subject to electrical shocks from which they were unable to escape would later fail to escape when escape was possible. Instead they would carry on with the behaviours they had developed in order to minimise the pain of the shock. Walker hypothesised that women who experienced domestic violence which they were unable to control would, over time, develop a condition of “learned helplessness”, which would prevent them from perceiving or acting on opportunities to escape from the violence.
- 6 Both aspects of “battered woman syndrome” have been subject to strong criticism.¹² While there is evidence that a cycle of violence typifies many violent relationships, it is not the only pattern. While there is evidence that human beings can develop learned helplessness as a response to negative events they cannot control,¹³ there is no clear evidence that it is a condition battered women are typically subject to or that it explains passive behaviour when this is exhibited by battered women. Seligman noted that battered women who

¹¹ The development of the theory is described in Christopher Peterson, Steven Maier and Martin Seligman *Learned Helplessness: A Theory for the Age of Personal Control* (Oxford University Press, Oxford, 1993).

¹² See, for example, Marilyn McMahon “Battered Women and Bad Science: The Limited Validity and Utility of Battered Woman Syndrome” (1999) 6 *Psychiatry, Psychology and Law* 23; and David L Faigman and Amy J Wright “The Battered Woman Syndrome in the Age of Science” (1997) 39 *Arizona Law Review* 67.

¹³ Christopher Peterson, Steven Maier and Martin Seligman, above n 11.

remain with abusive husbands appear to be displaying maladaptive passivity but that it is not clear that this is due to learned helplessness.¹⁴ Considerable research has shown that there are other compelling reasons – economic, sociological and psychological – that explain why battered women do not leave their abusive partners.¹⁵

Submissions on “battered woman syndrome”

- 7 The theory of “battered woman syndrome” was criticised in a number of submissions for promoting a rigid, limited view of battered women’s experiences and behaviour that over emphasised their psychological reactions. The word “syndrome” was considered misleading because it implies that battered women suffer from a condition of mental disability.
- 8 It was also suggested that the theory of “battered woman syndrome” did not take into account cultural diversity. This is particularly important in view of the fact that Māori women make up a disproportionate number of battered women in New Zealand and often experience more extreme levels of violence.¹⁶ Many of the prominent New Zealand cases involving evidence of domestic violence have concerned Māori women¹⁷ or non-Pākehā immigrant women.¹⁸

¹⁴ Peterson, Maier and Seligman, above n 11, 238–239.

¹⁵ Lee H Bowker “A Battered Woman’s Problems are Social, Not Psychological” in Richard J Gelles and Donileen R Loseke (eds) *Current Controversies on Family Violence* (California, Sage, 1993) 154; Regina Schuller and Patricia A Hastings “The Scientific Status of Research on Domestic Violence Against Women” in David L Faigman and others *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West, Minnesota, 1997) 354–362.

¹⁶ Warren Young and others *New Zealand National Survey of Crime Victims 1996* (Victimisation Survey Committee, Wellington, 1997) 43–45. For the year 1 July 1998 to 30 June 1999 National Collective of Independent Women’s Refuges Inc. (NCIWR) report that 44 per cent of adult clients were Māori and 51 per cent of all children accompanying their mothers were Māori: correspondence with NCIWR dated 22 February 2001.

¹⁷ For example, *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA); *Department of Social Welfare v Te Moananui* [1996] DCR 387; *R v Witika* [1993] 2 NZLR 425 (CA); *New Zealand Police v Whakaruru* (15 September 1999) unreported, District Court, Hastings, CRN 90200110/25.

¹⁸ For example, *R v Wang* [1990] 2 NZLR 529 (CA); *R v Zhou* (8 October 1993) unreported, High Court, Auckland Registry, T7/93.

- 9 Many submitters were concerned that the theory of “battered woman syndrome” risked creating a new stereotype of “the battered woman” to the detriment of victims of domestic violence who did not fit the stereotype. For example, in *R v Oakes* the Crown suggested, incorrectly, that battered women typically do not leave their partners or take active steps to protect themselves and that, therefore, since the accused did take these actions she could not have been in a battering relationship.¹⁹
- 10 The National Collective of Independent Women’s Refuges pointed out that the theories which formed the basis of “battered woman syndrome” are over 20 years old. Significant developments have been made in domestic violence research since then that are not adequately reflected in the theory of “battered woman syndrome”. A major review of evidence about the validity and use of evidence concerning battering and its effects in criminal trials has concluded that, while an extensive body of scientific and clinical knowledge strongly supports the validity and relevance of battering as a factor in the reactions and behaviour of victims of domestic violence, the term “battered woman syndrome” no longer reflects the breadth of empirical knowledge now available concerning battering and its effects.²⁰
- 11 Some submitters who had been battered themselves said that they had experienced a cycle of violence and noted negative psychological effects from the violence. Submissions from psychologists suggested that many battering relationships do go through a cycle of violence for at least part of the relationship and that domestic violence does have a debilitating effect psychologically on the victim. However, it was generally agreed that the particular theory of “battered woman syndrome” described by Walker in *The Battered Woman Syndrome* did not adequately or comprehensively describe the nature of battering relationships or the effects of battering.

¹⁹ *R v Oakes* [1995] 2 NZLR 673, 680 (CA).

²⁰ *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials: Report Responding to Section 40507 of the Violence Against Women Act* (US Department of Justice, Office of Justice Program, National Institute of Justice, US Department of Health and Human Services, National Institute of Mental Health, 1996) 17.

“Battered woman syndrome” revised as post-traumatic stress disorder

- 12 In her later work Dr Walker characterised “battered woman syndrome” as a subset of post-traumatic stress disorder (PTSD), a psychological condition recognised in the DSM IV.²¹ In *PP41* we referred to an apparent difference of opinion between the psychiatrists and the psychologists we consulted.²² The former expressed the view that that “battered woman syndrome” was not a diagnosable medical condition, whereas the latter said that “battered woman syndrome” could be diagnosed as a form of PTSD. We have since received the following joint statement that clarifies the situation:²³

The presumed difference in view between the forensic psychiatrists and the clinical psychologists outlined in this section is due to a misunderstanding as to the definition of “battered woman syndrome”.

The forensic psychiatrists were defining “battered woman syndrome” as the battering cycle, while the clinical psychologists were defining it, as Lenore Walker now does, as that form of post-traumatic stress disorder (PTSD) that exists after a woman has been in a violent relationship.

It appears that there is no point of disagreement between our two groups.

We agree that the process of the battering cycle is different from the psychological consequences of battering.

We agree that there are many consequences of battering: anxiety disorders, borderline personality disorder, depression, increased tendency to substance abuse, self-mutilation, and PTSD.

We agree that not all battered women will develop PTSD. We are also in agreement that while symptoms of PTSD are generic in nature, for example intrusive symptoms, these symptoms refer to reactions which are linked directly to a specific event or reminders of that event, ie, a woman victim of violence may have recurrent memories of the violence, dream about the violence, [etc]

We are all in agreement that it is important for expert witnesses to be able to make a connection between the offence and the syndrome.

²¹ *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, American Psychological Association, Washington, 1994) (DSM IV) 309.18. Domestic battering is referred to in DSM IV as a stressor that might give rise to symptoms of PTSD. However, DSM IV does not divide PTSD into types or subsets.

²² *PP41*, above n 1, paras 21–23.

²³ Submission from Dr Blackwell, Dr Chaplow, Dr Ratcliffe and Dr Simpson.

Recommendation

- 13 We recommend that the term “battered woman syndrome” or any use of the term “syndrome” in this context be dropped and that reference be made instead to the nature and dynamics of battering relationships and the effects of battering.

FURTHER ISSUES RAISED IN SUBMISSIONS

Expert evidence on domestic violence

- 14 Under the proposed Evidence Code, expert evidence will be admissible if it is relevant and substantially helpful to the fact-finder.²⁴ In *PP41* we said that expert evidence on the social, economic and psychological aspects of domestic violence could be substantially helpful to the fact-finder in the trials of battered defendants, provided the relevance of such evidence is established by facts proved in the particular case. Depending on the nature of the evidence, those qualified to give such evidence could include psychologists, psychiatrists, refuge workers and social scientists. Such evidence should be termed “expert evidence on battering relationships”. These conclusions were strongly supported in the submissions, which, however, urged us to set out in detail the sort of expert evidence relevant to the different aspects of the legal defences. We do so in chapter 2.

Nature of domestic violence

- 15 Several submitters emphasised the importance of recognising the often coercive nature of domestic violence. Dr V Elizabeth wrote:²⁵

[It is important that members of the legal profession and the judiciary recognise] the specificity and complexity of the battering context.

Violent behaviours – be they physical, psychological, economic and social – are not just expressive acts but also instrumental acts that coerce the actions of others. The outcome of being coerced through exposure to repeated acts of violence is inevitably the diminishment of

²⁴ Law Commission *Evidence Code and Commentary*: NZLC R55 (Wellington, 1999) s 23(1) [R55]. The Government has announced its intention to introduce a bill based on the Evidence Code into Parliament this year: New Zealand House of Representatives *Replies Supplement: Replies to Questions for Written Answer* (6 March 2001) Question no 914.

²⁵ Submission of Dr Vivienne Elisabeth, Dept of Sociology, University of Auckland.

possibilities for action: because one fears the repercussions that will follow from taking such actions . . . This constriction on possibilities for action sets the battering context apart from most other contexts in which people commit crimes against those they know.

- 16 There is strong support in the literature for the suggestion that domestic violence is often used as a means of gaining power and control over the victim.²⁶ This proposition was also supported by the individual battered women and groups representing battered women that we consulted.

Jury directions on expert evidence

- 17 Julia Tolmie criticised *PP41* for failing:²⁷

. . . to allude to an issue which becomes of great practical importance when expert evidence about domestic violence is used in support of the criminal defences. This is the degree to which the judge should be obligated to direct the jury on the relationship between the expert evidence and the specific requirements of the legal defences.

This submitter asserted that in some cases New Zealand and Australian courts have left it to defence counsel to make these links clear to the jury and have not required the trial judge to make them explicit.²⁸ We note the position in Canada where the Supreme Court has held that, once self-defence is raised and expert evidence on battering relationships introduced in support of the defence, then the jury should be informed as to how that evidence may be of use in understanding:²⁹

- why an abused woman might remain in an abusive relationship;
- the nature and extent of the violence that may exist in a battering relationship;

²⁶ R Busch, N Robertson, and H Lapsley, *Protection from Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (Victims Task Force, Wellington, 1992) 32–34; Ken McMaster, Gabrielle Maxwell and Tracy Anderson *Evaluation of Community Based Stopping Violence Programmes* (Institute of Criminology, Victoria University, Wellington, 2000) 45–46, 140; Joan Erskine “If it Quacks Like a Duck: Recharacterising Domestic Violence” (1999) 65 *Brooklyn Law Review* 1207, fn 17.

²⁷ Submission by Julia Tolmie, Senior Lecturer in Law, Auckland University of Auckland.

²⁸ *R v Oakes*, above n 19; *R v Osland* (1998) 159 ALR 170 (HC).

²⁹ *R v Malott* (1998) 121 CCC (3d) 456, 464–5 (SC).

- the accused's ability to perceive danger from her abuser. In particular whether, for the purposes of self-defence, she had a reasonable apprehension of death or grievous bodily harm; and
- whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.

Recommendation

- 18 It is the duty of the judge to ensure that an accused's defence is properly before the jury. Juries are likely to be assisted by clear directions linking the different aspects of the expert evidence on battering relationships to the various elements of the defences to which that evidence relates.³⁰ We do not consider that legislation making directions mandatory is necessary but we recommend that consideration be given to including some guidance on suitable directions in the Criminal Jury Trial Bench Book.
- 19 We cannot emphasise too strongly that it is incumbent on defence counsel to be fully aware of the nature, dynamics and social context of domestic violence so that they will know when domestic violence issues should be explored with their client³¹ and when to call expert evidence to support their client's case.

³⁰ For an example of such direction in a self-defence case see *R v Manual* (17 September 1997) unreported, High Court, Rotorua Registry, T7/97.

³¹ Counsel for the mother of James Whakaruru at her sentencing on a charge of wilfully permitting her child to be ill-treated (but not for the episode that led to the boy's death) and a second charge of assaulting the child with a weapon, explained her acts and omissions in the context of a battering relationship. The explanation was accepted by the judge who imposed a suspended term of imprisonment and supervision with counselling (from sentencing notes of Judge AP Christiansen in *New Zealand Police v Whakaruru*, above n 17.

2

Self-defence

INTRODUCTION

20 THE RELEVANT STATUTORY PROVISION on self-defence is section 48 of the Crimes Act 1961:

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

21 In the recent decision of *R v Wei Hau Li and Yue Qiang Wu*,³² the Court of Appeal commented on how a judge should direct a jury on the section. The Court said:³³

The preferable approach, and the one upon which trial judges usually proceed, is that taken by Tipping J in *Shortland v Police* (High Court Invercargill AP74/95, 23 April 1996) (see Adams CA48.07). In summary, on this approach the jury is asked to consider first what the defendant believed the circumstances to be, from his or her point of view. The second question is whether, bearing in mind that belief of the accused about what was happening, he or she was acting in self-defence (again considered from his or her point of view). The last question is whether, given that belief, the force used in self-defence was actually reasonable.

THE INTERPRETATION OF “REASONABLE FORCE”

22 In the preliminary paper we noted that, while section 48 was on its face gender neutral and liberal, there had been criticism of the way it had been applied in cases where battered women claimed to have

³² *R v Wei Hau Li and Yue Qiang Wu* (28 June 2000) unreported, Court of Appeal, CA140/00, 141/00.

³³ *R v Wei Hau Li and Yue Qiang Wu*, above n 32, 6.

killed an abusive partner in self-defence.³⁴ These criticisms centred on two of the factors that are used to determine the reasonableness of the force used: the imminence of the danger and a lack of alternatives to the use of force.³⁵

- 23 Imminence focuses on danger that is close at hand. This has the effect of limiting the inquiry to the discrete incident of violence immediately preceding the defendant's use of force. Yet the kind of danger battered women face is on-going violence rather than a one-off incident of violence. It is the constant threat of violence that underpins the abuser's use of domestic violence as an instrument of control.
- 24 Imminence is closely linked to whether or not the battered woman had a reasonable alternative to avoiding the danger. Threats of future violence are typically used to keep a battered woman from leaving a relationship (see paragraph 46). Going to the police, for example, is a reasonable alternative to the use of force if thereby the defendant obtains effective protection, but not if it will ensure the defendant's safety only for as long as she is in the presence of police officers.³⁶ In the preliminary paper we raised the question of whether in some circumstances inevitability of danger may be a more useful concept in determining the reasonableness of the force used, rather than imminence of danger.

Question (2): Should it be possible for a defendant to be acquitted on the basis that he or she acted in self-defence where the danger sought to be avoided was inevitable but not imminent?

Submissions

- 25 In general, the submissions favoured allowing inevitability to be a factor in assessing reasonableness where the danger is not imminent.
- 26 One submitter pointed out that focusing on imminence may misinterpret (and negate) the nature of the threat that the battered

³⁴ *PP41*, above n 1, paras 36–46.

³⁵ Adams on Criminal Law (Brookers, Wellington, 1992) loose-leaf ed, para CA48.08A [Adams].

³⁶ Ordinarily, a person fearful of violence will not be permitted by the law to engage in self-help. But if in particular circumstances, there is a real reason to apprehend that police assistance will not be available or sufficient to deal with the threat, the option of self-help may arise.

defendant is responding to. A search for “imminent danger” inclines the court to look for a one-off attack and to measure the defendant’s use of force in relation to that attack. Such an approach is based on a view of domestic violence as a series of discrete acts of physical violence between which the woman is not being abused and is free to leave. However, violence within a battering relationship is often just part of a general strategy to maintain power and control over the intimate partner. Successfully negotiating a particular incident of physical violence by calling the police, leaving the room or leaving the relationship at a particular point in time may not be the end of the matter. A woman may have done all of these things many times in respect of particular incidents of violence without ultimate relief from the constant threat of violence in her life. In fact, these actions may be instrumental in escalating the terror she lives with. Other submitters made similar observations.

- 27 Another submitter suggested that it was incorrect to assume that where the danger is not imminent an alternative means of dealing with the threat will always be available. This submitter considered that the jury should be fairly informed about the facts of a particular relationship and the defendant’s experience with and belief about the usefulness of apparent alternatives. Others suggested that it was important for the fact-finder to take account of the realities of the limitations of law enforcement and social services. Often with the best will in the world, government agencies are not able to act. It was noted that this was appreciated by the English Court of Appeal in *R v Hudson and Taylor*.³⁷
- 28 Others suggested that the concept of inevitability more appropriately reflects the experience of battered defendants than the concept of imminence. Acknowledging that would avoid the potential distortion of the concept of imminence by attempting to fit “deserving” cases into it. A legal academic referred to a case where he believed the defence of insanity had clearly been distorted to enable a battered defendant, whom the jury considered morally blameless, to “get off”. A more realistic approach to reasonableness would encourage juries to apply the law without resorting to distortions.
- 29 Despite the general support for allowing inevitability to be an additional factor in assessing reasonableness where the danger is not imminent, submitters were divided on whether a legislative

³⁷ *R v Hudson and Taylor* [1971] 2 QB 202.

amendment is the best way to achieve this. One noted that section 48 in its present form says nothing about imminence or inevitability and that it is open to the Court of Appeal to develop the law. Another thought that this course of action would require a process of revision of long held attitudes and interpretations on the part of the courts and that such a process would be long and uncertain.

The Commission's view

- 30 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.
- 31 We agree that the terms of section 48 do not require the courts to exclude self-defence where danger is inevitable but not imminent. However, we think it preferable to make this explicit by legislative reform, rather than to leave the law to be developed case by case. Relying on the courts to develop the law may require a person to be convicted and then to appeal successfully before the legal position is clarified. While the Court of Appeal would be free to change its earlier approach, a trial judge may feel he or she is required to follow the approach in *Wang*. Until the Court of Appeal had dealt with the matter, the correct interpretation of section 48 would remain unclear, although some trial judges may approach section 48 in terms of inevitability.

Recommendation

- 32 Section 48 should 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.

THE THRESHOLD FOR ALLOWING SELF-DEFENCE TO GO TO THE JURY

- 33 In the preliminary paper we considered a further issue in relation to self-defence. The Court of Appeal in *Wang* held that a trial judge may withhold the issue of self-defence from the jury if he or she

considers that no jury could properly regard the defendant's use of force to be reasonable.³⁸ In *Wang*, the defendant was an immigrant from China who was charged with the murder of her abusive husband. On the night of the homicide the husband 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. She claimed to have acted in self-defence. At trial a psychiatrist gave evidence that in her mental state she could not see any alternative to the use of force. The trial judge determined that on no view of the evidence could her use of force be seen as reasonable and did not allow the issue of self-defence to go to the jury. The Court of Appeal upheld the trial judge.

- 34 We noted that views on what is reasonable change over time and that views on domestic violence in particular had changed considerably over recent years. We asked:

Question (1): Whenever the evidence establishes a reasonable possibility that a defendant intended to act defensively, should questions about the reasonableness of the force used by the defendant always be left to the jury?

Submissions

- 35 A large majority of submitters favoured leaving the issue of reasonableness to the jury, whenever the evidence established a reasonable possibility that the defendant intended to act defensively.
- 36 Those in favour emphasised that it was the task of the jury to make the assessment of reasonableness and that the judge should not enter into the arena of factual determination.
- 37 One submitter suggested that social norms and understandings concerning domestic violence have been in a state of flux. This leaves room for considerable disagreement about the interpretation to be placed on any particular set of facts. It is the role of the jury to inject community values into the criminal justice process and to act as a safeguard against those instances where judges and lawyers might otherwise lose touch with the community's sense of justice. This submitter noted that in several cases in Australia the jury has

³⁸ *R v Wang*, above n 18, 536–7.

taken a more lenient approach to the facts than the judge was inclined to.³⁹ A very experienced advocate submitted that judges, while paying lip service to the common sense and discernment of juries, too often interfere and so do not allow that very common sense and discernment to be applied.

- 38 Those opposed to the suggestion considered that it was preferable to have a judicial filter so as to assist the jury to avoid perverse verdicts based on sympathy.

The Commission's view

- 39 The Commission agrees that the determination of what is reasonable in self-defence calls for the application of community values. We are of the view that, contrary to *Wang*, the issue of the reasonableness of the force used in self-defence should always be left to the jury if there is evidence of a reasonable possibility that the defendant intended to act in self-defence.
- 40 A judicial filter would remain because a judge would still have to decide whether, on the evidence, it was a reasonable possibility that the defendant intended to act defensively. Unlike the question of whether the force used was reasonable, this question does not involve an assessment of community values in which the community's sense of justice should come into play.

³⁹ For example, in the *Queen v R* (1981) 28 SASR 321, the accused was convicted of the murder of her violent husband at first instance. She killed him with an axe whilst he was sleeping. The appeal court rejected her argument that self-defence should have been left to the jury on the facts, but agreed that provocation should have been. It ordered a retrial of the case on this basis. In fact the jury, on retrial, returned a verdict of outright acquittal even though their only options were technically manslaughter on the basis of provocation or murder. (See David Brown and others (eds) *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (2 ed, Federation Press, Sydney, 1996) 687. In *R v Tassone* (20 April 1994) unreported, the Northern Territory Supreme Court left self-defence to the jury in respect of a woman charged with the attempted unlawful killing of her violent de facto husband whilst he was asleep. It is clear, however, from comments made during the trial that Gray J did not have much confidence that there was much, if any, case for self-defence on the facts. He commented that the case before him: "On any conceivable view . . . [is] on the outer limit of self-defence cases, will be very likely to be beyond the outer limit, but I say my inclination is to leave it [to the jury]." (174) In the end he was of the opinion that a trial judge needed to be extremely careful about withdrawing issues of fact from the jury. In fact the jury acquitted on the basis of self-defence.

- 41 We acknowledge that, as a general rule, questions of evaluative fact⁴⁰ may be withdrawn from the jury if there is insufficient evidence to support a finding that conduct was or might have been within the description.⁴¹ However, we believe a special rule is appropriate because the issue of what is reasonable force in self-defence is particularly appropriate for the application by a jury of community values.

Recommendation

- 42 We recommend that a new subsection be inserted in section 48 of the Crimes Act 1961 to the effect that in a jury trial, 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.

EXPERT EVIDENCE IN A SELF-DEFENCE CASE

- 43 Expert evidence on the social context, nature and dynamics of domestic violence is vital to ensure that the law on self-defence is applied flexibly and fairly. Under the Evidence Code, an expert is defined as “a person who has specialised knowledge or skill based on training, study, or experience”.⁴² Under this definition, those qualified to give expert evidence concerning the nature and dynamics of battering relationships and the effects of battering would not be limited to psychiatrists and psychologists but may include refuge workers and others working with victims of domestic violence, as well as those who have made a study of domestic violence. In the preliminary paper, we suggested that evidence concerning the behaviour of battered women, patterns of violence in battering relationships, social and economic factors, the psychological effects of battering, separation violence, and evidence concerning the battered defendant’s appraisal of the danger she is in may all be relevant and substantially helpful to the fact-finder.⁴³ Several commentators urged us to set out in greater detail the sort of evidence that is likely to be relevant and helpful in relation to particular sorts of cases. This section discusses the sort of expert

⁴⁰ These concern legal assessment of the facts as reasonable or negligent: Glanville Williams “Law and Fact” [1976] Crim LR 472.

⁴¹ Glanville Williams, above n 40, 482.

⁴² R55, above n 24, s 4.

⁴³ PP41, above n 1, para 28.

evidence that might be relevant and helpful in cases where a claim of self-defence is made by a battered defendant.

- 44 Expert evidence can help fact-finders understand why people remain in battering relationships: the reasons may be economic dependency, social isolation, beliefs that children need a father or that marriages are for life, or fear of separation violence (see paragraph 46). Cultural differences may be relevant. Ending a marriage may be less acceptable in some cultures than others. This sort of evidence should be admitted to counter any intuitive belief that if the beatings were really as severe as the victim said they were, he or she would have left the relationship long ago.
- 45 Expert evidence on the dynamics of battering relationships may help the fact-finder to assess the danger that the defendant was facing. Recognising the controlling/coercive nature of some battering relationships enables both the victim's and the abuser's actions to be better understood.⁴⁴ It alerts the fact-finder to the fact that the abuse may not be an isolated incident or a series of isolated incidents but is in fact part of an oppressive and intimidatory pattern of coercion and control. It helps to explain a victim's seemingly contradictory behaviour, for example, refusal to prosecute the abuser. It may also explain why an apparently minor incident may have a significant impact on the victim.⁴⁵ Because many batterers use violence tactically as an instrument of control, a victim of domestic violence can often predict that violence will be provoked by any act that the abuser interprets as an exertion of autonomy, and therefore as a challenge to the abuser's control. The very act of seeking help from others may escalate the violence.

⁴⁴ Of course, not all instances of domestic violence can be explained in this way. Other theories have offered to account for domestic violence. O'Neill and Patrick have listed five family violence theoretical models: pathology, expressive tension, instrumental power, learned behaviour and ideological social systems (Damian O'Neill and Jon Patrick "A Review of the Literature on Violence" in Jon Patrick, Helen Foster and Brian Tapper (eds) *Successful Practice in Domestic Violence in New Zealand* (Manawatu Men Against Violence, Palmerston North, 1997) 11–33). Some instances of domestic violence will be due to the pathology of the abuser or will be expressions of anger which are not intended to coerce. Nevertheless, it is clear that the desire to control a partner through physical and psychological coercion, is a major factor in many battering relationships.

⁴⁵ One of the battered women we interviewed indicated that after a single serious assault, her partner only had to threaten by words or gesture and she would be intimidated by the memory of the major assault.

46 Expert evidence on separation assault will help the fact-finder understand an individual defendant's claim that she had no safe alternative to the force that was used. Separation assault is the name given to "the particular assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation".⁴⁶ The existence of separation assault is well documented in the literature.⁴⁷ Interviews with, and submissions from, battered women and their advocates indicated that this is an important issue in New Zealand.⁴⁸ Expert evidence concerning separation assault could back up a defendant's belief that

⁴⁶ Martha Mahoney "Legal Images of Battered Women: Redefining the Issue of Separation" (1990) 90 Michigan Law Review 1, 6.

⁴⁷ See the discussion in *PP41*, above n 1, para 43. A Wallace, *Homicide: The Social Reality* (NSW Bureau of Crime Statistics and Research, Sydney, 1996) found that 46 per cent of the women in her study who were killed had either left or were in the process of leaving the relationship. C Perry "An Empirical Study of Applications for Protection Orders Made to the Christchurch Family Court" (2000) *Butterworths Family Law Journal* 139, studied 208 applications for protection orders to the Christchurch Family Court. He found that the "majority (71 per cent) who were separated reported that they had been subjected to domestic violence from their respondent after separating" (at 140). See also Ruth Busch and Neille Robertson "The Gap Goes On: An Analysis of Issues Under the Domestic Violence Act 1995" (1997) 17 NZULR 337; Ken McMaster, Gabrielle Maxwell and Tracy Anderson, above n 26, 45, 89; Martha Mahoney, above n 46; and Carolyn Hoyle *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Clarendon Press, Oxford, 1998) 189–191.

⁴⁸ The submission from Women's Refuge states: "Police statistics for July to September 1998 show that the vast majority (96 per cent of 936) of DVA offences are for contravening protection orders (i.e. attempting or making contact with the applicant/s or protected person/s). Of the 761 apprehensions of offenders, 97 per cent were for protection order breach. Approximately 65 per cent of breaches result in a conviction (Barwick, Helena, Alison Gray and Roger Macky *Domestic Violence Act 1995 Process Evaluation*, Ministry of Justice and Department for Courts, Wellington, 2000). During the interviews with Refuge clients for the 'Māori Women and Work' report, several women talked about the ineffectiveness of Protection Orders (simply a piece of paper) when their lives were in immediate danger. One woman commented on being unable to call the Police to inform them that her ex-partner was breaching her Protection Order because he had pulled the phone out of the wall and was attempting to strangle her with the cord". The submitter further noted that women are often most in danger after separation or when attempting to be proactive in stopping the violence, for example, Elizabeth Bennellick who was murdered by her former partner John Harold La Roche in a family court waiting room. (The Dominion, 9.12.98) and the victim in *R v Teapu* (11 December 1998) unreported, High Court, Wellington Registry, T 889–98, who was killed after reporting a beating to the police.

leaving the relationship was not a safe option, would not stop the violence and may in fact escalate it.

- 47 Evidence about the defendant's experience in seeking protection from the police could be supported by expert evidence concerning the limits of the ability of the police to adequately protect targets of serious domestic violence, even when responding within best practice guidelines.⁴⁹ There are several studies documenting the problems that targets of domestic violence have had in enlisting police protection.⁵⁰ Research and case law also indicate that legal protection is sometimes inadequate in cases of serious ongoing domestic violence.⁵¹ Such evidence would be helpful to the fact-finder in assessing both the options realistically available to the defendant and the credibility of the defendant's evidence of her own experience in seeking protection from the abuser.
- 48 Expert evidence about the cultural group to which the defendant belongs may be relevant in throwing light on particular difficulties the defendant may have faced in gaining access to legal protection. For example, language difficulties, lack of knowledge of the New Zealand legal system, lack of knowledge of their rights, and mistrust of police by refugees who have experienced state persecution.
- 49 Expert evidence concerning the ability of a battered woman to "read" her partner and to pick up signals of danger that would not be apparent to an outsider may be relevant to the defendant's claim that her use of force was reasonable in the circumstances as she saw them.

⁴⁹ For example, in the Australian case of *R v Gilbert* (4 November 1993) unreported, Supreme Court WA, an Aboriginal elder from the community the accused belonged to, and an Aboriginal Liaison Officer from the local police force, were introduced into court to explain the lack of resources available to the accused when she was trying to deal with the deceased's violence. This evidence was used to demonstrate that there had been a break down of both non-Aboriginal and Aboriginal systems of legal protection in relation to the violence faced by the accused. Witnesses testified that everyone in the community knew what was happening but were too afraid to intervene because they were all scared of the deceased.

⁵⁰ R Busch, N Robertson, and H Lapsley, above n 26; S Hatty, "Policing and Male Violence in Australia" in J Hanmer, J Radford, and E Stanko, (eds) *Women Policing and Male Violence*, (Routledge, London, 1989) 70; J Stubbs, and D Powell *Domestic Violence: Impact of Legal Reform in New South Wales* (New South Wales Bureau of Crime Statistics and Research, Sydney, 1989).

⁵¹ A Stewart "Who are the Respondents of Domestic Violence Protection Orders" (2000) 33 *The Australian and New Zealand Journal of Criminology* 77.

- 50 Expert evidence of the psychological effects of battering on the defendant may be relevant to the defendant's view of the circumstances in a self-defence case.
- 51 To establish the relevance of expert evidence on the nature and dynamics of battering relationships and the effects of battering, it will be necessary for the defence to lay a proper factual foundation. This may require the defendant to give evidence in some cases.
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3

Excessive self-defence

INTRODUCTION

- 52 **E**XCESSIVE SELF-DEFENCE is a partial defence in several other jurisdictions. It reduces murder to manslaughter where the defendant intended to act in self-defence but in doing so used more force than was necessary. The form of the defence is largely dependent on how the elements of self-defence are formulated. Thus, different forms of the defence have existed or been proposed in different jurisdictions. The defence previously existed in Australian common law and is currently available in South Australia (by statute),⁵² in India (as part of the Penal Code),⁵³ in Sudan (as part of its Penal Code),⁵⁴ and in Ireland (as a common law defence).⁵⁵
- 53 Excessive self-defence had a chequered history in Australia. It was introduced to Australian common law by the High Court of Australia in *R v Howe*,⁵⁶ rejected by the Privy Council in *Palmer v R*⁵⁷ (on appeal from the Jamaican Court of Appeal), re-established by the High Court of Australia in *Viro v R*⁵⁸ (not following the Privy Council), re-considered by the High Court of Australia in *Zecevic v R*⁵⁹ and abolished by a five to two majority. It

⁵² Section 15 of the Criminal Law Consolidation Act 1935 (SA).

⁵³ Stanley Yeo *Unrestrained Killings and the Law* (Oxford University Press, Delhi, 1998) 119.

⁵⁴ *Unrestrained Killings and the Law*, above n 53, 127.

⁵⁵ *Unrestrained Killings and the Law*, above n 53, 165.

⁵⁶ *R v Howe* (1958) 100 CLR 448.

⁵⁷ *Palmer v R* [1971] AC 814 (PC).

⁵⁸ *Viro v R* (1978) 141 CLR 88.

⁵⁹ *Zecevic v R* [1987] 162 CLR 645.

was the complexity of Mason J's six step direction in *Viro*⁶⁰ that led to the final abandonment of the defence.

54 Several English law reform bodies have recommended that excessive self-defence be introduced in tandem with a form of self-defence similar to our section 48 of the Crimes Act 1961. The Criminal Law Revision Committee of England and Wales has recommended the following version:⁶¹

Where a person kills in a situation in which it is reasonable for some force to be used in self-defence or in the prevention of crime but the defendant uses excessive force, he should be liable to be convicted of manslaughter not murder if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances.

⁶⁰ The *Viro* direction was a jury direction for cases involving claims of self-defence and excessive self-defence. At that time, the Australian version of self-defence required both a reasonable belief in circumstance that would justify the use of force and a reasonable belief in the proportionality of the force used in self-defence. The *Viro* direction stated:

- (1) (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.
- (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.
- (2) If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.
- (3) If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the defendant was reasonably proportionate to the danger which he believed he faced.
- (4) If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
- (5) If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury – did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
- (6) If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

⁶¹ Criminal Law Revision Committee *Offences Against the Person, 14th report* (1980) Cmnd 7844, recommendation 73, 138. The Committee had recommended the codification of self-defence along the lines of our section 48. Excessive self-defence was defined in relation to that defence.

The Law Commission (England and Wales) developed a similar formulation in section 59 of the draft Criminal Code:⁶²

A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public or private defence), but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.

This draft has the support of the House of Lords Select Committee on Murder and Life Imprisonment.⁶³ Neither has yet been enacted.

55 In the preliminary paper, we suggested a version drafted around the words of section 48:

It is a partial defence to a charge of murder (reducing the offence to manslaughter) if, in the defence of himself or another, a person uses more force than it is reasonable to use in the circumstances as he believes them to be.

56 Several advantages and disadvantages of the defence were noted in the preliminary paper. The main advantage of the defence is that it recognises that a person who kills, believing (albeit wrongly) that this is necessary in self-defence, is less culpable than a person who kills with no such belief. A qualified defence may provide a more appropriate outcome where a jury would otherwise acquit out of sympathy in cases where it considers that the defendant acted honestly but unreasonably.⁶⁴ However, the defence has been criticised as leading inevitably to overly complicated directions that confuse the jury.⁶⁵ It has also been suggested that a partial defence of excessive self-defence is unnecessary because the facts giving rise

⁶² Law Commission (England and Wales) *Criminal Law: A Criminal Code for England and Wales*, Law Com no 177 (HMSO, London, 1989) 68.

⁶³ House of Lords Select Committee on Murder and Life Imprisonment *Report of the Select Committee on Murder and Life Imprisonment* (HMSO, London, 1989) para 89.

⁶⁴ Noel O'Brien "Excessive Self-Defence: A Need for Legislation" (1983) 25 Crim L Q 441, 453.

⁶⁵ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Discussion Paper: Model Criminal Code: Chapter 5: Fatal Offences Against the Person* (ACT, Model Criminal Code Officers Committee, 1998) 113 [*Model Criminal Code*].

to such a defence may also go to prove provocation.⁶⁶ Further, the Crown has to prove that the defendant's use of force was not reasonable and it was thought that a jury would be slow to accept this if the defendant honestly believed the force used to be necessary.⁶⁷

57 We asked for submissions on the following question:

Question (3): Should a new partial defence of excessive self-defence be introduced in New Zealand?

Submissions

- 58 A small majority was against the introduction of excessive self-defence.
- 59 Of those who gave reasons against introducing the defence, all but one said that they preferred a sentencing discretion for murder, which would render a partial defence unnecessary. Two referred to the complexity of the defence as a reason for opposing its introduction. Several submissions suggested that the defence would not be particularly beneficial for battered defendants as it was focused on proportionality. That is, it only applied in a situation where it would be reasonable to use some force. As was pointed out in *PP41*, the problems battered defendants have with self-defence relate to matters of imminence and the existence of alternative options to the use of force, rather than proportionality.
- 60 Those who favoured introducing the defence thought that partial defences performed an important role in signalling the reduced culpability of some intentional killers by allowing them to be convicted of manslaughter rather than murder. The intention to act in self-defence reduces the culpability of the defendant who kills in excessive self-defence, and this should be reflected in the crime for which such a defendant is convicted.
- 61 One commentator argued that, aside from reasons of moral culpability, there are strong reasons in legal principle for introducing the defence of excessive self-defence. Such a defence fits logically with the treatment of gross negligence as the basis for involuntary

⁶⁶ *Zecevic v R*, above n 59, 664, per Wilson, Dawson and Toohey JJ.

⁶⁷ *Zecevic v R*, above n 59, 654, per Mason J.

manslaughter.⁶⁸ The defence, in effect, holds the accused morally culpable for unreasonably misjudging the force necessary in the circumstances as he or she believed them to be.

62 One submitter observed that the complexity of the defence was overstated. The jury direction used in *Viro* was extremely complex because of its relationship to the Australian version of self-defence. When the *Viro* direction was devised, Australian self-defence required both a reasonable belief in circumstance that would justify the use of force and a reasonable belief in the proportionality of the force used in self-defence. A defence of excessive self-defence based on section 48 would be relatively simple because both the circumstances and the reasonableness of the force used would be assessed according to the honest belief of the defendant.

63 However, this submitter preferred the following version to the version proposed by the Law Commission (see paragraph 55):⁶⁹

A person charged with murder shall have the offence reduced to manslaughter if he or she believed that the conduct was necessary to defend himself or herself or another person . . . and his or her conduct was not a reasonable response in the circumstances as perceived by him or her.

The submitter was concerned that the defence proposed by the Law Commission did not explicitly require an honest belief on the part of the defendant that the force used was necessary in self-defence.

64 Several submitters disputed the suggestion that excessive self-defence was unnecessary because in most cases it would overlap with provocation. It was pointed out that, while there may be overlaps between the two defences, they are aimed at quite different situations.

⁶⁸ At common law manslaughter can result from an unlawful act or from gross negligence in performing a lawful act. In New Zealand ss 155 and 156 of the Crimes Act 1961 impose criminal responsibility for failure to have and use reasonable knowledge, skill, care and precautions with regard to dangerous activities and dangerous things. However, s 150A, enacted in 1997, essentially requires a standard of gross negligence if the sections are relied on to support a charge of manslaughter. See the discussion in AP Simester and Warren J Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998) 487–494. See also the discussion in Stanley Yeo “Revisiting Excessive Self-Defence” (2000) 12 *Current Issues in Criminal Justice* 39.

⁶⁹ This version is proposed in: Stanley Yeo, above n 68, 52.

- 65 The suggestion that excessive self-defence was unnecessary because the Crown has to prove that the defendant's use of force was not reasonable and a jury would be slow to accept this if the defendant honestly believed the force used to be necessary, was also disputed. It was submitted that just because the defendant genuinely believes that the force used was necessary does not mean that the jury would agree that this was so.
- 66 Some submissions were of the view that excessive self-defence may be more applicable to the situation of battered defendants than provocation or diminished responsibility. The defence recognised that the defendant had a defensive motive, although his or her actions were excessive in the circumstances. Unlike provocation, there was no requirement for loss of self-control, a requirement that may pose evidential difficulties for battered defendants (see the discussion at paragraphs 102–104). Unlike diminished responsibility, it does not entirely locate the defence in the inadequacy of the defendant.

The Commission's view

- 67 The Commission acknowledges the strength of the arguments in support of excessive self-defence as a partial defence. Of all the partial defences considered in the preliminary paper, this is the one we would most favour introducing into New Zealand law. 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.⁷⁰ 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.

⁷⁰ Yeo notes that the South Australian provision appears to be working reasonably well in practice since its inception in 1997 and that the same has been said of the Irish common law defence: Stanley Yeo, above n 68, citing P Charleton *Offences against the Person* (The Roundhouse Press, Dublin, 1992) 159.

68 Despite this, and as discussed in chapter 7, our preference is not to retain or introduce partial defences, but instead rely on a sentencing discretion for murder to accommodate the many and various situations when a lesser culpability in intentional homicide should be recognised.

Recommendation

69 We do not recommend the creation of a new partial defence of excessive self-defence.

4

A new defence for battered defendants?

INTRODUCTION

- 70 **B**ECAUSE OF THE DIFFICULTIES that battered defendants may have in relying on self-defence, some commentators have recommended creating a new defence that takes better account of the nature of the danger that battered defendants face. In the preliminary paper, we discussed three such defences: self-preservation, an extended form of self-defence proposed by the Western Australian Task Force for Gender Violence and tyrannicide.
- 71 Several versions of self-preservation have been proposed. The version discussed in the preliminary paper was proposed by a New Zealand group and is intended as a partial defence to murder. The partial defence would be available to:⁷¹
- . . . 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.
- 72 The Task Force on Gender Violence set up by the Chief Justice of Western Australia proposed a new complete defence which would extend the concept of self-defence and exist alongside traditional self-defence:⁷²

⁷¹ Suzanne Beri "Justice for Women Who Kill: A New Way?" (1997) 8 Australian Feminist Law Journal 113, 114.

⁷² *Report of the Chief Justice's Taskforce on Gender Bias* (Perth, 1994) 214.

Conduct is carried out by a person in self-defence if the person is responding to a history of personal violence against herself or himself or another person and the person believes that the conduct was necessary to defend himself or herself or that other person against the violence.

- 73 The proposed defence of tyrannicide⁷³ would be a complete defence specifically designed for those who are attempting to free themselves from “private tyrants”. A private tyranny is defined as existing where one person maintains control of another through social isolation, violence and threats of violence to the other person and those important to that person, and, further, uses these means to prevent the other person from freeing him or herself from the tyrant’s control. The defence would have two requirements. First, proof of a regime of private tyranny. Second, the killing of the tyrant must be reasonably necessary for the victim to escape from the tyranny, employing the traditional standards of “necessity” and “reasonableness”.
- 74 We asked for submissions on two questions:

Question (4): Should a special defence for victims of domestic violence who kill or assault their abusers be enacted?

Question (5): If so, which of the defences discussed in this section do you favour, or should the defence take another form?

Submissions

- 75 The majority of submissions did not favour a special defence (either full or partial) for victims of domestic violence who kill or assault their abusers.
- 76 A special partial defence was rejected by a number of submitters because they thought that a sentencing discretion for murder was preferable to the use of partial defences.
- 77 A special complete defence was rejected on the ground that it would be unnecessary if self-defence was widened to include defensive action against inevitable violence that was not imminent, and if expert evidence about the realities of domestic violence and the

⁷³ Jane Maslow Cohen “Regimes of Private Tyranny: What do they Mean to Morality and for the Criminal Law?” (1996) 57 *Uni of Pitt LR* 757.

inadequacies of official protection were made available to the fact finder.

- 78 One submitter noted that the defence of “tyrannicide” was sufficiently different from self-defence to be useful as a “stand alone” defence. However, the submitter questioned whether escape from “tyranny”, as opposed to avoiding a measurable threat to life and health, could justify homicide. On balance, the submitter thought it would be preferable to amalgamate the better parts of the concept into a more expansively defined version of self-defence.
- 79 It was also argued that any new defence runs the risk of introducing uncertain and unintended consequences into the criminal law. Therefore, it is preferable to expand existing defences.
- 80 Some submitters feared that the creation of a special defence for victims of domestic violence would suggest to some people that women, who constitute the majority of battered defendants, are getting special or different treatment. Indeed, one submission described a special defence for battered defendants as “ad hoc and unfair”.
- 81 It was also thought that a satisfactory defence would be difficult to draft.
- 82 Supporters of a new special defence said that any modification of the existing defence of self-defence is unlikely to be satisfactory for battered defendants. Although the re-interpretation of what is considered “reasonable” and what is understood by “danger” would undoubtedly lead to an improvement in their situation, the effectiveness of such changes will almost certainly be hampered by the historical legacy of this defence.
- 83 If there is to be a new special defence for victims of domestic violence, an option not having majority support, there was a strong preference for a gender-neutral defence that applied to all relationships involving domestic violence. There was no widespread preference for any particular defence.

The Commission’s view

- 84 The Commission does not support the creation of a special complete defence for victims of domestic violence who kill or assault their abusers. It is preferable that the general requirement of reasonableness in self-defence be interpreted so that it can incorporate the use of force in self-defence against violence that may not be imminent but which is necessary to save life or limb. We accept that the historical background to the defence may make this difficult, but we

believe that this difficulty can be overcome by the calling of relevant evidence, judicial directions and the reforms we propose.

- 85 Nor do we support the creation of a special partial defence. We do not think such a defence is necessary given our recommendation that the mandatory life sentence for murder be replaced with a sentencing discretion. Our reasons for preferring a sentencing discretion to partial defences are set out in chapter 7.

Recommendation

- 86 We do not recommend the creation of a special defence for battered defendants.
-

5

Provocation

INTRODUCTION

87 **P**ROVOCATION IS A PARTIAL DEFENCE that, when successful, reduces a charge of murder to one of manslaughter. The defence developed as part of the common law to mitigate the capital consequences of a murder conviction. In New Zealand it has been codified in section 169 of the Crimes Act 1961:

169 Provocation

- (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
- (2) Anything done or said may be provocation if—
 - (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
 - (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.
- (3) Whether there is any evidence of provocation is a question of law.
- (4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.
- (5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.
- (6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.
- (7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

DIFFICULTIES WITH THE DEFENCE

- 88 In the preliminary paper, we identified three major problems with the defence: how to take account of mental characteristics that affect the power of self-control, the use of the defence to partially excuse domestic violence and the difficulty victims of domestic violence have in accessing the defence.

Mental characteristics and the ordinary person

- 89 Provocation has both a subjective element and an objective element. The subjective element requires that the provocation must have caused the defendant to lose the power of self-control, thereby inducing him or her to kill. The objective element requires that the provocation must be sufficient to cause a person having the power of self-control of an ordinary person, but in other respects having the characteristics of the defendant, to lose the power of self-control. The objective element is intended to place some limits on the defence so that it is not available to those defendants who fail to show the level of self-control that “everyone is entitled to expect that his fellow citizens will exercise in society as it is today”.⁷⁴
- 90 The current form of the objective test is sometimes referred to as the “hybrid person test” because it combines objective elements (the ordinary person’s power of self control) with subjective elements (the characteristics of the defendant). This “hybrid person test” has been the subject of much debate, and judicial interpretation of the test has varied over the years. In particular, attempting to take account of the particular characteristics of the defendant has led to considerable confusion over what effect should be given to mental characteristics, such as depression or brain damage, which may affect the defendant’s power of self-control.
- 91 In *R v McGregor*, the first appellate judgment to interpret the section, the Court of Appeal said that the offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self control is weakened because of some particular characteristic possessed by him.⁷⁵ The Court said that a “characteristic” must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have a sufficient degree of

⁷⁴ *DPP v Camplin* [1978] AC 705, 717, per Lord Diplock (HL).

⁷⁵ *R v McGregor* [1962] NZLR 1069, 1081–1082 (CA).

permanence. Physical as well as mental qualities, and attributes such as colour, race and creed could all be characteristics. As regards mental characteristics, it was not sufficient to be merely mentally deficient or weak-minded. The provocation must be related to or directed at the characteristic, so that the words or conduct are particularly provocative to the individual because of the characteristic.

- 92 This interpretation caused difficulties and was much criticised.⁷⁶ In *R v McCarthy*,⁷⁷ the Court of Appeal abandoned the position it had taken in *McGregor*. The Court noted that the *McGregor* interpretation had caused continual difficulty and suggested that the case may have unduly restricted the ambit of provocation in New Zealand. The suggestion that the provocation must be directed at the characteristic was disapproved. Mental deficiency or a tendency to excessive emotionalism as a result of brain injury were given as examples of characteristics of the offender that could be attributed to the hypothetical person of section 169(2)(a). The ordinary power of self-control is left to be assessed on the assumption that the hypothetical person has the same characteristics as the defendant. The question to be asked is “whether a person with the ordinary power of self control would in the circumstances have retained self control, notwithstanding such characteristics”.⁷⁸ The court acknowledged that this could be a difficult question. *McCarthy* created confusion because the judgment can be interpreted as allowing a characteristic to be relevant because it reduces the defendant’s power of self-control, and also as denying this.
- 93 In *R v Campbell* the Court of Appeal clarified its pronouncement in *McCarthy* by holding that a characteristic can be taken into account in considering an offender’s sensitivity or susceptibility to the provocation, but not in assessing the power of self-control of the hypothetical ordinary person.⁷⁹
- 94 The application of section 169 with regard to mental or emotional characteristics that of their nature reduce a defendant’s power of self-control has remained controversial. *R v Rongonui*,⁸⁰ the most

⁷⁶ The *McGregor* interpretation has been consistently criticised in *Adams* from its first edition (*Adams on Criminal Law and Practice in New Zealand* (1964) 268–270) to the current edition (*Adams*, above n 32, para CA169.10A).

⁷⁷ *R v McCarthy* [1992] 2 NZLR 550 (CA).

⁷⁸ *R v McCarthy*, above n 77, 558.

⁷⁹ *R v Campbell* [1997] 1 NZLR 16, 25 (CA).

⁸⁰ *R v Rongonui* [2000] 2 NZLR 385 (CA).

recent Court of Appeal judgment to extensively discuss the issue, graphically shows that a solution is not in sight. At the time of the offence, the appellant in *Rongonui* was suffering from a major depressive episode and from PTSD. She was also brain damaged as a result of long-term physical and chemical abuse. The Court of Appeal divided 3:2 as to whether these characteristics should be allowed to temper the power of self-control of the ordinary person in section 169(2)(a).

95 The majority⁸¹ held that the *Campbell* direction was correct: that section 169(2)(a) required the characteristics of the offender to be taken into account in assessing the gravity of the provocation, but did not allow the power of self-control of the hypothetical ordinary person to be affected by those characteristics. The majority view was based on a literal interpretation of the words of the section: the “but otherwise” qualification in section 169 was intractable and controlling. The majority also held that there had to be a connection between the circumstances of the provocation and the characteristic, departing from *McCarthy*.

96 The minority preferred a purposive interpretation of the section, holding that the direction on provocation should follow *McGregor*, but without the gloss that the provocation must be directed at the characteristic. The minority’s interpretation of the section as stated by the Chief Justice was that:⁸²

By s 169(2)(a), all offenders are held to the standard of self-control of the ordinary person. They cannot call in aid the bad temper or self-indulgence all ordinary people can be tempted by and can overcome. “But otherwise”, if they have a characteristic which affects their self-control because in them the control mechanism of the ordinary person is diminished by the characteristic, then in my view the meaning of the clause permits that characteristic to be taken into account in assessing whether the provocation was “sufficient” to cause loss of control.

97 In the minority’s view, it was unfair to impose a standard that the accused could not possibly attain due to his or her particular characteristics. It was often not possible to separate the effect of a mental characteristic on the severity of the provocation, from its effect on the power of self-control. Jury directions based on such a distinction merely confused and mystified. Indeed, the majority judges acknowledged that a literal interpretation of section 169 (2)

⁸¹ Richardson P, Blanchard and Tipping JJ.

⁸² *R v Rongonui*, above n 80, 423.

(a) led to a very complex and difficult test, and thought the law in need of reform.

98 Courts in England have encountered similar problems in trying to allow for individual frailties within a universal standard with which all are expected to comply. In England the common law defence of provocation (in which the objective element is represented by “the reasonable man”) is modified by section 3 of the Homicide Act 1957, which provides:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

In the recent case of *R v Smith*,⁸³ the House of Lords split 3:2 on the issue of what effect the defendant’s alcoholism and depression should be allowed to have on the application of the objective test.

99 The majority⁸⁴ determined that the jury was allowed to take into account not only those characteristics of the accused that were relevant to the gravity of the provocation, but also those that affected his powers of self-control. But instead of referring to the test of a reasonable man, with or without the personal attributes of the accused, the majority held that the jury should be directed simply to consider:

- whether something has caused the accused to lose self-control;
- if so, whether the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the crime from murder to manslaughter.

100 The minority disagreed. The minority thought that, while the jury must form a view as to the gravity of the provocation for the defendant in all the circumstances, it must still determine whether a person having ordinary powers of self-control would have done what the defendant did.

⁸³ *R v Smith (Morgan)* [2000] 3 WLR 654 (HL).

⁸⁴ For a criticism of the majority speeches see Sir John Smith [2000] Crim LR 1004.

101 The minority also criticised the majority for passing to the jury the responsibility for making judgments on culpability on society's behalf without articulating any standard which the jury is to apply.⁸⁵

Battered defendants and provocation

102 In the preliminary paper, we noted that provocation has been a difficult defence for battered defendants. The principle reason for this is the requirement of loss of self-control.

103 Under section 169, the courts have accepted that a defendant might react to provocation with a “slow burn”,⁸⁶ that a comparatively minor incident after cumulative provocation may be the “final straw” which causes loss of self-control,⁸⁷ and that earlier provocation may be revived some days later.⁸⁸ However, to preclude premeditation, the paradigm of the defence remains a sudden angry retaliation following immediately upon the provocation.

⁸⁵ *R v Smith (Morgan)*, above n 83, 710.

⁸⁶ *R v Ahluwalia* [1992] 4 All ER 889 (CA).

⁸⁷ In *R v Ross* (16 July 1992), unreported, Court of Appeal, CA 76/92, 4, the Court of Appeal said “the provocation was not so much the abuse from the deceased when she realised her ‘wiles’ no longer were effective but rather the prolonged build-up of exploitation of a vulnerable man”. In *R v Pita* (1989) 4 CRNZ 660, 665–666 (CA), Bisson J, stated “we find it difficult to exclude provocation in such a setting of a close human relationship in which there can be a build up, over a period, of emotions and a further incident can cause feelings of both parties to run high and trigger a loss of self control”. In *R v Osland*, above n 28, 185, the Australian High Court accepted the “last straw” argument with regard to cumulative provocation. The English Court of Appeal has held that that the whole history of a violent relationship was relevant in assessing the provocation and whether it actually caused a loss of self-control on the part of the defendant: *R v Humphries* [1995] 4 All ER 1008 (CA); *R v Thornton (No 2)* [1996] 1 WLR 1174 (CA). In *Luc Thiet Thuan v R* [1997] AC 131, 147 (PC:Hong Kong), a case which did not involve domestic violence, the Privy Council commented that a relatively unprovocative act could be provocative if it was the last in a series of acts which finally provoked the loss of self control by the defendant. However, the Court declined to comment on the application of its remark to battered woman cases. In the New South Wales Court of Criminal Appeal case of *Muy Ky Chhay* (1994) 72 A Crim R 1, 13–14, the Court held that, while loss of self control at the time of the killing was essential, there was no requirement that the killing immediately follow upon the provocative act, and that the loss of self-control can develop after a lengthy period of abuse and without the need for a specific triggering incident.

⁸⁸ *R v Taaka* [1982] 2 NZLR 198, 201–202 (CA).

104 Research⁸⁹ and case law⁹⁰ indicate that victims of domestic violence often do not react to the abuse with immediate retaliation. Battered defendants who kill their violent partners tend to do so because of fear and despair, rather than anger.⁹¹ Although fear and despair may also affect self-control, they are less likely to lead to a sudden explosive reaction immediately following the provocation. Indeed, many battered defendants who kill their abusers behave in an outwardly calm and deliberate manner.⁹² Thus, provocation may be a difficult defence for battered defendants to argue. Any delay between the provocation and the killing makes it easier for the prosecution to convince the jury that the defendant's intention to kill was due to revenge or some other cold-blooded motive rather than to loss of self-control.

Provocation partially excuses domestic violence

105 While victims of domestic violence may find the defence of provocation beyond their reach, perpetrators of domestic violence have successfully called on it for protection. In the preliminary paper, we noted that section 169 has been used to reduce the culpability of men who have killed their wives because they reported a severe beating to the police after promising under threat not to do so,⁹³ or were found in a compromising situation with another man,⁹⁴ or had taunted the husband with sexual or other inadequacies.⁹⁵

⁸⁹ See R Emerson Dobash and Russell Dobash *Violence Against Wives* (Open Books, London, 1980) 108–109; Elaine Hilberman and Kit Munson “Sixty Battered Women” (1977) 2 *Victimology* 460, 462; Jan E Stets *Domestic Violence and Control* (Springer-Verlag, New York, 1988) 107–109; 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, 588–589, 593.

⁹⁰ See the cases cited in Martin Wasik “Cumulative Provocation and Domestic Killing [1982] *Crim LR* 29; Jeremy Horder “Sex, Violence, and Sentencing in Provocation Cases” [1989] *Crim LR* 546; and Susan Edwards “Battered Woman Who Kill” (1990) 140 *NLJ* 1380.

⁹¹ Jeremy Horder *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) 190–191 [*Provocation and Responsibility*]. Horder did not conduct a research study but based this claim on his extensive reading of the cases.

⁹² *Provocation and Responsibility*, above n 91, 190–191.

⁹³ *R v Tepu* (11 December 1998) unreported, High Court, Wellington Registry, T 889–98.

⁹⁴ See the cases referred to in Elisabeth McDonald “Provocation, Sexuality and the Actions of ‘Thoroughly Decent Men’ ” (1993) 9 *Women’s Studies Journal* 126.

⁹⁵ “Minnitt” *The Evening Post*, Wellington, New Zealand, 5 August 1980, 34.

REFORM OPTIONS

Abolition

- 106 The difficulties posed by the defence of provocation have led to several calls to abolish the partial defence and replace it with a sentencing discretion for murder.⁹⁶ In the preliminary paper, we asked for submissions on the following questions:

-
- Question (6): Should the defence of provocation be abolished:
- (a) if the mandatory life sentence for murder is replaced with a sentencing discretion?
 - (b) if the mandatory life sentence is retained?
-

Submissions

- 107 The submissions were marginally in favour of abolition if the mandatory life sentence for murder is abolished. If the mandatory life sentence for murder is retained, then most agreed that the partial defence of provocation should be reformed.
- 108 The reasons given for retaining provocation are those applicable to all partial defences:
- A killer who kills under provocation is less culpable than other intentional killers and should not have the stigma of a murder conviction.
 - The defence allows for jury participation in determining the level of culpability where there is evidence of provocation.
- 109 It was also argued that making provocation a matter going to mitigation rather than a partial defence would affect the standard of proof to the detriment of the defendant.

⁹⁶ New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976); Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991) 45–46; *Model Criminal Code*, above n 65, 105; Attorney-General's Department *Review of Commonwealth Criminal Law: Principles of Criminal Responsibility and Other Matters* (AGPS, Canberra, 1990) para 13.56; the Canadian Law Reform Commission's proposed criminal code does not provide for a provocation defence – see Law Reform Commission of Canada *Recodifying Criminal Law*, R31 (Ottawa, 1987).

110 Those who favoured abolishing provocation argued:

- The defence is an historical anomaly that is unnecessary once the mandatory life sentence for murder is abolished. It poses as a substantive partial defence to murder but is a factor that may only mitigate sentence for any other offence. Recognising one mitigating factor as a substantive defence while treating all others as only relevant to sentencing is unfair and illogical.
- The notion of an intentional killing being reduced to manslaughter, which most lay people think of as a non-intentional killing, confuses people, in particular those close to the victim.⁹⁷ Intentional killings should not be grouped with non-intentional killings because there happen to be mitigating circumstances. Instead, mitigating circumstances ought to be relevant to the *consequences* of an intentional killing, for example, on sentencing.
- The District Court Judges Trial Committee described the law of provocation as “an all but impenetrable and incomprehensible mess”. The High Court Judges, in their submission, said “its definition is a blot on the criminal law”. Further comments were made to this effect by other submitters. These criticisms are echoed in the case law.⁹⁸
- Because of the difficulties judges and juries have with the defence, there is a real concern that it is being applied unevenly from trial to trial. There must be cases where the jury simply decides the matter according to the level of sympathy felt for the defendant.
- Provocation is gender biased: the difficulties of the defence are heightened for the defendant who has offended in the context of a battering relationship for the reasons described in the Law Commission’s preliminary paper.

⁹⁷ This was clearly demonstrated in *R v Rongonui* (25 August 2000) unreported, High Court, Wellington Registry, T2605/98, 6. The friends and relatives of the victim were distressed at suggestions that she had “provoked” her killer. A verdict of diminished responsibility would have been more acceptable because it points to the killers “abnormality of mind” as the mitigating factor rather than to the contributory actions of the victim.

⁹⁸ For example, Lord Hoffman, in *R v Smith (Morgan)* above n 83, 664, commented that “it is impossible to read even a selection of the extensive modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws”.

- Provocation can be considered on sentencing in a broad, non-technical way that avoids the difficulties posed by the technicalities of the legal defence.
- The stigma argument put forward by supporters of the defence is overstated. The true stigma arises from the perceived circumstances of the crime, not from the label attached to the crime. A person thought by some to have “got off on manslaughter” would not escape stigma. Public reaction to the verdicts on Dr Minnitt⁹⁹ and Ms Rongonui¹⁰⁰ indicated as much. Conversely, Mrs Albury-Thomson¹⁰¹ was unlikely to be widely stigmatised, even if she had been convicted of murder for what was a premeditated, determined killing.

Retention and reform

- 111 The need to reform the defence, if it is retained, was strongly expressed in several submissions. Some submitters favoured adopting *Smith (Morgan)* or the minority judgments in *Rongonui*. Another suggested creating a completely subjective defence. Other submitters suggested excluding certain conduct as a basis for provocation: for example, acts of sexual infidelity and other acts causing jealousy, and reporting the defendant’s unlawful acts to the police.

Proposed NSW Reform

- 112 The New South Wales Law Reform Commission (NSWLRC) has recommended reforming the defence¹⁰² so that it consists of a subjective test (actual loss of self-control by the accused) qualified by the application of community standards of blameworthiness:¹⁰³

... the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

⁹⁹ “Minnitt”, above n 95, 36.

¹⁰⁰ *R v Rongonui*, above n 97.

¹⁰¹ *R v Albury-Thomson* (1998) 16 CRNZ 79 (CA).

¹⁰² The NSW defence is found in s 23 of the Crimes Act 1900 (NSW).

¹⁰³ New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide*, R83 (Sydney, 1997) ix [*Partial Defences to Murder: Provocation and Infanticide*, R83].

According to the NSWLRC, this “allows for all the personal characteristics of the accused to be considered while at the same time providing a simple, straightforward means by which the jury may make a final evaluation on the degree of culpability involved”.¹⁰⁴

- 113 However, the NSWLRC’s reformulation of section 23 of the Crimes Act 1900 (NSW) is not unproblematic. The test of whether the accused, taking into account all of his or her characteristics and circumstances, should be excused for having lost self-control so as to warrant the reduction of murder to manslaughter is similar to the way the majority in *R v Smith* said the jury should be directed. Of such a direction, Lord Hobhouse has said:¹⁰⁵

It is not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied. The function of the criminal law is to identify and define the relevant criteria. It is not proper to leave the decision to the essentially subjective judgment of the individual jurors who happen to be deciding the case. Such an approach is apt to lead to idiosyncratic and inconsistent decisions. The law must inform the accused, and the judge must direct the jury, what is the objective criterion which the jury are to apply in any exercise of judgment in deciding the guilt or innocence of the accused. Non-specific criteria also create difficulties for the conduct of criminal trials since they do not set up the necessary parameters for the admission of evidence or the relevance of arguments.

The Commission’s view

- 114 There are many circumstances that may reduce the culpability of an intentional killer and it seems unfair and illogical to single out one particular situation. The “lesser culpability” argument would in logic require a partial defence for every set of circumstances which renders intentional killing less culpable or a system of degrees of murder which recognises all the levels of seriousness, from an aged pensioner assisting a spouse to gain release from an excruciatingly painful, incurable condition, to an armed robber callously killing a policeman in order to gain access to a bank vault.
- 115 The argument for jury participation in determining levels of culpability should logically extend to all crimes and not be confined to murder. For good reason this has never been suggested. Instead, the task of crafting penalty to fit blameworthiness has long been the daily diet of judges.

¹⁰⁴ *Partial Defences to Murder: Provocation and Infanticide*, R83, above n 103, 51.

¹⁰⁵ *R v Smith (Morgan)*, above n 83, 710.

- 116 The Commission finds the submissions in favour of abolition compelling.
- 117 The Commission also considers that the defence diverges from modern values in some significant respects. The defence arose at a time when society supported an angry retaliation for slights against a man's "honour".¹⁰⁶ Despite later developments, this historical genesis can still be seen in the modern defence. This is apparent in the way in which the defence has been used to partially excuse killings arising from sexual jealousy and possessiveness, or in response to perceived insults to a man's "honour".¹⁰⁷
- 118 At the heart of the defence of provocation is the collision between two fundamental public interests. Each is a facet of the basic value of any civilised society: the protection of the humanity of each of its members and the humanity of the community as a whole. One expression of that value is the profound importance given to the preservation of human life. The other expression of that same value is the recognition of the part compassion must be allowed to play in the criminal justice system. The Commission considers that this difficult reconciliation is best achieved by abolishing the partial defence of provocation and replacing it with a sentencing discretion for murder. Judges will then be able to take provocation into account as a mitigating circumstance when sentencing for murder, as they do now for all other offences.
- 119 Previous New Zealand law reform bodies have come to the same conclusion. In the early 1970s, after efforts spanning four years, the New Zealand Criminal Law Reform Committee concluded that the law on provocation required reform but that a satisfactory solution, short of excision, was hard to find. The Crimes Consultative Committee (with one dissent) came to the same conclusion in 1991.

Recommendation

- 120 We recommend abolition of the partial defence of provocation. Matters of provocation can be taken into account in the exercise of a sentencing discretion for murder.

¹⁰⁶ *Provocation and Responsibility*, above n 91, 21–42.

¹⁰⁷ McDonald, above n 94.

6

Diminished responsibility

INTRODUCTION

- 121 **D**IMINISHED RESPONSIBILITY is a partial defence in some other jurisdictions. It reduces liability for murder to manslaughter if the defendant was not legally insane at the time of the killing but was suffering from an abnormality of mind that substantially impaired his or her mental responsibility. The rationale for the defence is that if total mental incapacity absolves all blame, then serious mental incapacity short of total impairment should reduce culpability.
- 122 The defence has its origins in Scottish common law. In 1957 it was introduced in England by statute law and from there spread to a number of commonwealth jurisdictions. It is also available in a number of American jurisdictions. The English defence (which has been widely copied) provides as follows:¹⁰⁸
- (1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.
 - (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
- 123 The first requirement for a defendant wishing to argue diminished responsibility is that he or she was suffering from an “abnormality of mind” at the time of the offence. Abnormality of mind has been interpreted by Lord Parker to be:¹⁰⁹

¹⁰⁸ Homicide Act 1957 (UK), s 2. With both the defence of insanity and the partial defence of diminished responsibility, the burden of proof is on the defendant, on the balance of probabilities.

¹⁰⁹ *R v Byrne* [1960] 2 QB 396, 403 (CCA).

. . . a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether the act was right or wrong, but also the ability to exercise will power to control physical acts, in accordance with rational judgment.

- 124 The second requirement is that the abnormality of mind must arise from arrested or retarded development, inherent causes, disease or injury. This factor must be established by expert evidence.¹¹⁰ The third requirement of the defence, substantial impairment of mental responsibility, is not a clinical question but a legal or moral one.¹¹¹
- 125 The English statutory defence has been criticised for using overly broad, vague terms that have no defined or agreed psychiatric meaning.¹¹² Various reforms of the defence have been proposed. These were discussed in the preliminary paper¹¹³ and are set out in question eight below.
- 126 The main advantages claimed for the defence are that it allows less culpable killers to avoid the label of “murderer” and it involves the community, by way of the jury, in making decisions on culpability. However, the defence has the disadvantage of lack of clarity and raises a sentencing dilemma with regard to defendants whose abnormality of mind is such that they pose a danger to the public.
- 127 Some commentators have recommended the adoption of the defence as a means of recognising the lesser culpability of some battered women who kill.¹¹⁴
- 128 In the preliminary paper, we asked for submissions on the following questions:

Question (7): Should New Zealand adopt a partial defence of diminished responsibility?

¹¹⁰ *R v Byrne*, above n 109, 403.

¹¹¹ Susanne Dell *Murder into Manslaughter* (Oxford University Press, Oxford, 1984) 29.

¹¹² See the discussion in *PP41*, above n 1, para 114.

¹¹³ *PP41*, above n 1, paras 117–124.

¹¹⁴ Judith Ablett-Kerr “A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility” (1997) 9 *Otago Law Review* 1.

Question (8): If the answer to question 7 is yes, which version of diminished responsibility do you prefer:

- (a) The English version: section 2 of the Homicide Act 1957
Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.
- (b) The English version as amended by the Butler Report?
Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1956¹¹⁵ and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter.
- (c) The English version as amended by the Criminal Law Revision Committee?
Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1956 and if, in the opinion of the jury, the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter.
- (d) The version in the English Law Commission's draft criminal code?
 - (1) *A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter.*
 - (2) *In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.*
 - (3) *Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated.*
- (e) The version proposed by the New South Wales Law Commission?

¹¹⁵ Defined as a mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

- (1) *A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:
 - (a) understand events; or
 - (b) judge whether that person's actions were right or wrong; or
 - (c) control himself or herself,was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.*

“Underlying condition” in this subsection means a pre-existing mental or physiological condition other than of a transitory kind.
- (2) *Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, the effects of that self induced intoxication are to be disregarded for the purpose of determining whether or not the person suffered from diminished responsibility under this section.*

(f) Some other version?

Submissions

- 129 The submissions were evenly balanced on whether New Zealand should adopt a partial defence of diminished responsibility.
- 130 Those in support argued that the defence encompasses a significant range of human frailty that should be properly taken into account when assessing culpability. The defence is available to those defendants who are unable to meet the high threshold for the defence of insanity but where it would be overly harsh, because of their mental condition, to hold them fully responsible for murder. It was also argued that introducing the defence would bring New Zealand law into step with a number of other commonwealth countries.
- 131 Those against introducing the defence argued that a sentencing discretion for murder was to be preferred to the use of partial defences.
- 132 It was also argued that the defence itself, in all the forms discussed, was complex and unclear and difficult to apply with any uniformity. Its introduction would add a layer of complexity to the criminal law similar to that caused by the defence of provocation. The history of the defence in England was described as “bizarre”.
- 133 It was suggested that it would be very difficult to fashion a statutory provision that is sufficiently precise so that it covers the wide range

of deserving cases without opening the door to other cases that should be kept out. Indeed, many submitters who supported the defence nevertheless expressed concern that it might be available to “undeserving accused”. Those versions of the defence that, in essence, invite the jury to do what it considers just in the particular circumstances (such as the English Law Commission’s draft) are objectionable because it should not be the function of the jury to replace the law with its own subjective views.

- 134 Several submitters thought that there were problems with introducing the defence with the specific intention of helping battered defendants. Labelling a battered defendant as having “diminished responsibility” was seen as stigmatising her. It sought the reason for the defendant’s actions in her abnormal mentality, rather than in the desperation of her circumstances. Further, it was suggested that, unless the defence was extended to cover mental states that did not amount to an abnormality of mind, it would not be relevant for most battered defendants. While battered women may be emotionally and physically traumatised, generally they tend not to be mentally abnormal.
- 135 Some expressed the view that batterers were more likely to benefit from the defence than their victims. They referred to the English study, noted in the preliminary paper, which found that 38 percent of diminished responsibility pleas were wife killings arising, in the majority of cases where the offender was not psychotic, from “amorous jealousy or possessiveness”.¹¹⁶
- 136 Submissions on the preferred form of the defence were mixed. All versions of the defence were criticised.

The Commission’s view

- 137 The Commission considers that diminished responsibility is a difficult concept to define clearly. We note the difficulties that have arisen with the English defence and are not persuaded that any of the alternatives have satisfactorily resolved these difficulties. Further, the circumstances giving rise to diminished responsibility are matters better considered at sentencing: as well as reduced culpability, abnormality of mind may also indicate a likelihood of re-offending.¹¹⁷

¹¹⁶ Dell, above n 111, 11. No motive was recorded for psychotic offenders because of the difficulties of attributing motives to the psychotic.

¹¹⁷ See, for example, the *Veen* cases in Australia: *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 465.

- 138 As discussed above, diminished responsibility is not of particular relevance for the majority of battered defendants. As noted in the preliminary paper, the forensic psychiatrists we consulted thought that domestic violence may lead to a range of psychological responses in the victim but does not commonly cause the victim to develop abnormality of mind to the degree required by the defence of diminished responsibility.¹¹⁸
- 139 For the reasons expressed in chapter 7, we prefer to rely on a sentencing discretion for murder rather than partial defences.

Recommendation

- 140 We do not recommend introducing a partial defence of diminished responsibility.
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¹¹⁸ However, as noted in *PP41*, above n 1, para 20, studies have found a much higher rate of PTSD in battered women than in the general population. PTSD was one of the four most commonly diagnosed conditions giving rise to the defence of diminished responsibility in a study of the defence in New South Wales between 1993 and 1994: Ablett-Kerr, above n 114, 9. Also, in England and Wales, some battered defendants have been found guilty of manslaughter due to diminished responsibility, for example, the accused in *R v Ahluwalia*, above n 86.

7

Sentencing for murder

INTRODUCTION

- 141 **A**N ACCUSED WHO IS CONVICTED of murder is subject to a mandatory life sentence and may not be considered for parole for at least ten years. It has been suggested that the mandatory life sentence may be too harsh for those battered defendants who kill their abusive partner in mitigating circumstances. For example, those who use more force than is subsequently considered necessary to save themselves from threatened death or serious injury.
- 142 The inability to take mitigating factors into account in sentencing for murder is, of course, an important issue for all intentional killers. It has occupied the mind of legal commentators and reformers for many decades. Some jurisdictions have chosen to introduce flexibility into sentencing for murder by replacing the mandatory life sentence with a discretionary sentence. Others have introduced partial defences that reduce the charge of murder to manslaughter in certain defined circumstances. Still others have developed degrees of murder that grade the seriousness of the crime and the punishment according to certain criteria.
- 143 In the preliminary paper we asked whether the mandatory life sentence for murder should be replaced with a sentencing discretion and whether particular partial defences should be retained and/or created.

THE MANDATORY LIFE SENTENCE

Question (9): Should the current mandatory life sentence for murder be replaced with a sentencing discretion?

Submissions

144 A large majority of the submitters were in favour of a sentencing discretion for murder.

Arguments in support of a discretionary sentence for murder

- 145 Those who supported a discretionary sentence gave as reasons:
- Murder is not necessarily more heinous than any other crime: a premeditated armed robbery for financial gain during which the offender deliberately causes grievous bodily harm may be considered more heinous than a mercy killing.
 - Whether the victim dies and hence whether the offender is charged with murder or some other “less heinous” crime might well result from accident of circumstance rather than any additional culpability on the part of the accused.
 - There are varying degrees of culpability among those convicted of murder. The circumstances that lead to the commission of murder are diverse, and so are the backgrounds and personal histories of the people who commit it. This should be recognised in the sentence.
 - No other reform will cover the full range of cases that merit the extension of mercy. Partial defences inevitably create a fairly arbitrary patchwork which then has to be stretched out of shape to catch “deserving” cases.
 - Juries may be reluctant to convict where there are mitigating circumstances if a conviction will incur a mandatory life sentence.
 - Discretionary sentencing should decrease the cost of trials to the State as it should lead to more guilty pleas. Though sentencing processes will often be longer, there should be a net saving and improved use of resources.
 - A mandatory life sentence and liability to recall for life is not necessary to protect the public in all cases. Many murderers are not dangerous in terms of possible re-offending. On the other hand, some of those convicted of other offences may well be.

Arguments against a discretionary sentence for murder

- 146 Those in favour of retaining the mandatory sentence for murder were of the view that murder is a uniquely heinous crime and that a mandatory life sentence is necessary to reflect the gravity of the crime and society's abhorrence of murder.

The Commission's view

- 147 We consider that the arguments in favour of replacing the mandatory sentence for murder with a sentencing discretion are very strong. The most potent argument is the variability in blameworthiness among murderers.¹¹⁹ As Lord Hailsham of St Marylebone states:¹²⁰

Murder, as every practitioner of the law knows, though often described as one of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from the most brutal, cynical and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, "mercy killing" of a beloved partner.

- 148 Partial defences are incapable of reflecting the full range of mitigating circumstances, which in the eyes of a civilised community reduce moral culpability and should result in a lesser sentence.
- 149 Over several decades, New Zealand and overseas law reform bodies, judges and legal commentators have supported replacing the mandatory life sentence for murder with a sentencing discretion.¹²¹

¹¹⁹ This variability has been commented on by law reform bodies and the judiciary over a number of years. See Lord Bingham of Cornhill's 13 March 1998 Newsham Memorial Lecture "The Mandatory Life Sentence for Murder" for some notable examples.

¹²⁰ *R v Howe* [1987] AC 417, 433 (HL).

¹²¹ For example: Attorney-General's Department, above n 94, para 13.56; *Model Criminal Code*, above n 65, 67; Butler Committee *Report of the Committee on Mentally Abnormal Offenders* (1975) Cmnd 6244, paras 19.14–19.16; Advisory Council on the Penal System *Sentences of Imprisonment: A Review of Maximum Penalties* (HMSO, London, 1978) para 256; House of Lords Select Committee on Murder and Life Imprisonment, above n 63, para 118. In New Zealand, the

A number of comparable jurisdictions have enacted a sentencing discretion for murder.¹²²

- 150 A survey of public opinion on certain aspects of homicide and criminal justice, carried out in England in 1995, indicated that the public invariably adopt a very discriminating approach when assessing different homicide scenarios and believed that a good or bad motive should influence the law's response.¹²³ A similar result was obtained in a recent New South Wales survey.¹²⁴ No survey has been undertaken in New Zealand, but the sympathetic response of the community to killers driven by unbearable pressures¹²⁵ shows that the public is capable of differentiating and does differentiate between various degrees of blameworthiness.

Recommendation

- 151 The Commission recommends that the mandatory life sentence for murder be replaced by a sentencing discretion.

A limited or a full discretion?

- 152 Several submitters who supported discretionary sentencing favoured a limited discretion. One submitter suggested a two-stage approach:
1. Giving the sentencing judge a discretion to depart from the life sentence for murder if the judge is satisfied that there are mitigating circumstances relating to the offence or the offender that support a less severe sentence.

Criminal Law Reform Committee recommended abolishing both the mandatory life sentence for murder and the partial defences (with the exception of infanticide). These recommendations were embodied in the Crimes Bill 1989, which was never enacted. In its 1991 report on that Bill, the Crimes Consultative Committee supported the Criminal Law Reform Committee's recommendations. Several Australian state law reform bodies have also recommended discretionary sentencing for murder and four states have introduced it.

¹²² There is no mandatory sentence for murder in Victoria (Crimes Act 1958 (Vic) s3), Tasmania (Criminal Code (Tas) s 158, NSW ((Crimes Act 1990 (NSW) ss 19A(3), 442 or ACT (Crimes Act (ACT) ss 12(2), 442).

¹²³ Barry Mitchell "Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide" (2000) *Criminal Law Review* 814, 820.

¹²⁴ The survey tested excessive self-defence scenarios: Lamberth and Yeo forthcoming, cited in Stanley Yeo, above n 68, 43.

¹²⁵ Such as the defendant in *R v Albury-Thomson*, above n 99, who killed her autistic 17 year old daughter.

2. If the judge finds mitigating circumstances, he or she would then consider whether there might be countervailing considerations that make the life sentence appropriate. The availability of the Crown's right of appeal on sentence and the guiding hand of the Court of Appeal would operate in the normal way to set standards.

The Commission's view

- 153 The Commission considers that murder is a very serious crime that merits a life sentence unless there are strongly mitigating circumstances. We also acknowledge that this is a sensitive area where a complete discretion may be less acceptable to the public than a limited discretion. We agree with the submission in paragraph 152, that even where there are mitigating circumstances there may be countervailing reasons that would make a life sentence appropriate.

Recommendation

- 154 The sentencing discretion for murder should be a limited discretion. There should be an assumption that a conviction for murder will carry a life sentence. However, where strongly mitigating factors exist, relating either to the offence or the offender, that would render a life sentence clearly unjust, the judge may give a lesser sentence. In deciding whether to exercise his or her discretion, the judge may also take into account any countervailing considerations and any aggravating factors. The Government's recently announced sentencing reform, which will introduce a limited discretion in sentencing for murder, is along similar lines.¹²⁶

THE PARTIAL DEFENCES

- 155 If a sentencing discretion for murder is introduced, the question arises as to whether the partial defences should be retained.¹²⁷ As we noted in *PP41*, the introduction of a sentencing discretion for

¹²⁶ *The Sentencing and Parole Reform Bill Briefing Paper: Press Release by the New Zealand Government*, 3:06pm, 15th March 2001.

¹²⁷ We have not included infanticide (s 178 of the Crimes Act 1961) in this discussion because it functions as an offence as well as a partial defence to a charge of murder.

murder would not necessarily require the abolition of the partial defences.¹²⁸ Both the Select Committee of the House of Lords on Murder and Life Imprisonment¹²⁹ and the Criminal Law Revision Committee¹³⁰ recommended that diminished responsibility and provocation be retained whether or not the sentence for murder was to become discretionary. The four Australian states¹³¹ that have introduced a sentencing discretion for murder have also retained various partial defences.¹³²

156 In the preliminary paper, we asked for submissions on the following questions:

Question (10): If a sentencing discretion for murder is introduced, should the partial defences be abolished?

Question (11): If the answer to question (10) is no, which partial defences should be retained or introduced?

Submissions

157 The submissions were evenly balanced on whether the partial defences should be abolished if a sentencing discretion for murder is introduced. We note that the two submissions from judicial officers supported abolition.

¹²⁸ *PP41*, above n 1, para 142.

¹²⁹ House of Lords Select Committee on Murder and Life Imprisonment, above n 63, para 83.

¹³⁰ Criminal Law Revision Committee, above n 61, para 76.

¹³¹ There is no mandatory sentence for murder in Victoria (Crimes Act 1958 (Vic) s3), Tasmania (Criminal Code (Tas) s 158), NSW (Crimes Act 1990 (NSW) ss 19A(3), 442) or ACT (Crimes Act (ACT) ss 12(2), 442). The NSW reform was prompted by a recommendation from the Task Force on Domestic Violence that the law of homicide be amended so as to ameliorate the position of a woman who killed following a history of domestic violence against her.

¹³² All the state jurisdictions have a provocation defence; NSW and ACT, have a diminished responsibility defence; NSW, Victoria, and Tasmania have an infanticide defence.

Arguments in support of the partial defences

- 158 Those who favoured retaining the partial defences gave as reasons:
- The partial defences allow less culpable killers to avoid the stigma of a murder conviction.
 - It is preferable that the jury should determine the level of culpability for intentional killing through consideration of the partial defences at trial, rather than a judge at sentencing. This leads to greater “public ownership” of the decision and thus makes the resulting sentence more acceptable to the public.
 - It is preferable for criteria of moral accountability to be set out in the partial defences than to be sentencing considerations. If the factors set out in the partial defences are merely sentencing considerations, then they would be one of a mix of many considerations which might or might not influence individual judges when applying their own standard of what is appropriate to any given set of facts.
 - Partial defences are more likely to be subject to continuous scrutiny and debate by lawyers and academics than are sentencing considerations.
 - The application to any set of facts of the criterion for reducing culpability is more likely to receive public scrutiny and legal challenge if it occurs at trial rather than at sentencing. While a jury’s deliberation is not a transparent process, a trial is more likely to receive public attention than a sentencing hearing, and the matters that go into making a determination of fact are more likely to be exhaustively explored by counsel than matters that go to mitigation.
 - Determining issues relating to partial defences at sentencing is more onerous for the defendant. For some of the partial defences, once the defendant points to sufficient evidence to make the defence a live issue, the onus of disproof beyond a reasonable doubt rests on the prosecution. At sentencing the onus is on the Crown to a standard of “the preponderance of evidence”.

Arguments against retaining the partial defences

- 159 Those who favoured abolishing the partial defences argued:
- Attaching the “murder” label to defendants who would otherwise come under the partial defences would not be problematic because they are *intentional* killers.

- The partial defences are unfair and illogical as they benefit some less culpable intentional killers but not others.
- There are considerable difficulties with the partial defences of provocation, and diminished responsibility. If partial defences are replaced with a sentencing discretion, the circumstances they try to embody will still be able to found a plea in mitigation. In that arena, the present difficulties with provocation and diminished responsibility will not be problematic – the courts have no difficulty with such pleas in attempted murder, or wounding etc.
- The matters encompassed in the partial defences are taken into account by judges when sentencing for all crimes other than murder. It has not been suggested that such judicial assessment is in any way unsatisfactory in relation to these crimes.

Which partial defences should be retained/introduced?

- 160 The majority of the submissions which addressed question (11) recommended retaining provocation and introducing diminished responsibility and excessive-self-defence.

The Commission's view

- 161 The Commission does not support the retention or creation of partial defences once a sentencing discretion is available for murder. It does not seem fair to make a distinction between those intentional killers who are able to bring themselves within one of the partial defences and those who cannot, but who are nevertheless sentenced to a finite term because of mitigating circumstances.
- 162 We agree with the submission that the partial defences have proved to be difficult in practice and that it would be easier to take account of the mitigating circumstances they represent in sentencing.
- 163 We do not agree with the submission in paragraph 158, that it is preferable for matters of moral accountability to be set out in partial defences rather than to be sentencing considerations. Matters of moral accountability, such as motive and characteristics of the offender, are typically taken into account at sentencing. A judge exercising a discretion must do so within established principles, in open court and must state reasons. If either the offender or the Crown think the discretion was misapplied, and the sentence excessive or inadequate, they can appeal.

Recommendation

- 164 We recommend that partial defences not be retained or introduced, if the recommendation for a sentencing discretion for murder is accepted.

EXISTING DISCRETION

- 165 Currently, judges can increase the non-parole period to more than the 10 year minimum when sentencing for murder. In *PP41* we suggested that one way of giving judges a sentencing discretion without abolishing the mandatory life sentence would be to allow them to fix a non-parole period of less than 10 years. This would have the advantage of allowing the effective period of incarceration to be reduced in a deserving case, yet retaining the life-long power of recall as a backup.
- 166 We asked for submissions on the following question:

Question (12): If the mandatory life sentence is retained, should judges be given a discretion to set non-parole periods of less than 10 years?

Submissions

- 167 A majority of submissions support a judicial discretion to set non-parole periods of less than 10 years if the mandatory life sentence for murder is retained.
- 168 Those who did not support the proposal argued that that it would effectively abolish the mandatory life imprisonment by a side wind. Life-long power of recall and a substantial minimum term of imprisonment are important concomitants of a life sentence, reflecting the gravity of the crime and sentence. Public confidence in the validity of the life sentence may be eroded if a person convicted of murder and sentenced to life imprisonment can, if the judge decides, become eligible for parole after serving, say, two or three years. The Parole Board can already reduce the parole period in special cases.¹³³ This is best left as a residual power that falls appropriately within the Parole Board's functions.

¹³³ See ss 97(5) and 97(9) of the Criminal Justice Act 1985.

The Commission's view

- 169 We do not support a judicial discretion to set non-parole periods of less than 10 years as a means of introducing flexibility into sentencing if the mandatory life sentence for murder is retained. This would be out of line with the importance the public has come to place on “truth in sentencing” in recent years.

Recommendation

- 170 We do not recommend giving judges a discretion to set non-parole periods of less than 10 years if the mandatory life sentence for murder is retained.

ESTABLISHING THE FACTUAL BASIS FOR SENTENCING

- 171 A number of submitters have assumed that abolishing the partial defence of provocation and introducing a sentencing discretion for murder could alter the onus and standard of proof to the detriment of the defendant. Currently, if the defence can point to evidence that the killing may have been induced by provocation, the onus is on the prosecution to disprove it beyond reasonable doubt. Submitters have expressed concern that if provocation became a matter of mitigation, the onus would be on the defendant to prove that he or she was provoked to commit the homicide.
- 172 In the majority of cases, there is no dispute about the facts on which the sentence is based. Where there is a dispute, the accepted view appears to be that disputed facts critical to the determination of the sentence and which would justify a heavier sentence must be proved by the prosecution beyond reasonable doubt.¹³⁴ The position in relation to facts in mitigation put forward by the defence to justify a lesser sentence is less clear. Countries within the common law jurisdiction appear to take different approaches.¹³⁵ There is a paucity of New Zealand authority on the standard of proof to be applied where facts put forward in mitigation are disputed.

¹³⁴ *R v Moananui* [1983] NZLR 537, 543 (CA); *Select Rent Registry Ltd v Stevens* [1990] 2 NZLR 588, 592–593; *Hall's Sentencing* loose-leaf service (Butterworths, Wellington, 1993–) appendix 1, para 1.3.4.

¹³⁵ See the discussion in *Hall's Sentencing*, above n 134, appendix 1, para 1.3.4, and Archibold *Criminal Pleading Evidence and Practice* (Sweet and Maxwell, London, 2001) 507–514.

173 Our recommendation (and the Government position announced in the recent sentencing review) is that the sentence for murder should be life imprisonment unless the circumstances of the offending or offender would make such a sentence clearly unjust. The Commission will undertake a supplementary project on the onus and standard of proof that should apply when establishing the factual basis for sentencing. As is customary, we will publish a short discussion paper on which we will invite submissions and comment before making final recommendations in a report.

Compulsion/duress by threats

INTRODUCTION

Duress

- 174 **T**HE COMMON LAW DEFENCE of duress by threats has long been available to a person who is forced by another person to commit an offence under threat of death or serious injury if he or she did not commit the offence. An example is a bank teller compelled at gunpoint to open a safe and hand over the bank's money to a robber. More recently, the common law has recognised another form of duress, duress of circumstances.¹³⁶ Duress of circumstances occurs when the defendant commits an offence, not because of coercion, but because perilous circumstances exist that will cause death or serious bodily harm to the defendant if the offence is not committed. For example, a defendant who trespasses in order to escape from a rabid dog or from a lynch mob.
- 175 Thus, there are two essential differences between the two defences. The first is that duress of circumstances may arise even though the defendant is not required to commit an offence, while this is essential for duress by threats. The second is that duress of circumstances can arise from both human and non-human dangers.

Victims of domestic violence and duress

- 176 Victims of domestic violence have been subject to both forms of duress. An example of duress by threats (in New Zealand called compulsion) is found in *R v Richards*.¹³⁷ The defendant in *Richards* had been convicted of selling cannabis and possession of cannabis

¹³⁶ JC Smith and Brian Hogan *Criminal Law* (7th ed, Butterworths, London, 1992) 232.

¹³⁷ *R v Richards* (15 October 1998) unreported, Court of Appeal, CA 272/98. Richards was unable to bring herself with s 24 of the Crimes Act 1961 because her partner was not present when she committed the offence.

for sale. The Court of Appeal was satisfied that she “incontestably was suffering from Battered Women’s Syndrome”,¹³⁸ and that “if she had not held for sale, or sold, it seems likely that she would have been beaten”. An example of duress by circumstances (in New Zealand sometimes called necessity) is found in *R v Atofia*.¹³⁹ The defendant in *Atofia* was convicted of fraudulently claiming a domestic purposes benefit while working. Her ex-partner was required under a paternity order to pay money to the Inland Revenue Department for the maintenance of their child, but he disputed paternity and demanded \$100 fortnightly from her, with threats that if she did not pay she would be beaten. She could not have relied on the defence of compulsion because her ex-partner did not compel her to commit benefit fraud. She raised the defence of necessity, presumably on the ground that without the extra income from the benefit she could not have met her ex-partner’s demand for money as well as provide for herself and her child. The trial judge allowed expert evidence on battered woman syndrome to be called in support of the defence of necessity (duress of circumstances). His ruling was upheld by the Court of Appeal.¹⁴⁰

Duress of circumstances and necessity

177 We pointed out in *PP41* that the terms “duress of circumstances” and “necessity” are often used interchangeably. But necessity has also been used more broadly to denote a situation in which a person is faced with two evils, one involving committing an offence and the other some greater evil to that or another person.¹⁴¹ In *PP41* we used the term necessity as meaning duress of circumstances. We are now persuaded that this was a mistake, as it leaves us without a term to describe those cases where the defendant’s will is not overborne and there is no crisis requiring an immediate response, but the defendant makes a considered and rational decision which involves deliberately committing what would usually be an offence, in order to prevent the future occurrence of a greater harm. These are not (it

¹³⁸ See our comments on the use of the term “battered woman syndrome” in para 13.

¹³⁹ *R v Atofia* [1997] DCR 1053.

¹⁴⁰ *R v Atofia* (15 December 1997) unreported, Court of Appeal, CA 453/97, CA 455/97.

¹⁴¹ See *Re A (children)(conjoined twins)* [2000] 4 All ER 961, 1047–1048, per Brooke LJ.

is thought) cases of duress of circumstances, but it is possible that the conduct is nevertheless justified on the basis of necessity. *Re A (children) (conjoined twins)* is an extreme example.¹⁴² Others are cases involving sterilisation of mentally disabled but sexually active hospital patients,¹⁴³ and the detention without statutory authority of mentally disabled people in order to protect them.¹⁴⁴ As is recognised by Brooke LJ in *Re A*, such cases do not involve the actor's mind being irresistibly overborne, nor an emergency in any normal sense of the word.¹⁴⁵ Consequently, in this report we have used the term "duress of circumstances" for situations where offences are committed because the actor's mind is irresistibly overborne in the face of dire emergencies and will use the term "necessity" to refer only to the defence based on a choice of evils. Where others have used the term necessity as meaning duress of circumstances, this report will refer to "necessity (duress of circumstances)".

178 Duress of circumstances is the subject of the next chapter. In this chapter we deal with the defence of duress by threats, which in New Zealand is known as compulsion and is codified in section 24 the Crimes Act 1961.

COMPULSION (DURESS BY THREATS)

179 Section 24 provides:

24 Compulsion

- (1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he believes that the threats will be carried out and if he is not a party to any association or conspiracy whereby he is subject to compulsion.

¹⁴² *Re A (children) (conjoined twins)*, above n 141. This case involved conjoined twins, one dependant for life on the other. The twins would both die in several months if they were not separated, due to the strain that the dependant twin put on the healthy twin's heart. Separating them would save the healthy twin but result in the immediate death of the dependant twin.

¹⁴³ *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL).

¹⁴⁴ *R v Bournemouth Mental Health Trust, Ex parte L* [1999] 1 AC 458 (HL).

¹⁴⁵ *Re A (children) (conjoined twins)*, above n 141, 1047–1048, 1051.

- (2) Nothing in subsection (1) of this section shall apply where the offence committed is an offence specified in any of the following provisions of this Act, namely:
 - (a) Section 73 (treason) or section 78 (communicating secrets):
 - (b) Section 79 (sabotage):
 - (c) Section 92 (piracy):
 - (d) Section 93 (piratical acts):
 - (e) Sections 167 and 168 (murder):
 - (f) Section 173 (attempt to murder):
 - (g) Section 188 (wounding with intent):
 - (h) Subsection (1) of section 189 (injuring with intent to cause grievous bodily harm):
 - (i) Section 208 (abduction):
 - (j) Section 209 (kidnapping):
 - (k) Section 234 (robbery):
 - [(ka)Section 235 (aggravated robbery):]
 - (l) Section 294 (arson).
- (3) Where a married woman commits an offence, the fact that her husband was present at the commission of it shall not of itself raise the presumption of compulsion.

180 The terms of section 24 require the presence of the threatener when the offence is committed and what the Court of Appeal describes as “a particular kind of threat associated with a particular demand” (we refer to this as a “specific threat”).¹⁴⁶ In *PP41*, we pointed out that some defendants, especially victims of domestic violence, may require neither a specific threat nor the actual presence of their abuser to be coerced into offending.¹⁴⁷ Experience may have taught them that the response to disobedience on their part would be severe physical retribution, so that they may offend out of general fearfulness of their abuser without the need for the abuser to make “a particular kind of threat associated with a particular demand”. Arguably, the coercive force of this fearfulness is not any less because the abuser is not actually present, if his or her ability to mete out punishment is certain.

¹⁴⁶ *R v Raroa* [1987] 2 NZLR 486, 493; see also *R v Teichelman* [1981] 2 NZLR 64, 67. The passages in *Raroa* and *Teichelman*, that suggest that s 24 is confined to cases where an offence is demanded of the defendant, were obiter. The point was challenged in *R v Lamont* (27 April 1992) unreported, CA, 442/91, but was not decided. While the law is not completely clear, it seems reasonable to assume that a demand is necessary until the Court of Appeal rules otherwise.

¹⁴⁷ *PP41*, above n 1, paras 164, 167–171.

181 In its 1991 report on the Crimes Bill 1989, the Crimes Consultative Committee proposed a revision of clause 31 of the Bill:

Duress –

- (1) A person is not criminally responsible for any act done or omitted to be done because of any threat of immediate death or serious bodily harm to that person or any other person from a person who he or she believes is immediately able to carry out that threat.
- (2) Subclause (1) does not apply where the person who does or omits the act has knowingly and without reasonable cause placed himself or herself in, or remained in, a situation where there was a risk of such threats.
- (3) Subclause (1) does not apply to the offences of murder or attempted murder.

182 The revised subclause (1) would require the existence of a threat (which the Court of Appeal has interpreted as a particular sort of threat associated with a particular demand) but not the actual presence of the threatener during the commission of the offence. Instead, the defendant must believe that the person who made the threat is immediately able to carry out that threat. The research indicates that within the more extreme battering relationships, escape from a threat of immediate physical violence may be no assurance of the victim's safety.

183 However, if the requirements for a specific threat and for immediacy of harm were to be removed from clause 31, the defence would be very broad and its application would depend largely on the defendant's subjective judgment. If such changes are to be effected, it may be desirable to limit the defence by requiring a standard of reasonableness against which the defendant's beliefs and actions can be measured.

184 In *PP41* we asked the following questions:

Question (13): Should section 24 be replaced by clause 31?

Question (14): If the answer to question (13) is yes,

(a) should clause 31 be amended so that:

- (i) The definition of "threat" includes non-specific threats arising from the circumstances of the violent relationship?
- (ii) The immediacy requirement is replaced with an "inevitability" requirement?
- (iii) The defendant's beliefs about the existence of a threat and whether it will be carried out must be reasonable?

(b) What offences, if any, should be excluded from the defence?

Submissions

Clause 31 or section 24?

- 185 There was very strong support in the submissions for replacing section 24 with the revised clause 31.

Non-specific threats

- 186 A small majority favoured extending the meaning of “threat” in clause 31(1) to include non-specific threats arising from the circumstances of the violent relationship. One submission that favoured extension pointed out that in violent relationships non-specific threats tend to predominate over specific threats. It was suggested that requiring “a well founded fear” of immediate death or serious bodily harm should be sufficient.
- 187 Those against the extension thought that it would make the defence too open-ended and would “open the floodgates”. It was suggested that it was undesirable to distort the defence by trying to make it specifically fit the circumstances of battered women. It was also suggested that broadening the provision in this way could create problems for battered defendants. Clause 31(2) excludes the defence if the defendant has knowingly and without reasonable cause placed himself or herself in, or remained in, a situation where there was a risk of such threats. If “threats” includes non-specific threats, clause 31(2) may have the effect of excluding all victims of domestic violence who remain in abusive relationships from the defence.

Immediacy or inevitability

- 188 A large majority supported replacing the immediacy requirement in subclause (1) with an inevitability requirement. One submitter gave the reason that the change would be consistent with the ruling in *Hudson and Taylor*¹⁴⁸ where two women threatened with violence were able to raise the plea even though the threats could not immediately be carried out. It was argued that a test of “inevitability” would simply adopt the broader common law understanding.

¹⁴⁸ *R v Hudson and Taylor*, above n 37.

189 One submitter opposed substituting inevitability for immediacy because inevitability is too open-ended a concept in a defence which operates as a complete excuse for causing harm to an innocent third party.

Reasonableness test

190 A small majority was against requiring that the defendant's beliefs (that the threat exists and that the person behind the threat is immediately able to carry it out) must be reasonable.

191 Those opposed to a reasonableness test argued that it would substitute a reasonable level headed person for the defendant and could narrow the scope of the defence. The actor's perception of the danger should be the key, as with self-defence.¹⁴⁹ The reasonableness of the belief will go to the question of honesty of belief.

192 Those who supported a reasonableness test agreed with the suggestion in *PP41* that, if non-specific threats and inevitable danger are to be included within the defence, then a reasonableness test is necessary to prevent the defence from applying too widely.

General comments

193 Some general comments were made in the submissions with regard to the defence:

- A defence that results in acquittal for wrongful conduct needs to be narrowly confined.
- Clause 31 was not drafted with battered defendants in mind and its application would not be confined to them. It would be undesirable to distort the defence by trying to make it specifically fit the circumstances of battered defendants. It should remain a special protection for rare circumstances.

The Commission's view

194 The Commission considers that section 24 should be replaced by clause 31. The clause updates the section and was strongly supported in the submissions. However, we do not support the further changes canvassed above.

¹⁴⁹ This was also the view of the Crimes Consultative Committee, above n 94, 21.

- 195 The defence of compulsion is capable of being a complete excuse for a wide range of conduct causing varying degrees of harm to innocent third parties. Therefore, we think that it is appropriate to require that the defence be confined to very limited, tightly defined circumstances.
- 196 On balance, we think that this is best done by requiring a specific threat of immediate harm, rather than a reasonably based belief that a threat exists and that it will be carried out. Such a test is by its nature inexact. While this may expose the defendant to the risk of harm in some cases, this must be balanced against the harm that the defendant could potentially be causing to an innocent third party.¹⁵⁰ The situation is quite different from one of self-defence, which involves the defendant using force against a person whom the defendant believes will otherwise harm him or her. In contrast, compelled defendants know that they will (potentially) be harming an innocent third party. It is right to expect them to refrain from offending until a demand is made and until the danger is immediate, despite the high level of risk this may incur. Compulsion that does not fit within the terms of the defence can be taken into account in mitigation of sentence.
- 197 We are also concerned that to apply a reasonableness test to the defendant's belief may be unfair to those who genuinely believe that a threat of immediate harm can and will be carried out. The effect of the belief on the defendant will be unaffected by its reasonableness.

Recommendation

- 198 We recommend that section 24 be replaced by clause 31 as revised by the Crimes Consultative Committee, with the amendments recommended below.

SUBCLAUSE (1)

- 199 The issue was not raised in *PP41*, but we consider that subclause (1) should be clarified in two respects. First, the words “under compulsion” (which appear in section 24) should be restored in place of the words “because of”. This puts it beyond doubt that the defence will continue to apply only to a situation where the commission of the offence has been demanded of the defendant.

¹⁵⁰ Not all offences will involve innocent third parties, some will be “victimless” crimes such as living on the earnings of prostitution.

The words “because of” first appear in the 1989 Crimes Bill but it seems from the explanatory notes to the Bill that a wider meaning was not intended.¹⁵¹ This wording was carried over in the Crimes Consultative Committee’s 1991 report.

- 200 Second, we consider that what is probably implied should be expressly stated that the defendant must believe that the threatener is not only able to carry out the threat, but will actually do so.

Recommendations

- 201 The Commission recommends that subclause (1) be amended to read:

A person is not criminally responsible for any act done or omitted to be done *under compulsion* of any threat of immediate death or serious bodily harm to the person or any other person from a person who he or she believes *can and will* carry out that threat.

- 202 Expert evidence on the dynamics of domestic violence and the social context in which it occurs may be relevant to support a battered defendant’s claim that a threat of immediate death or serious injury exists and to explain why he or she may believe that the threat will be carried out. Those who have no experience of domestic violence will find such evidence substantially helpful in understanding the context within which the defence is raised.

- 203 We have not been able to find a satisfactory explanation why the Crimes Bill 1989 inserted a test that “a person of ordinary common sense and prudence could not be expected to act otherwise” for the defence of necessity (duress of circumstances) but not compulsion, nor why the Crimes Consultative Committee retained that distinction. The pressure on the defendant is extreme in each case and we can see no justification for differentiating between the two situations. However, we think it unrealistic and unfair to require, as clause 30(1)(b) does, that people who find themselves in situations of crisis not of their own choosing should all be expected to react in the same way as would a person of ordinary common sense and prudence.

- 204 Yet insofar as a defendant seeks total exoneration from the consequences of an otherwise criminal act, it is desirable to have some standard against which his or her actions can be measured. We

¹⁵¹ The explanatory note said: “Clause 31 is based on section 24(1) of the present Act, relating to acts committed under duress.”

favour the test proposed by the English Law Commission¹⁵² for duress by threats. This requires the threat to be one which in all the circumstances, including any of the defendant's personal circumstances that affect its gravity, the defendant cannot reasonably be expected to resist.

- 205 We further recommend legislative stipulation that the threat is one which in all the circumstances (including any of the defendant's personal circumstances that affect its gravity) the defendant cannot reasonably be expected to resist.

SUBCLAUSE (2)

- 206 We did not ask any questions in relation to subclause (2) but one submitter expressed the view that the association exception should be more narrowly defined to preclude any "assumption that people in violent relationships are either required to leave their relationships or to justify why they did not do so". She preferred the version suggested in the Australian Model Criminal Code, which provides that the defence of duress:

. . . does not apply if the threat is made by or on behalf of persons with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out by him or her.

This confines the exception to situations where there is some moral fault on the part of the defendant contained in the fact of association or self-exposure to the risk.

- 207 We agree that subclause (2) may be interpreted as requiring victims of domestic violence to justify remaining in a battering relationship. Subclause (2) is intended to exclude those who join an association of criminals from relying on the defence. The wording in section 24 more clearly expresses that purpose.

Recommendation

- 208 The Commission recommends that subclause (2) should be amended to read:
- (2) Subclause (1) does not apply where the person who does or omits the act is a party to any association or conspiracy whereby that person is subject to compulsion.

¹⁵² Law Commission (England and Wales), above n 62, 60–61.

SUBCLAUSE (3)

- 209 There was a wide range of answers to the question: What offences (if any) should be excluded from the defence? Most submissions supported at least excluding murder and attempted murder from the defence. Logically, since the purpose of the defence is to excuse otherwise unlawful acts done under such extreme pressure that a person's freedom of choice is overborne by a wrongful and drastic threat, there is no reason why any offence should be excluded.
- 210 The Crimes Bill 1989 had no exclusions to the defences of duress (compulsion) and necessity (duress of circumstances). The Crimes Consultative Committee excluded murder and attempted murder from both defences in response to public submissions. As the Crimes Consultative Committee noted there are arguments on both sides.
- 211 On the one hand:¹⁵³
- Blackstone wrote that a man under duress “ought rather to die himself than escape by the murder of an innocent”. The sanctity of life and the inherent equality of all life prevails.
- 212 On the other hand, it is arguable that:¹⁵⁴
- . . . it is not only futile, but also wrong, for the *criminal* law to demand heroic behaviour. The attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State.
- 213 In our view, it is not so much a question of whether the criminal law should demand a heroic standard of behaviour, but the point so succinctly made by Ward LJ in *Re A (children)(conjoined twins)*:¹⁵⁵
- The policy of the law is to prevent A being judge in his own cause of the value of his life over B's life or his loved one C's life, and then being executioner as well.
- 214 Hard cases will arise where the defendant's choice to kill is seen as not merely excusable but as justifiable.¹⁵⁶ An example is the sailor who pushed a man off an emergency ladder into the sea during the

¹⁵³ *Re A (children)(conjoined twins)*, above n 141, 1014 per Ward LJ.

¹⁵⁴ Law Commission (England and Wales) *Legislating the Criminal Code: Offences Against the Person and General Principles*, R218 (HMSO, London, 1993) para 30.11 [*Legislating the Criminal Code*].

¹⁵⁵ *Re A (children)(conjoined twins)*, above n 141, 1014.

¹⁵⁶ It is possible that such cases could come under the defence of necessity discussed at para 177.

Zeebrugge disaster.¹⁵⁷ The man was frozen with fear and was blocking the only escape route for the sailor and for others below him on the ladder. Such cases must be dealt with by sensible use of the prosecutorial discretion.

Recommendation

- 215 The Commission recommends that subclause (3) be adopted unchanged.
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¹⁵⁷ Discussed in *Re A (children)(conjoined twins)*, above n 141, 1041.

Duress of circumstances

INTRODUCTION

216 **I**N NEW ZEALAND there is no codified general defence of duress of circumstances. However, section 20 of the Crimes Act 1961 preserves all common law justifications and excuses except so far as they are altered by or are inconsistent with the Crimes Act or any other enactment. At common law, duress of circumstances (in New Zealand sometimes called necessity) provides a complete defence where a person commits an offence because perilous circumstances exist that will cause death or serious bodily harm to that person or some other person if the offence is not committed. The defence is not available for murder, attempted murder or for some forms of treason. A case which illustrates this defence is *NZ Police v Anthoni*,¹⁵⁸ in which the defendant struck a child in order to dislodge the child from a rubber tube that was being swept by currents in the directions of rocks likely to cause the child serious injury.

217 It would appear from *Kapi v Ministry of Transport*, that the elements of the defence in New Zealand are:¹⁵⁹

- a belief formed on reasonable grounds;¹⁶⁰
- of imminent peril of death or serious injury;
- there is no realistic choice other than to act as the defendant did;

¹⁵⁸ *NZ Police v Anthoni* [1997] DCR 1035.

¹⁵⁹ *Kapi v Ministry of Transport* (1992) 8 CRNZ 49 (CA). Kapi left open the question of whether the defence actually existed in NZ, however, subsequent cases have accepted the existence of the defence: *NZ Police v Kawiti* [2000] 1 NZLR 117.

¹⁶⁰ Recent English cases have suggested that an honest belief will suffice: *R v Martin* [2000] 2 Cr App R 42.

- the conduct is in response to the perceived peril; and
- the conduct is proportionate to the perceived peril.¹⁶¹

218 As with self-defence, the requirements that the peril be imminent and that there be no realistic alternatives may limit the availability of the defence to victims of domestic violence. The peril that a victim of domestic violence seeks to avoid may not be imminent but it may be inevitable, for example, the situation in *R v Atofia*, referred to in paragraph 176. A victim of domestic violence may assess realistic alternatives differently from an “ordinary” reasonable person who has no experience of domestic violence.

219 As a result of the Court of Appeal’s decision in *Kapi v Ministry of Transport*, the defence is also not available in New Zealand where the source of the threat is human. The defendant in that case was charged with failing to stop after an accident. He relied on the defence of necessity (duress of circumstances), arguing that he failed to stop because he feared that residents of the area might beat him up. There was, however, no evidence that any person was near the scene of the accident. The Court of Appeal held that, since section 24 provides a defence of compulsion where a criminal act is done under threat of death or grievous bodily harm from a person who is present when the offence is committed, section 20 cannot preserve a common law defence of duress by threat or fear of death or grievous bodily harm from a person who is not present. The result is that defendants who commit offences due to threats of danger emanating from persons, but who cannot fit themselves within the terms of section 24, cannot rely on necessity (duress of circumstances). The ruling has been affirmed or followed in subsequent cases.¹⁶²

220 Although the result in *Kapi* was probably right on the facts, the logic of the Court of Appeal’s reasoning may be questioned. Section 24 is intended to cover the typical stand-over situation where one person commits an offence because he or she is threatened by another person with death or serious bodily harm unless the first person does as he or she is told. That is not the only kind of situation in which one human being can be a source of peril for another human being. A lynch mob poses no less a threat to its target, even though its intention is not to compel the target to commit a crime, but to kill

¹⁶¹ The requirement of proportionality when the defence already requires imminent peril of death or serious bodily harm has been criticised: KJM Smith [1999] Crim LR 363, 370.

¹⁶² *R v Lamont*, above n 144; *NZ Police v Kawiti*, above n 159.

him or her outright. Just why the provision of a defence under section 24 for acts committed under one kind of human threat necessarily precludes a defence for acts committed under another kind of human threat is not readily apparent.

CODIFICATION

221 Necessity (duress of circumstances) was considered by the Crimes Consultative Committee in its 1991 report on the Crimes Bill 1989.¹⁶³ It proposed a revised version of clause 30 of the Bill:

Necessity—

- (1) A person is not criminally responsible for any act done or omitted to be done under circumstances of emergency in which—
 - (a) The person believes that it is immediately necessary to avoid death or serious bodily harm to that person or any other person; and
 - (b) A person of ordinary common sense and prudence could not be expected to act otherwise.
- (2) Subclause (1) does not apply where the person who does or omits the act has knowingly and without reasonable cause placed himself or herself in, or remained in, a situation where there was a risk of such an emergency.
- (3) Subclause (1) does not apply to the offences of murder or attempted murder.

222 The requirement that the peril must be imminent has been replaced with a requirement that the act or omission that constitutes the offence must be immediately necessary to avoid the peril. There is no explicit legal alternative requirement but presumably it would be encompassed under (1)(b). A human threat that is not intended to compel the defendant to commit an offence is not excluded from the defence. In that respect it would overturn the ruling in *Kapi* and is to be welcomed. However, we noted in *PP41* that the requirement for an “emergency” may be problematic for battered defendants because an incident of violence within a relationship of recurring violence may not be seen by some as an “emergency”.¹⁶⁴

¹⁶³ The defence proposed in the Crimes Bill 1989 was actually a combination of duress of circumstances and that type of necessity which exculpates a defendant who commits an offence in order to avoid a greater evil. The defence was based on clause 43 of the English Law Commission’s draft Criminal Code (1989) (a duress of circumstances provision) and section 3.02 of the USA Model Penal Code (a necessity provision).

¹⁶⁴ *PP41*, above n 1, para 200.

223 We asked for submissions on the following questions:

Question (15): Should the defence of necessity be codified?

Question (16): If the answer to question (15) is yes, should clause 30, as set out in para 198, be enacted?

Question (17): If the answer to question (16) is yes,
(a) should clause 30 be enacted without the requirement of “emergency”?
(b) what offences (if any) should be excluded from the defence?

Submissions

Codification

224 A very large majority of submissions supported codification in the form of clause 30 as amended by the Crimes Consultative Committee. It was suggested that codification was necessary to clarify the existence and scope of the defence. The need to avoid the exclusion of necessity (duress of circumstances) created by human agency, which had resulted from the *Kapi* judgment, was also given as a reason for codification.

“Emergency”

225 A very large majority favoured retaining the requirement of “emergency”. It was argued that the requirement underlines the need for lack of reasonable alternatives. In the absence of an emergency, what is truly “necessary” becomes much harder to pin down.

226 It was noted that an emergency may be either sudden or extraordinary and that expert evidence could be called in special cases such as those of battered defendants to help the fact finder understand what may constitute an emergency in the context of a battering relationship.

227 Those who rejected the requirement of emergency suggested that the defence should also be available where the peril is inevitable even if the situation is not one of emergency.

The Commission's view

- 228 The Commission agrees with the submission that duress of circumstances should be codified in order to clarify the scope of the defence. We consider that the requirement of an emergency should be retained. In permitting action that must be taken immediately in order to ward off a danger that is not itself immediate,¹⁶⁵ clause 30(1)(a) sufficiently recognises the realities of battering relationships without extending the availability of the defence beyond rare cases. Expert evidence would be available to help the fact finder understand the situation of victims of domestic violence. For example, to bolster an assertion that it would not have been safe for the defendant to have left the relationship and therefore the defence should not be excluded under sub-clause (2).
- 229 Codification of the defence of duress of circumstances is not intended to affect the separate defence of necessity that is described by Lord Justice Brooke in *Re A (children)(conjoined twins)*. If such a defence exists in New Zealand common law it should be preserved by section 20 of the Crimes Act 1961.
- 230 It is clear from the report of the Crimes Consultative Committee that the word “it” in subclause (1)(a) “The person believes that it is immediately necessary...” refers to the “act done or omitted to be done” in the main body of subclause (1). For the sake of clarity, we consider that the words “such act or omission” should replace the word “it” in subclause (1)(a).
- 231 The requirement in subclause (1)(b) – “A person of ordinary common-sense and prudence could not be expected to act otherwise” – may be appropriate in some situations of necessity where a person has to make a deliberate and considered choice between two evils, as in the case of the conjoined twins. We doubt the test should be applied in circumstances of duress calling for an urgent response to a pressing crisis. For the reasons expressed in paragraphs 203–204 above, we consider a test of what is reasonable for the particular defendant should be adopted.

¹⁶⁵ For a discussion of the importance of the distinction between immediate danger and danger that must be instantly met see Robert F Schopp *Justification Defences and Just Convictions* (Cambridge, Cambridge University Press, 1998) 99–102.

Recommendations

- 232 We recommend that clause 30 be adopted with two amendments. First, the words “such act or omission” should replace the word “it” in subclause (1)(a). Second, subclause (1)(b) should be replaced by a requirement that the emergency is such that in all the circumstances (including any of the defendant’s personal circumstances that affects its gravity) the defendant cannot reasonably be expected to act otherwise.
- 233 We further recommend legislative stipulation to the effect that codification of the defence of duress of circumstances does not affect the existence or scope of the wider defence of necessity, except for those aspects of necessity encapsulated in the defence of duress of circumstances.
- 234 The difficulty we identified with clause 31(2) (in paragraphs 206–207) does not exist here. We recommend that subclauses (2) and (3) be adopted unchanged.

ONE DEFENCE OR TWO?

- 235 We suggested in *PP41* (at paragraph 203) that the defence of duress of circumstances may encompass the defence of compulsion so as to make the latter superfluous, and asked for submissions on this suggestion.

Submissions

- 236 There was some support for a combined defence in theory, but (with one exception) not for the version put forward in paragraph 202 of *PP41*. That version said:

A person is not criminally responsible for any act done or omitted to be done if—

- (a) the person reasonably believes that it is necessary to avoid death or serious bodily harm to that person or any other person; and
- (b) A person of ordinary common-sense and prudence could not be expected to act otherwise.

- 237 Those who were against combining the defences thought that a significant distinction arose from the different factual situations that gave rise to the two defences. One submitter noted that with duress by a person, the nature of the coercion was fairly predictable; with duress of circumstances, it was highly unpredictable.
- 238 Those who thought that the defences should be combined gave no supporting reasons but may have agreed with the suggestion of

superfluity. The submitter who favoured the version suggested in paragraph 202 of *PP41* wrote:

It would avoid many of the specific obstacles that currently face battered defendants in raising either duress or necessity and yet it encapsulates the essence of those defences. Unlike duress it does not require that the accused be responding to a specific threat as opposed to simply acting in response to the threat presented by her relationship and it does not require that the perpetrator be present at the commission of the crime by the accused. And, unlike necessity, it does not require that the situation of emergency that the accused is responding to be created by non-human agency. It focuses on the essence of the compulsion defences – the issue of necessity – instead of the narrow technical requirement of an immediacy of threat.

The Commission's view

239 These are cogent arguments. However, we do not consider a merged defence should be adopted. First, as explained in paragraphs 203–204 above, we now realise that the proposal to apply the test of a person of ordinary common sense and prudence to situations of duress was misconceived. Second, while there are similarities between duress of circumstances and compulsion,¹⁶⁶ as was pointed out in the submissions, there are also differences: with duress by a person, the nature of the coercion is fairly predictable; with duress of circumstances it is highly unpredictable. The policy considerations in each are not straightforward, which may be why most proposals for reform kept them separate. We therefore prefer the safer course of keeping the two defences separate, at least until the matter can be more thoroughly debated than in the context of this project.

Recommendation

240 The Commission recommends that the two defences remain separate.

¹⁶⁶ Lord Hailsham of Marylebone has called the differentiation between the two defences a distinction without a relevant difference. He said that duress was only “that species of the genus of necessity which is caused by wrongful threats” and he could not see how a person of ordinary fortitude could be excused from the one type of pressure on his will rather than the other: *R v Howe*, above n 118, 429.

APPENDIX A

Battered heterosexual men, gay men and lesbians

A1 **I**N *PP41* we stated:¹⁶⁷

. . . the Law Commission has undertaken a project to look at how the law applies to those people, whether male or female, who commit criminal offences as a reaction to domestic violence inflicted on them by their partner. Most of the research in this area is about women battered by male partners. The project will focus particularly, but not exclusively, on this paradigmatic battering relationship.

A number of submissions criticised the lack of any discussion of battering within same-sex relationships and battering by women of their male partners in heterosexual relationships. Consequently, we have undertaken a review of the research in these areas for the purpose of the report.

WOMEN WHO COMMIT DOMESTIC VIOLENCE AGAINST MALE PARTNERS

A2 National crime statistics, police call-out data, criminal victimisation surveys using national probability samples,¹⁶⁸ and clinical populations¹⁶⁹ give a very high proportion of men as perpetrators and women as victims of domestic violence.¹⁷⁰ Studies also indicate that women have a significantly increased risk of injury from

¹⁶⁷ *PP41*, above n 1, para 2.

¹⁶⁸ Russell Dobash, R Emerson Dobash, Margo Wilson, and Martin Daly “The Myth of Sexual Symmetry in Marital Violence” (1992) 39 *Social Problems* 71, 75 [“The Myth of Sexual Symmetry in Marital Violence”]. A recent New Zealand study indicates the rate of partner abuse reported by women was two to three times higher than that reported by men: Warren Young and others, above n 16, 41. This survey had a sample of 5000 randomly selected adults.

¹⁶⁹ Clinical populations are populations with some sort of clinical association, for example, couples undergoing therapy for marital disharmony.

¹⁷⁰ Felicity Goodyear-Smith and Tannis Laidlaw “Aggressive Acts and Assaults in Intimate Relationships: Towards an Understanding of the Literature” (1999) 17 *Behavioural Sciences and the Law* 285, 286.

domestic disputes compared to men.¹⁷¹ In contrast, there is a body of research that indicates that female to male (FTM) partner violence occurs as frequently as male to female (MTF) partner violence.¹⁷² This research consists principally of community surveys using the Conflict Tactics Scales (CTS) methodology that measures the ways in which couples resolve conflict.

- A3 The CTS investigates how conflict is resolved, whether through reasoning, verbal abuse or physical violence.¹⁷³ It lists specific acts of reasoning (for example, discussing the problem), verbal aggression (such as yelling and insulting) and physical violence (from pushing and shoving to attacks with a weapon). Respondents are asked whether and how frequently they and their spouse have carried out such acts against the other during a specified time period, usually the last twelve months.
- A4 CTS has been widely criticised for creating a misleading picture of domestic violence because (among other things) it does not measure the purpose of the violence (for example, whether it was in self-defence), or its physical effects (whether injuries were caused), or its psychological effects (whether the victim felt fear).¹⁷⁴
- A5 Critics have suggested that studies that looked at the reasons for the violence and its effects on those involved indicate that:
- Women are more likely than men to use violence against a partner in self-defence.¹⁷⁵
 - Most FTM cases fail to exhibit evidence of chronic intimidation that is often a characteristic of MTF violence.¹⁷⁶ Male aggression

¹⁷¹ Felicity Goodyear-Smith and Tannis Laidlaw, above n 170, 287.

¹⁷² Felicity Goodyear-Smith and Tannis Laidlaw, above n 170, 287.

¹⁷³ For a full description of CTS see Murray Straus “Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales” in Straus and Gelles (eds) *Physical Violence in American Families* (Transaction Publishers, New Brunswick, 1995) ch 3, 29–47.

¹⁷⁴ Leslie Tutty *Husband Abuse: An Overview of Research and Perspectives* (Health Canada, Ottawa, 1999), 15; “The Myth of Sexual Symmetry in Marital Violence” above n 168, 76–77; Martin Schwartz and Walter DeKeseredy “The Return of the ‘Battered Husband Syndrome’ Through the Typification of Women as Violent” (1993) 20 *Crime, Law And Social Change* 249.

¹⁷⁵ See James’ discussion of the relevant research in Kerrie James, above n 4, 158–159; see also Hamberger and others “An Empirical Classification of Motivations for Domestic Violence” (1997) 3 *Violence Against Women* 401, 418.

¹⁷⁶ “The Myth of Sexual Symmetry in Marital Violence”, above n 168.

towards females is more coercive and controlling than female aggression toward males,¹⁷⁷ even when the severity of the violence is the same.¹⁷⁸

- Despite the approximately equal frequencies of husband and wife violent acts, the physical damage done to wives by husbands is far greater than the reverse.¹⁷⁹
- Among violent couples, women felt fearful of conflict but men did not.¹⁸⁰

A6 The differing pictures painted by different methodologies is illustrated by two recent studies on a Dunedin cohort of 21-year-olds. A study using CTS to measure a broad range of verbal and physical acts of domestic violence found approximate gender symmetry.¹⁸¹ In contrast, a study of the same cohort looking at rates of physical assault¹⁸² found that four times as many women as men reported having been assaulted by a partner at least once in the preceding 12 months.¹⁸³ The results also showed that women tend to be more severely harmed than men in partner assaults.

A7 In summary, the research indicates that men and women are equally likely to be subject to acts of verbal and physical abuse by a

¹⁷⁷ Hamberger and others, above n 175.

¹⁷⁸ M Cascardi and D Vivian “Context for Specific Episodes of Marital Violence, Gender and Severity of Violence Difference” (1995) 10 *Journal of Family Violence* 265, cited in Kerrie James, above n 4.

¹⁷⁹ M Cascardi, J Langhinrichsen and D Vivian “Marital Aggression: Impact, Injury, and Health Correlates of Husbands and Wives” (1992) 152 *Archives of Internal Medicine* 1178.

¹⁸⁰ Neil Jacobson and others “Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with a Violent Husband” (1994) 62 *Journal of Consulting and Clinical Psychology* 982, 986.

¹⁸¹ Magdol and others “Gender Differences in Partner Violence in a Birth Cohort of 21-Year-Olds: Bridging the Gap between Clinical and Epidemiological Approaches” (1997) 65 *Journal of Consulting and Clinical Psychology* 68.

¹⁸² A list of actions that fell within the definition of physical assault was shown to the participant. This list comprised hitting, punching, hitting with something, kicking, biting, choking, arm twisting, pushing or shoving, using a weapon, and burning or scalding. Participants were then asked questions based on the list.

¹⁸³ John Langley, Judy Martin and Shyamala Nada-Raja “Physical Assault Among 21-Year-Olds by Partners” (1997) 12 *Journal of Interpersonal Violence* 675, 681.

heterosexual partner. However, women are much more likely than men to be subject to the serious form of domestic violence that constitutes battering.¹⁸⁴

- A8 The research also suggests that male victims of female domestic violence are unlikely to encounter the same difficulties in “fitting into” the legal defences as female victims of male domestic violence. A number of researchers have noted that, on average, men possess greater physical size and strength than women with whom they have intimate relationships.¹⁸⁵ They are (generally) able to respond immediately to an attack with equal or greater force.¹⁸⁶ Thus, they need not resort to pre-emptive strikes in self-defence. Nor are they disadvantaged with regard to provocation. An immediate response to a provocative act will not endanger them in the way that it might a female victim of male violence.
- A9 Nevertheless, there are almost certainly cases that do not fit the general model, in particular, where the male partner suffers from a physical disability or is the smaller and physically weaker of the two. If these men are in a similar situation to battered women, the reforms we propose will be equally beneficial to them.
- A10 There are also aspects of FTM domestic violence that may usefully be the subject of expert evidence, where it is alleged that FTM

¹⁸⁴ See Grania Sheehan and Bruce Smyth “Spousal Violence and Post-separation Financial Outcomes” (2000) 14 Australian Family Law Journal 102, 107–109 for a discussion of the effect of differing definitions of “spousal violence” on the results of their study. Goodyear-Smith and Laidlaw, above n 170, 287, have suggested that the reason for the difference in results between studies using judicial, clinical and social service samples and the CTS studies is that the former represent the more serious end of the domestic violence continuum while the CTS studies represent the entire range of domestic violence within the population. See also the discussion in Michael Johnson “Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Woman” (1995) 57 Journal of Marriage and the Family 283, where it is suggested that large-sample survey research and data gathered from women’s shelters indicate that some families suffer from occasional outbursts of violence from either husbands or wives (common couple violence), while other families are terrorised by systemic male violence (patriarchal terrorism).

¹⁸⁵ J Geles-Simes *Wife Battering: A Systems Theory Approach* (Guildford, New York, 1983); Koss and others *No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community* (American Psychological Association, Washington DC, 1994) cited in Hamberger and others, above n 175, 402.

¹⁸⁶ Whereas, even minor violence by women increases the probability of severe assaults from their male partners: S Feld and M Straus “Escalation and Desistance of Wife Assault in Marriage” (1989) 27 Criminology 141.

domestic violence is a relevant factor in a case. There is evidence that men in heterosexual relationships may refrain from reporting abuse by their female partners due to fear of ridicule.¹⁸⁷ For example, a recently published evaluation of the Domestic Violence Act 1995 indicates that, although male applicants are not disadvantaged under the Act, social taboos, stigma and shame can make it difficult for men to apply for a protection order.¹⁸⁸ Steinmetz and Lucca found that three factors were likely to influence a man to stay in a relationship where he is subject to domestic violence: lower levels of violence, whether leaving will involve a drop in his standard of living due to having to support two households, and a belief that staying is in the best interests of the children.¹⁸⁹ Further, while men are more likely than women to have access to resources to enable them to flee an abusive relationship, those who do not would not be able to go to a women's refuge.¹⁹⁰ These factors may be relevant to the credibility of a male defendant who claimed that he had been subject to domestic violence by his female partner.

SAME-SEX DOMESTIC VIOLENCE

- A11 Very little research has been done on same-sex domestic violence.¹⁹¹ Nevertheless, it is clear that same-sex domestic violence does occur,

¹⁸⁷ Suzanne Steinmetz and Joseph Lucca "Husband Battering" in V Hasselt and others (eds) *Handbook of Family Violence* (Plenum Press, New York, 1988) 233, 239.

¹⁸⁸ Helena Barwick, Alison Gray and Roger Macky *Domestic Violence Act 1995: Process Evaluation* (Ministry of Justice and Department for Courts, Wellington, 2000) 41, 124.

¹⁸⁹ Suzanne Steinmetz and Joseph Lucca, above n 187, 242–243.

¹⁹⁰ Victim Support, a non-government voluntary organisation that runs a 24-hour, free and confidential service offering practical and emotional support to crime and accident victims, supplies help to both men and women.

¹⁹¹ Phyllis Goldfarb "Describing with Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence" (1996) 64 *George Washington Law Review* 582, 590.

although estimates as to its prevalence vary greatly.¹⁹² Same-sex domestic violence appears to have a number of features in common with heterosexual domestic violence as well as a number of differences.

- A12 There may be a strong disinclination to reveal same-sex abuse to others. Some of the reasons for this are common to heterosexual abusive relationships: for example, shame, commitment to the relationship, repentance by the batterer, and fear of reprisal. However, additional reasons for secrecy exist in same-sex relationships. Where the victim has not come out in the open about his or her sexuality, he or she may fear being exposed at work, to family, or to the neighbours as gay or lesbian. Gay men and lesbians may also feel a need to maintain a positive image of their relationships in the face of common social disapproval of such relationships and hence be reluctant to admit to abuse within their relationships. Gay men may feel a social stigma about not being able to defend themselves. These factors would be relevant to the credibility of a defendant who claimed that he or she had been subject to violence within a same-sex relationship.
- A13 Several factors could mitigate against victims of same-sex abuse seeking outside protection. Like other minorities, they may experience pressure from within their community not to report domestic violence to the authorities because it would reflect badly on the community.¹⁹³ They may be cut off from their families due to disapproval of their homosexuality. There may be a lack of resources sensitive to same-sex relationships.¹⁹⁴ In particular, gay men (like heterosexual men) would not be able to gain admission into

¹⁹² JM Cruz and JM Firestone “Exploring Violence and Abuse In Gay Male Relationships” (1998) 13 *Violence and Victims* 159; Susan C Turell “A Descriptive Analysis of Same-Sex Relationship Violence for a Diverse Sample” (2000) 15 *Journal of Family Violence* 281, 282. In her 1997 literature survey, Renzetti notes that none of the research so far on partner abuse in same-sex relationships has been able to measure “true prevalence” because the studies have used self-selected rather than random samples: Claire Renzetti “Violence in Lesbian and Gay Relationships” in Laura O’Toole and Jessica Schiffman (eds) *Gender Violence: Interdisciplinary Perspectives* (New York University Press, New York, 1997) 285, 287.

¹⁹³ This was a factor for 10 of 100 lesbians in a self-selected sample of victims of domestic violence in lesbian relationships: Claire Renzetti *Violent Betrayal: Partner Abuse in Lesbian Relationships* (Sage, California, 1992) 85.

¹⁹⁴ However, it should be noted that a protection order under the Domestic Violence Act 1995 can be obtained by either a man or a women with respect to a partner of either sex.

women's refuges. Refuge services are open to lesbians and are used by them,¹⁹⁵ however, some lesbian victims of domestic violence may consider refuges are places for heterosexual women. Lesbian victims of domestic violence may not consider refuges safe places. There is anecdotal evidence from the USA of a lesbian abuser checking herself into the same refuge as her escaping partner.¹⁹⁶ Same-sex victims of battering may fear that the police would not take their complaints seriously.¹⁹⁷ Same-sex domestic violence may be seen as mutual aggression if the victim has fought back.¹⁹⁸ These factors may be relevant to both the credibility of the defendant's claim to be a victim of domestic violence and to the options available to the defendant in the circumstances as he or she perceived them.

A14 The evidence is very sparse, but two studies of self-selected groups of 100 lesbians¹⁹⁹ and 25 gay men²⁰⁰ who identified themselves as being in a same-sex battering relationship indicate that the types of domestic violence and abuse experienced by the participants in the studies mirrored the experiences of women in abusive heterosexual relationships. The lesbian study indicated that lesbian victims of domestic violence report leaving and returning to the relationship several times, a common occurrence in heterosexual relationships

¹⁹⁵ Statistics supplied by the National Collective of Women's Refuges NZ show that for the year 1 July 1999 to 30 June 2000, 89 clients identified as being lesbian. The total number of women clients for the same period was 6,865. Lesbian abusers comprised 1.2 per cent of the total abusers.

¹⁹⁶ Steve Friess "Behind Closed Doors" *The Advocate USA*, Issue 748, 12/09/97, 48.

¹⁹⁷ Christie notes that efforts are now being made by the Police to improve the attitudes of their officers. For example, the Police in Wellington have appointed a Liaison Officer whose role is to work with gay men and lesbians as victims, and with the Police Officers dealing with these cases. However, he suggests that because of their histories, police departments are generally viewed as repositories of institutionalised homophobia: Nigel Christie "Comment: Thinking about Domestic Violence in Gay Male Relationships" (1996) 4 *Waikato Law Review* 180, 185.

¹⁹⁸ Patrick Letellier "Gay and Bisexual Male Violence Victimisation: Challenges to Feminist Theory and Responses to Violence" in L Kevin Hamburger and Claire Renzetti (eds) *Domestic Partner Abuse* (Springer, New York, 1996) 11–12; Claire Renzetti, above n 193, 107–112.

¹⁹⁹ Claire Renzetti, above n 193.

²⁰⁰ JM Cruz and JM Firestone "Exploring Violence and Abuse in Gay Male Relationships" (1998) 13 *Violence and Victims* 159, 170.

involving domestic violence. However, there was little evidence that lesbian victims of domestic violence stayed in an abusive relationship because of children or because of financial dependency on the partner.²⁰¹

²⁰¹ In Renzetti's study, above n 193, children were a factor in one relationship and financial dependency a major factor in six relationships.

APPENDIX B

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