



## Law Commission Report – Understanding Family Violence: Reforming the Criminal Law relating to Homicide

12.05.2016

### Fact Sheet for Media

#### Background

- New Zealand has the highest reported rate of family violence in the developed world (P16).
- Nearly half of all homicides are related to family violence, and most occur within intimate partner relationships (P16).
- A small subset of family violence homicides – less than 10%, or less than 5% of all homicides in New Zealand – happen when a victim of family violence kills their abuser (P16).
- Most victims of family violence who kill are women, who kill their abusive male partners.
- There are also cases involving young adults who have killed abusive fathers or stepfathers, sometimes to protect themselves or their mothers.
- The Law Commission has considered the position of victims of family violence who commit homicide in two previous reports.<sup>1</sup>
- There has been law reform in this area in Australia, England and Wales, and Canada.
- There is a need for a better understanding of the dynamics of family violence across the community and within the criminal justice system, including by lawyers, judges and Police.

<sup>1</sup> *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001); and *The Partial Defence of Provocation* (NZLC R98, 2007). Both reports are available at <[www.lawcom.govt.nz](http://www.lawcom.govt.nz)>.

## The Scope of the Report

- The Report looks at whether the law can be improved for victims of family violence who kill their abusers.
- In particular, it examines the following questions:
  1. Does the test for self-defence (under section 48 of the Crimes Act 1961) need to be modified?
  2. Is a partial defence to murder justified?
  3. Do current sentencing principles reflect the circumstances of victims of family violence who are convicted of murder?

## The Law of Self-defence

- The law of self-defence in New Zealand can be traced back in statute law to 1893.
- Self-defence is provided for in section 48 of the Crimes Act 1961, which states:

*Everyone is justified in using, in defence of himself or herself or another such force as, in the circumstances as he or she believes them to be, it is reasonable to use.*
- Self-defence is a 'complete' defence – it results in an acquittal if successful.
- It was developed primarily in response to male violence because most violent offenders are men (P72).
- The "typical" self-defence scenario is a one-off encounter between two men of relatively equal strength.
- The courts have interpreted section 48 to require an **imminent** or immediate threat, and that there be no available alternative to the use of force.<sup>2</sup>

## The Law of Self-Defence in relation to Victims of Family Violence

- The Law Commission suggests law change is necessary to make self-defence more relevant and accessible for victims of family violence who kill their abusers.
- Self-defence is often claimed by victims of family violence, but is not usually successful (P71).

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<sup>2</sup> *Afamasaga v R* [2015] NZCA 615 at [47], citing *R v Wang* [1990] 2 NZLR 529 (CA) at 536.

- Of 24 cases examined by the Law Commission in which victims of family violence killed their abusers from 2001 to 2015, self-defence was claimed in 10 of the 16 cases that went to trial.
- It was successful in three cases, and unsuccessful in seven.
- The Commission recommends a new provision in the Crimes Act 1961 to clarify that where self-defence is claimed in response to family violence, the threat the defendant is responding to need not be imminent (P104).
- The concept of **imminence** is problematic for victims of family violence because (P75):
  1. It focuses on the immediate circumstances, but for many victims of family violence (typically women) there is not one isolated confrontation but a long history of family violence and an ongoing threat of harm.
  2. Focusing on imminence means that the reality of ongoing family violence can be obscured. For example:
    - The defensive use of force may be seen as disproportionate if a knife is used to ward off a beating with fists, but it might be reasonable in considering the wider context of abuse and the deceased's history of using violence against the victim.
    - Retreating and seeking help from the police might protect the victim from the imminent threat, but may not protect them from death or serious injury in the long term. Evidence shows that women are at a high risk of being killed or seriously injured when they leave their abusive partners.
  3. Limiting self-defence to imminent threats can exclude some victims of family violence who defend themselves when they are not facing an immediate threat.
    - Some victims may attack when their abusers' guard is down due to the difference in size and strength or because previous attempts to protect themselves have failed. *For example in R v Wang,<sup>3</sup> the question of self-defence was withheld from the jury because the defendant waited until her husband, who had earlier in the evening threatened to kill her and members of her family, was asleep before killing him – she claimed, to protect herself and her family.*
- The law should not focus on the immediate circumstances. It should be up to the jury to decide whether, in all the circumstances (in particular in the

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<sup>3</sup> *R v Wang* [1990] 2 NZLR 529 (CA).



context of the abusive relationship as a whole), the force used was reasonable.

- This is consistent with the current statutory test in section 48 of the Crimes Act (minus the court-imposed requirement for imminence), and with how self-defence is interpreted and applied in Australia and Canada.
- The Law Commission also recommends an amendment to the Evidence Act 2006 to support evidence of previous family violence, and of expert evidence to explain to the jury the dynamics of family violence and victim responses to that violence.

#### How New Zealand currently recognises reduced culpability

- In cases where a homicide cannot be justified in self-defence, there may still be factors that reduce a defendant's culpability.
- In cases where victims of family violence kill their abusers, the history of family violence will likely be such a factor.
- There are two main ways to recognise reduced culpability in homicide cases – through the charge, and through sentencing.  
*For example, a person who is alleged to have killed their abuser might be charged with manslaughter instead of murder.*  
They may also be found guilty, by a jury after trial, of the lesser offence of manslaughter even if they are tried for murder.
- Most victims of family violence who kill their abusers are charged with murder but few are found guilty of murder at trial (P50). Most are convicted of manslaughter.
- The Law Commission recommends that the Solicitor-General consider whether the *Prosecution Guidelines*, which govern decisions to lay criminal charges, should include reference to the potential relevance of a defendant's history as a victim of family violence.
- Reduced culpability can also be recognised through sentencing.
- New Zealand abolished the mandatory life sentence for murder in 2002.
- Judges now generally have the power to make case-specific decisions about culpability for murder (P121) subject to a strong presumption of a sentence of life imprisonment (P44).

- Some have expressed concern that despite this discretion and the mitigating effect of the prior family violence, victims of family violence who kill their abusers may still face heavy sentences.

### Partial Defences

- Partial defences are a special kind of defence that apply only in homicide cases. Where successful, they reduce murder to manslaughter, even if the defendant killed with murderous intent.
- New Zealand repealed its only general partial defence – provocation – in 2009 (P119).
- At present there are no other general partial defences (P121).
- The Commission reviewed the arguments for and against partial defences and considered whether there is a case for a new partial defence for victims of family violence who kill their abusers.
- The Commission considers that in New Zealand's legal context no new partial defence should be introduced.
- The Commission considers that there is a high risk of unintended consequences with partial defences, and that mitigating factors are best considered at sentencing (P159).

### Sentencing

- Although there is a presumptive life sentence for murder, this can be departed from when it would be seen to be 'manifestly unjust'.
- In cases where victims of family violence kill abusers, sentencing judges often take into account the defendant's history of family violence. However there may be inconsistencies in approach (P168).
- Section 9 of the Sentencing Act 2002 sets out a number of mitigating factors, The Commission recommends amending this to clarify the relevance of family violence.
- The Commission also looks at the three strikes sentencing law and concludes there is a case that this law may create injustice for victims of family violence who kill their abusers.

- The Law Commission recommends that the Ministry of Justice consider the three strikes sentencing law as it applies to homicide offenders in exceptional circumstances.

**New Zealand cases involving victims of family violence who kill their abusers include:**

- Daryl Kirk,<sup>4</sup> found guilty of manslaughter (self-defence unsuccessful), not yet sentenced (2016)
- Aaliyah Tagatauli (also known as Amanda Taitapanui), pleaded guilty to manslaughter, sentenced to 12 months' home detention (2016)
- Jessica Keefe, acquitted on basis of self-defence (2014)
- Patricia Paton, found guilty of manslaughter (self-defence unsuccessful), sentenced to five years, three months' imprisonment (2013)
- Rachel Rihia, pleaded guilty to murder, sentenced to 10 years' imprisonment (2012)
- Natalie Ford, acquitted on basis of self-defence (2011)
- Jacqueline Wihongi, found guilty of murder, sentenced to eight years' imprisonment, uplifted on appeal to 12 years' imprisonment (2010)
- Dale Wickham, found guilty of manslaughter (self-defence unsuccessful), sentenced to 12 months' home detention (2010)
- Rangī Marie Reti, found guilty of murder, sentenced to life imprisonment (2008)
- Violet Mahari, found guilty of manslaughter (self-defence unsuccessful), sentenced to three years, six months' imprisonment (2007)
- Nooroa Raivaru, pleaded guilty to manslaughter, sentenced to four years' imprisonment (2005)
- Honor Stephens, acquitted on basis of self-defence (2002)
- Tikiahi Erstich, found guilty of manslaughter, sentenced to two years' supervision, uplifted on appeal to two years' suspended sentence (2002)
- Gay Oakes, found guilty of murder, sentenced to life imprisonment (1995)
- Xiao Jing Wang, found guilty of manslaughter, sentenced to five years' imprisonment (1989)

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<sup>4</sup> Still before the High Court at the time of publication, so excluded from our case review but noted in the Report.