



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 41

BATTERED DEFENDANTS
VICTIMS OF DOMESTIC VIOLENCE
WHO OFFEND

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to:
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by 23 October 2000

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

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Summary of Contents

	Page
Note	vii
1 Introduction	1
2 Battered woman syndrome	4
3 Self-defence	11
4 Excessive self-defence	18
5 A new defence for battered defendants	22
6 Provocation	26
7 Diminished responsibility	34
8 Sentencing for murder	43
9 Duress	48
10 Compulsion	49
11 Necessity	57
Appendix Homicidal heirs and battered defendants	66
Select bibliography	68

Contents

	Para	Page
Note		vii
1 INTRODUCTION		1
2 BATTERED WOMAN SYNDROME		4
What is battered woman syndrome?	11	4
Cycle of violence	13	4
Learned helplessness	15	5
Criticism of cycle of violence and learned helplessness as applied to battered women	16	5
Changing conceptions of battered woman syndrome	20	7
Expert evidence on battered woman syndrome	21	7
Is battered woman syndrome itself a diagnosable condition?	21	7
The content of expert evidence on battered woman syndrome	25	8
3 SELF-DEFENCE		11
Self-defence and battered defendants	36	12
Imminence of danger and lack of alternatives	37	12
Proportionality	47	16
Intent to act in self-defence	51	16
Issues for reform	53	17
Leaving self-defence to the jury	54	17
Imminence or inevitability	55	17
4 EXCESSIVE SELF-DEFENCE		18
Advantage of the defence	63	20
Disadvantage of the defence	65	20
Is the defence necessary?	66	20
5 A NEW DEFENCE FOR BATTERED DEFENDANTS		22
Self-preservation	70	22
Western Australia proposal	74	23
Tyrannicide	77	24
Conclusion	82	25
6 PROVOCATION		26
Section 169	86	26
The hybrid person test	88	27
Provocation and battered defendants	92	28
Actual loss of self-control	92	28
“Battered Woman Syndrome” as a characteristic	95	30
Provocation operates to excuse perpetrators of domestic violence	98	30
Should provocation be relevant only to sentencing?	99	31
Provocation revisited: <i>R v Rongonui</i>	103	32

	Para	Page
7	DIMINISHED RESPONSIBILITY	34
	Can the defence be reformed?	117 36
	The situation in New Zealand	125 38
	Should New Zealand adopt a partial defence of diminished responsibility?	127 39
	Arguments in favour	127 39
	Arguments against	132 40
	Diminished responsibility and battered defendants	135 40
8	SENTENCING FOR MURDER	43
	Sentencing discretion for murder	138 43
	Existing discretion	145 46
	Degrees of murder bill	146 46
	Ministry of Justice sentencing project	151 47
9	DURESS	48
	Rationale of the defence	154 48
	Principles of duress	156 49
	One defence or two?	157 49
10	COMPULSION	51
	Elements of the defence	162 52
	Section 24 and battered defendants	163 52
	Particular kind of threat associated with a particular demand	164 52
	Actual existence of a threat	165 52
	The identity of the victim of the threat	166 53
	The presence of the threatener when the offence is committed	167 53
	Proposals for reform	172 54
11	NECESSITY	57
	Is there a defence of necessity in New Zealand?	178 57
	Elements of the defence of necessity	185 59
	A belief formed on reasonable grounds of imminent peril of death or serious injury	186 59
	<i>Reasonable grounds for belief</i>	186 59
	<i>Imminent peril of death or serious injury</i>	187 60
	No realistic choice other than to commit the offence	188 60
	Proportionality of response	190 61
	Reasonable foreseeability of actions leading to emergency	192 61
	Limits to the defence	195 62
	Necessity is not a defence to murder or attempted murder	195 62
	The defence is not available whenever the source of the threat is another person	196 62
	Reform	198 62
	A single defence of duress?	201 63
	Should a defence of duress be available where the peril is moderate but the response to the peril is proportionate?	204 64
	APPENDIX	
	Homicidal heirs and battered defendants	66
	SELECT BIBLIOGRAPHY	68

Note

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Submissions or comments on this paper should be sent by 23 October 2000 to Karen Belt, Law Commission, PO Box 2590, DX SP23534, Wellington, or by email to com@lawcom.govt.nz. We prefer to receive submissions by email if possible. Any initial inquiries or informal comments can be directed to Karen Belt: phone (04) 473-3453; fax (04) 471-0959. This paper is also available on the internet at the Commission's website: <http://www.lawcom.govt.nz>.

1

Introduction

- 1 **D**OMESTIC VIOLENCE IS A MAJOR SOCIAL PROBLEM in New Zealand,¹ as it is in other countries. In recent years there has been increasing criticism that battering relationships have not been well understood by the community or the legal profession.² It is said that some existing legal defences have not been available to some defendants who claim that their offending arose out of their situation as battered women.³ It is further said that the existing defences should be reformed and that new defences are needed.⁴ There have been calls for the convening of a royal commission of inquiry to consider the issue as part of a review of the criminal justice system.⁵
- 2 In response to these concerns, 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. Our terms of reference, approved by the Minister of Justice, are to:
- (1) examine how the existing New Zealand law applies to those who commit criminal acts in circumstances where they are victims of domestic violence, in particular, the defences of self-defence, provocation, duress and necessity;

¹ In 1996 a number of government departments commissioned a survey into violence against women by their partners. The resulting study found that around a quarter of the respondents with current partners and almost three-quarters of respondents with recent partners (ie partners within the last two years) reported at least one act of physical or sexual abuse by their partner. Three per cent of women with current partners and 24 per cent of women with recent partners reported that they had been afraid that their partner might kill them: Allison Morris *Women's Safety Survey 1996* (Victimisation Survey Committee, Wellington, 1997) viii, ix. See also Julie Leibrich, Judy Paulin and Robin Ransom *Hitting Home: Men Speak about Abuse of Women Partners* (Department of Justice in Association with AGB McNair, 1995) and the studies referred to in Nan Seuffert "Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law" (1999) 23 *Melb U LR* 211, 212-213.

² See, for example, Bruce Robertson "Battered Woman Syndrome: Expert Evidence in Action" (1998) 9 *Otago LR* 277.

³ See, for example, Robertson, above n 2.

⁴ See, for example, Suzanne Beri "Justice for Women Who Kill: A New Way?" (1997) 8 *A Fem LJ* 113.

⁵ Judith Ablett Kerr "The Criminal Justice System: Crying Out for a Royal Commission or Merely Crying Over Spilt Milk?" (1998) 507 *LawTalk* 13.

- (2) consider developments and proposals in other jurisdictions, in particular, the defences of self-preservation, diminished responsibility and judicial discretion in sentencing for murder;
- (3) make proposals for reform, if appropriate.

The Minister asked that the discussion be related to the Evidence Code and cover the latest scientific thinking on battered woman syndrome.

3 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 to 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.

4 The second aspect is whether the law applies fairly to battered defendants. Commentators have argued that some legal defences are gender biased, being based on the experiences of men.⁶ For example:⁷

The general defences of provocation and self-defence available to ... women defendants have all been developed on the basis of male experiences and definitions. This is hardly surprising given the overwhelming proportion of men among the judiciary and legal profession. By a process known as legal method, these men determine what facts should be considered as relevant and what facts should be dismissed as irrelevant. Since the experiences of women would normally fall outside those of men, facts based on their experience are likely to be dismissed. Contributing to this male-gendered definition of criminal defences is the fact that a large majority of cases coming before the criminal courts involve male defendants. Accordingly the courts would feel perfectly comfortable in pronouncing the law to meet the experiences of these defendants. The resulting distortion occurs when women defendants seek to rely on these defences. The women are confronted with the prospect of either failing to plead them successfully, or having to distort their experiences in an effort to fit them into the defences.

5 We begin with a discussion of battered woman syndrome. We conclude that, while there is disagreement about the existence of a psychological syndrome specific to battered women, domestic violence may nonetheless affect the victim in ways that are forensically relevant. Therefore, expert evidence concerning the psychological, social and economic aspects of domestic violence will often be relevant in cases involving battered defendants.

⁶ Rebecca Bradfield "Is Near Enough Good Enough? Why Isn't Self-defence Appropriate for the Battered Woman?" (1998) 5 *Psychiatry, Psychology and Law* 71; Susan Edwards *Sex and Gender in the Legal Process* (Blackstone Press, London, 1996) [Sex and Gender in the Legal Process]; Jeremy Horder *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) 186–197 [*Provocation and Responsibility*]; Elizabeth M Schneider "Resistance to Equality" (1996) 57 *U Pitt L Rev* 477, 493; Nan Seuffert "Battered Women and Self-Defence" (1996–97) 17 *NZULR* 292; Elisabeth McDonald "Women Offenders and Compulsion" (1997) *NZLJ* 402; Helen Brown "Provocation as a Defence to Murder: To Abolish or to Reform?" (1999) 12 *A Fem LJ* 137; Adrian Howe "Reforming Provocation (More or Less)" (1999) 12 *A Fem LJ* 127; Stanley Yeo *Unrestrained Killings and the Law* (Oxford University Press, Delhi, 1998) 51 [*Unrestrained Killings and the Law*].

⁷ Mark Findlay, Stephen Odgers and Stanley Yeo *Australian Criminal Justice* (Oxford University Press, Melbourne, 1994) 278.

- 6 We then examine several legal defences as they apply to battered defendants. Our discussion of the defences divides logically into two parts. In the first, we consider defences that are relevant to the battered defendant who kills or assaults the batterer. These are self-defence, the partial defences (provocation, excessive self-defence and diminished responsibility)⁸ that reduce murder to manslaughter and several proposed new defences. We also consider the possibility of introducing a sentencing discretion for murder. In the second part of the discussion, we consider defences that may excuse offences against third parties: compulsion and necessity.
- 7 We do not propose to attempt a comprehensive review of the legal defences. Our concern is to ask whether the legal defences apply equitably to battered defendants. We conclude that some reform is needed. A number of options are discussed. We do not at this stage express a preference for any particular proposal.
- 8 Our approach throughout this paper is that domestic violence does not justify or excuse retaliatory killing or wounding any more than does non-domestic violence. Generally, the law does not allow victims of violence to take the law into their own hands. In this respect, victims of domestic violence are no different. But the law recognises that there are extraordinary situations where retaliatory violence may be justified or excused. These situations give rise to the legal defences. If aspects of a defence work against battered defendants, that is not in itself evidence of unfairness. It would only be unfair if the motivation and circumstances of the offending fall within the reasons for allowing the defence, but the offenders are unable to avail themselves of the defence because of the way the defence is constructed.
- 9 We have drawn extensively on the work of others, in particular the Criminal Law Reform Committee, the Crimes Consultative Committee and the New South Wales Law Reform Commission. A select bibliography is appended.

⁸ Excessive self-defence and diminished responsibility are not currently available in New Zealand.

2

Battered woman syndrome

- 10 **T**HIS CHAPTER EXPLAINS what battered woman syndrome is, the scientific basis for it, and the role expert evidence on domestic violence can play in a criminal trial.

WHAT IS BATTERED WOMAN SYNDROME?

- 11 In the 1970s a number of researchers in the United States became interested in the issue of battered women and a literature began to develop on the topic.⁹ This literature examined the psychological, social and economic aspects of domestic violence. Some of these researchers were asked to appear as expert witnesses in the trials of battered women accused of killing their partners. The expert witnesses explained why the battered woman stayed in the relationship and why she might have perceived danger whereas someone outside the relationship would not. Their testimony was largely based on the work of Dr Lenore Walker who had developed a construct known as battered woman syndrome (BWS).
- 12 In 1979 Walker published a study based on interviews with a non-random sample of 120 battered women.¹⁰ From these interviews she developed two theories that were originally seen as the core of BWS: the theory of the cycle of violence and the application of the theory of learned helplessness to battered women.¹¹ In 1984 Walker published *The Battered Woman Syndrome*,¹² a research study that sought to test these theories.

Cycle of violence

- 13 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

⁹ Set out in 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) vol 1, 351.

¹⁰ Lenore E Walker *The Battered Woman* (Harper and Row, New York, 1979).

¹¹ The theory of learned helplessness was developed by Seligman and applied to battered women by Walker.

¹² Lenore E Walker *The Battered Woman Syndrome* (Springer, New York, 1984) [*The Battered Woman Syndrome*].

the batterer to the woman. The third phase may also be characterised by an absence of tension or violence, which then takes on a positive value.

- 14 The third phase provides positive reinforcement for women to remain in the relationship. Often in the initial stages the women hope that the undesirable behaviour of phases one and two will not recur. However, over time, the tension building period becomes more pronounced and the periods of loving contrition diminish. Some battered women may terminate the relationship when the abusive behaviour begins to outweigh the loving behaviour. However, often the batterer will not permit the woman to leave. The batterer may use violence, threats of violence, financial threats or threats to take the children.

Learned helplessness

- 15 The theory of learned helplessness was originally developed by Martin Seligman 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 violence that 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.

Criticism of cycle of violence and learned helplessness as applied to battered women

- 16 The cycle of violence theory has been criticised by commentators.¹³ Faigman and Wright note that Walker’s data do not support a single pattern of violence in battering relationships.¹⁴ Walker’s 1984 study found that 65 per cent of battering incidents showed signs of a tension building phase prior to the battering and in 58 per cent of incidents there was evidence of loving contrition afterwards.¹⁵ Because Walker failed to indicate the number of relationships that included all three phases, the percentage of women who experienced the entire cycle may have been as low as 23 per cent or as high as 58 per cent. Researchers have identified other patterns of violence within abusive relationships.¹⁶ Thus, while there is evidence that the cycle of violence typifies many violent relationships, it is not the only pattern.

¹³ 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; David L Faigman and Amy J Wright “The Battered Woman Syndrome in the Age of Science” (1997) 39 *Ariz L Rev* 67. These commentators criticise Walker’s methodology and the conclusions she draws from her work.

¹⁴ Faigman and Wright, above n 13, 77–78.

¹⁵ *The Battered Woman Syndrome*, above n 12, 96.

¹⁶ D Dutton and S Painter (1993) “The Battered Woman Syndrome: Effects of Severity and Intermittency of Abuse” (1993) 63 *Amer J Orthopsychiat* 614, cited in McMahon, above n 13, 33. Several studies of patterns of violence in battering relationships are reviewed in Schuller and Hastings, above n 9, 354–362.

- 17 Nevertheless, there is agreement on many of the common components of battering relationships.¹⁷ Examples are: the presence of domineering and controlling behaviour on the part of the abusive male; the presence of psychological and emotional abuse from the abusive male, which may include threats to the woman and her family; the frequent presence of sexual abuse;¹⁸ the destruction of property; and harm to pets¹⁹ and children.²⁰ Researchers have also consistently reported the potential for further violence when women attempt to leave a violent relationship²¹ and the difficulties women have in disclosing the fact that they are being abused.²²
- 18 The application of the theory of learned helplessness to battered women has also been strongly criticised. Faigman has questioned whether Seligman's work with caged dogs is applicable to battered women.²³ A number of researchers, including Walker, found that battered women frequently took action in relation to their situation.²⁴ Walker herself later wrote:²⁵
- Learned helplessness* describes the process by which organisms learn that they cannot predict whether what they do will result in a particular outcome (Seligman, 1975). It does *not* mean they learn to behave in a helpless way . . . One consequence for those who develop learned helplessness is the loss of their belief that they can reliably predict that a particular response will bring about their safety . . . In the case of battered women with learned helplessness, they do not respond with total helplessness or passivity; rather, they narrow their choice of responses, opting for those that have the highest predictability of creating successful outcomes.
- 19 While there is evidence that human beings can develop learned helplessness as a response to negative events they cannot control,²⁶ 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 remain with abusive partners appear

¹⁷ Schuller and Hastings, above n 9, 353; Regina A Schuller and Neil Vidmar "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature" (1992) 16 Law & Hum Behavior 273, 280–281.

¹⁸ Irene Hanson Frieze "Investigating the Causes and Consequences of Marital Rape" (1983) 8 Signs 532; *The Battered Woman Syndrome*, above n 12, 47–50, Marybeth K Hendricks-Matthews "Survivors of Abuse" (1993) 20 Family Violence and Abusive Relationships 391, 398.

¹⁹ Karla Fischer, Neil Vidmar and Rene Ellis "The Culture of Battering and the Role of Mediation in Domestic Violence Cases" (1993) 46 SMU L Rev 2117, 2121 at n 18.

²⁰ Susan M Ross "Risk of Physical Abuse to Children of Spouse Abusing Parents" (1996) 20 Child Abuse and Neglect 589.

²¹ Neville Robertson and Ruth Busch "Not in Front of the Children – the Literature on Spousal Violence and its Effects on Children" (1994) 1 BFLJ 107, 111–112. See also the studies referred to in n 60.

²² Hendricks-Matthews, above n 18, 394–395; P Jaffe, N Lemon, J Sandler and D Wolfe *Working Together to End Domestic Violence* (Mancorp Publishing, Florida, 1996) 28.

²³ David L Faigman (1986) "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" (1986) 72 Va L Rev 619, 640–643.

²⁴ McMahon, above n 13, 34; Schuller and Hastings, above n 9, 370–373; Schuller and Vidmar, above n 17, 280.

²⁵ Lenore E Walker "The Battered Woman Syndrome is a Psychological Consequence of Abuse" in Richard J Gelles and Donileen R Loske (eds) *Current Controversies on Family Violence* (Sage, London, 1993) 133, 134–135.

²⁶ Christopher Peterson, Steven Maier and Martin Seligman *Learned Helplessness: A Theory for the Age of Personal Control* (Oxford University Press, Oxford, 1993).

to be displaying maladaptive passivity but there is no clear evidence that this is due to learned helplessness.²⁷ 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.²⁸ A major report on battering by the United States Department of Justice states:²⁹

A number of factors or obstacles make terminating an abusive relationship difficult. Major factors . . . include a lack of economic and other tangible resources, fear of retaliation [through harm to the battered woman or those important to her], and emotional attachment. Other factors include the desire to provide the children with a father in the home, shame and embarrassment, and denial of the severity of the abuse . . . a battered woman's fear that her abusive partner will escalate his violence toward her at the point she attempts to separate from or end the relationship with him is validated, generally, by homicide statistics.

Changing conceptions of battered woman syndrome

- 20 Walker's work on battered women was not limited to the theories of the cycle of violence and learned helplessness but also described a number of negative psychological symptoms resulting from battering. There has been support for these findings in a number of other studies.³⁰ In her later work Walker has described BWS as a subset of post-traumatic stress disorder (PTSD), a psychological condition recognised in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV).³¹ Studies of battered women have found rates of PTSD ranging from 31 to 84 per cent.³² A study of women in the community found a prevalence rate of PTSD of 1 per cent.³³

EXPERT EVIDENCE ON BATTERED WOMAN SYNDROME

Is battered woman syndrome itself a diagnosable condition?

- 21 We have consulted a panel of four forensic psychiatrists concerning BWS, as well as two clinical psychologists who have extensive experience in

²⁷ Peterson, Maier and Seligman, above n 26, 238–239.

²⁸ 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; Schuller and Hastings, above n 9, 354–362.

²⁹ *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) section 1, 14.

³⁰ See the studies referred to in McMahon, above n 13, 29. See also Schuller and Vidmar, above n 17, 281.

³¹ *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, American Psychological Association, Washington, 1994), 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.

³² *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*, above n 29, 19.

³³ Walter J Gleason "Mental Disorders in Battered Women: An Empirical Study" (1993) 1 *Violence and Victims* 53.

treating battered women and in giving expert evidence about battered women and battering relationships. Not unexpectedly, the two groups differed in their views.

- 22 The forensic psychiatrists were concerned with whether BWS is a diagnosable medical condition; their view was that it is not. They agreed that a person in a battering relationship may develop a mental condition as a result of the trauma, for example, depression or PTSD of such severity as to constitute a disorder, and such a disorder may be forensically relevant in a particular case. However, not all battered women develop such a disorder. Nor, in their view, is it possible to conclude that a particular disorder was caused by domestic battering rather than by some other trauma.
- 23 The clinical psychologists, on the other hand, were concerned with broader issues, including the psychological effects of battering and the economic and social factors that impinge on the state of mind of battered women. Their view was that BWS is a diagnosable subset of PTSD and that there are recognisable symptoms associated with domestic battering. One of the psychologists pointed out that, while the symptoms of PTSD are generic in nature (for example, intrusive memories) the content of these symptoms will indicate the nature of the trauma that caused them (for example, the intrusive memories will be related to the traumatic event).³⁴
- 24 In our view, rather than getting caught up in the debate about what exactly BWS is and whether it is a diagnosable condition, effort should be directed at ensuring that evidence about the realities of battering relationships is presented in a way most likely to assist fact-finders.

The content of expert evidence on battered woman syndrome

- 25 While the debate concerning BWS has focused on Walker's two theories and the psychological effects of battering, evidence given in court under the rubric of BWS has covered a wide range of information concerning battered women and battering relationships. The United States Department of Justice in its report on *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials* states:³⁵

The scientific and clinical literature offers a large body of information relevant to various issues considered by the fact-finder in criminal cases involving battered women, and the term "battered woman syndrome" has been used to signal a shorthand reference to that body of knowledge. However, the use of the term "battered woman syndrome", in the context of the knowledge developed within the past 20 years, is imprecise and therefore misleading. The knowledge pertaining to battering and its effects does not rest on a singular construct, as the term "battered woman syndrome" implies. Thus, the term "battered woman syndrome" is not adequate to refer to the scientific and clinical knowledge concerning battering and its effects germane to criminal cases involving battered women.

³⁴ See the discussion in J Briere *Psychological Assessment of Adult Posttraumatic States* (American Psychological Association, Washington, DC, 1997) 61.

³⁵ *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*, above n 29, 17.

26 Judges and commentators have also made this point.³⁶ For example, in *Ruka v Department of Social Welfare*, Thomas J said:³⁷

[I]t is probably preferable . . . to avoid reference to [BWS] and to simply speak of the battering relationship. There is a danger that in being too closely defined, the syndrome will come to be too rigidly applied by the Courts. Moreover, few aspects of any discipline remain static, and further research and experience may well lead to developments and changed or new perceptions in relation to the battering relationship and its effects on the mind and will of women in such relationships.

27 Currently, New Zealand courts admit expert evidence on what is referred to as BWS in relation to a number of defences. Such expert evidence covers a broad range of issues concerning the psychological, social and economic aspects of domestic violence. In our view this evidence should continue to be admissible. However, we would prefer to avoid using the term BWS and instead call it “expert evidence on domestic violence”.

28 Under the proposed Evidence Code, expert evidence is admissible where it is relevant and substantially helpful.³⁸ While relevant expert evidence about domestic violence will vary from case to case, depending on the facts, expert evidence that is likely to be relevant and substantially helpful may include the following:

- Evidence concerning the behaviour of battered women – for example, a tendency to keep the violence a secret and to remain in relationships, even when they are severely battered. This sort of evidence is likely to be counter-intuitive³⁹ and could be used to support credibility where there is no independent evidence of battering or of the severity of the battering.
- Research on the patterns of violence in battering relationships,⁴⁰ the social and economic⁴¹ factors that affect battered women, the psychological effects of battering and separation violence.⁴² This may help to explain why the woman remained in the relationship or thought she had no alternative to using lethal force.
- Evidence concerning the battered defendants’ appraisal of the danger they are in. Intimate partners generally learn to read the subtle nuances of each other’s behaviour more clearly than outsiders, and battered spouses (like prisoners of war or hostages) have a great incentive to learn to read their abusers’ behaviour accurately.⁴³

³⁶ Mary Anne Dutton “Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome” (1993) 21 Hofstra L Rev 1191, 1195.

³⁷ *Ruka v Department of Social Welfare* [1997] 1 NZLR 154, 173 (CA).

³⁸ New Zealand Law Commission *Evidence Code and Commentary: R55* (Wellington, 1999) s 23(1).

³⁹ “Counter-intuitive” evidence is evidence that runs counter to commonly held beliefs or expectations.

⁴⁰ See paras 16–17.

⁴¹ The relevance of economic factors is discussed by Elisabeth McDonald in “Defending Abused Women: Beginning a Critique of New Zealand Criminal Law” (1997) 27 VUWLR 673, 674.

⁴² This refers to violence inflicted on a partner to prevent her from leaving a relationship, to retaliate for her departure or to end the separation forcibly. See the discussion in Martha R Mahoney “Legal Images of Battered Women: Redefining the Issue of Separation” (1991) 90 Mich L Rev 1.

⁴³ *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*, above n 29, 8.

- 29 To ensure the relevance of the expert evidence, a factual foundation linking the expert evidence to the circumstances of the particular case would need to be established. Thus, there would have to be evidence before the fact-finder from which it could conclude that the alleged abuser had battered the defendant. There would also have to be evidence before the fact-finder from which it could conclude that the particular social, economic and psychological factors that were the subject of expert evidence were relevant to the particular defendant. For example, expert evidence on the economic factors that typically affect battered women would not be relevant if the defendant was financially independent.
- 30 Those qualified to give such expert evidence would differ, according to the nature of the evidence. Under the Evidence Code, evidence that does not concern psychological matters could be given by someone with expertise in the social issues surrounding domestic violence, rather than a psychologist or psychiatrist.
-

3

Self-defence

31 **S**ECTION 48 of the Crimes Act 1961 provides:

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.

This defence recognises that people have a right to defend themselves against violence or threats of violence, so long as the force used is no more than is reasonable for that purpose. The law does not require people to wait until they have been attacked before taking action to protect themselves. But the law also acknowledges the attacker's right to life and bodily integrity and requires the force used in self-defence to be no more than is necessary to prevent the violence or threatened violence.

32 Self-defence often becomes an issue in trials of battered defendants who kill their partners after a long history of physical abuse.

33 To call self-defence a "defence" is in a way misleading, because it is the prosecution which must prove beyond a reasonable doubt that the defendant was not acting in self-defence.⁴⁴ However, in order for self-defence to become an issue for the jury to decide, the defendant must be able to point to material in the evidence that is capable of raising a reasonable possibility that he or she acted in self-defence. The judge must then determine, on the view of the evidence most favourable to the defendant, whether there is sufficient evidence to justify allowing the jury to consider the question.⁴⁵

34 The New Zealand test for self-defence contains both a subjective and an objective element. The fact-finder must determine what the defendant believed the circumstances to be when he or she resorted to the use of force. This is a subjective inquiry. The defendant's belief need not be reasonable, although lack of reasonableness may influence the fact-finder in deciding whether the defendant genuinely held that belief. The question whether the defendant was acting "in the defence of himself or another" is also subjective: the answer depends on whether

⁴⁴ In the absence of a statutory provision to the contrary, and with the exceptions of insanity and diminished responsibility, and (in the regulatory context) absence of fault, this rule concerning the burden of proof is also applicable to other defences.

⁴⁵ *R v Wang* [1990] 2 NZLR 529, 534 (CA).

this was the defendant's intention in the circumstances as the defendant saw them.⁴⁶

- 35 The fact-finder must then determine whether the force that the defendant used was reasonable in those circumstances. This is an objective test, but it is applied to the defendant's *subjective view* of the circumstances. Concepts developed at common law have been used to determine, as evidentiary matters, whether the response was objectively reasonable or not. These concepts are the imminence and seriousness of the attack or anticipated attack, proportionality of the defensive action to the perceived danger, and the lack of alternatives.⁴⁷

SELF-DEFENCE AND BATTERED DEFENDANTS

- 36 Section 48 is, on its face, gender neutral. However, commentators have said that the way in which it has been interpreted may limit its availability for women who kill in response to domestic violence.⁴⁸ This is because the concepts referred to in paragraph 35 were developed in the context of male conflicts: typically single confrontational encounters between two people of roughly equal strength.⁴⁹ Battered defendants, on the other hand, face repeated violence, generally from a person of greater physical strength. Conceptual tools developed to evaluate reasonableness in a one-off confrontation may not be adequate to evaluate reasonableness in a situation of on-going domestic violence.

Imminence of danger and lack of alternatives

- 37 In order to determine whether the force the defendant used was reasonable, juries are often told to consider two inter-related factors: whether the danger the defendant sought to avoid was imminent and whether the defendant had options other than the use of force. Imminence is a question of fact and degree and does not necessarily mean immediate. However, danger would not be considered imminent if the defendant has a reasonable means of avoiding it. The question is, was the defendant facing danger that was so pressing that he or she had no reasonable option to repel or avoid it other than to use the force that he or she used.
- 38 The relative physical weakness of many battered defendants vis-à-vis their abusers will often dictate the manner and timing of the battered defendants' responses. Research indicates that significant numbers of battered women who kill their spouses do so when they are not facing an immediate attack

⁴⁶ *R v Smith* (14 October 1994) unreported, Court of Appeal, CA 263/94, 5–6.

⁴⁷ JB Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 1992) Crimes Act, para CA48.08A (updated 4 February 2000) [*Adams*].

⁴⁸ Seuffert, above n 6; Elisabeth McDonald "Criminal Defences for Women" in New Zealand Law Society *Women in the Criminal Justice System* (New Zealand Law Society, Wellington, 1997) 46–49.

⁴⁹ Julie Stubbs and Julia Tolmie "Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?" in Julie Stubbs (ed) *Women, Male Violence and the Law* (Institute of Criminology, Sydney, 1994) 192, 195.

or threat of immediate attack.⁵⁰ By the time an immediate attack is threatened, any attempt at self-protection may be too late. Thus, victims of domestic violence may resort to surprise attacks,⁵¹ or they may attack during a lull in the violence against them.⁵² The partner may even be asleep.⁵³ This raises the issue of whether the danger posed by the partner was sufficiently imminent for the use of lethal force to be considered necessary and therefore reasonable.

- 39 To some extent, the courts have acknowledged the experiences of battered defendants when dealing with the concept of imminence. Expert evidence has been admitted to the effect that victims of domestic violence become attuned to their partners' behaviour and may pick up signs of an impending attack that would not be obvious to someone outside the relationship.⁵⁴ Or that the violence may affect the mind of a defendant so that he or she apprehends danger even when it is not objectively apparent.⁵⁵
- 40 Nevertheless, imminence is not always an adequate tool to assess the reasonableness of a battered defendant's use of force. The very word "imminence" encourages a short-term view of the danger that only looks at the situation immediately preceding the defendant's use of force, without reference to the possibility that the danger may continue even if the defendant escapes from the immediate threat. This tendency is compounded by the way imminence inter-relates with the other important factor in assessing reasonableness: the lack of alternatives. Generally, courts have not considered danger to be sufficiently imminent to justify the use of force if the defendant had a reasonable non-violent option for avoiding the immediate danger.
- 41 This is illustrated in *R v Wang*.⁵⁶ In that case, 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. The trial judge refused to allow self-defence to go to the jury. He said that, as the defendant was in no immediate danger and had alternative courses of action open to her, such as going to the police or seeking the help of her sister and friend who were with her in the house, there was no possibility the jury could have considered her use of lethal force to have been reasonable.⁵⁷

⁵⁰ 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. Contrast Holly Maguigan "Battered Women and Self-Defence: Myths and Misconceptions in Current Reform Proposals" (1991) 140 U Pa L Rev 379.

⁵¹ *R v R* (1981) 28 SASR 321 (SC).

⁵² *R v Lavellee* [1990] 1 SCR 852.

⁵³ *R v Secretary* (1996) 107 NTR 1 (Supreme Court of the Northern Territory, Court of Criminal Appeal).

⁵⁴ *R v Lavellee*, above n 52, cited in *R v Oakes* [1995] 2 NZLR 673, 676 (CA).

⁵⁵ *R v Oakes* [1995] 2 NZLR 673, 676 (CA).

⁵⁶ *R v Wang*, above n 45, 529.

⁵⁷ *R v Wang*, above n 45, 534.

- 42 The Court of Appeal upheld the trial judge. The Court accepted that it might be reasonable to make a pre-emptive strike in some circumstances.⁵⁸ However, where a person was subjected to a threat that could not be carried out immediately, a pre-emptive strike would not be reasonable if there were alternative courses of action available.⁵⁹ This raises questions about the sort of options that victims of domestic violence should be expected to take.
- 43 Research suggests that peaceful and effective avenues for self-protection are not always available to victims of domestic violence.⁶⁰ Some fear, with good cause, that they will be killed or seriously beaten if they go to the police for protection⁶¹ or seek to leave the abusive relationship. New Zealand research shows that the Police and the courts did not or could not always offer effective protection against abusive spouses.⁶² There is also considerable evidence of the dangers that leaving a violent relationship may pose for battered women.⁶³ Thus, some victims of domestic violence may have a realistic fear that they cannot escape from the inevitable danger posed by their spouse even if they are able to run away from the violent incident immediately confronting them. For example, a defendant may not consider leaving home to be a viable option, even though it may afford a short period of immediate relief, if past experience shows that the abuser will be able to find the defendant no matter where he or she runs to. For such a defendant, running away would only delay the inevitable.
- 44 As Schopp noted, there is a difference in the danger being immediate, and action which must be taken immediately in order to ward off a danger that is not itself immediate.⁶⁴ So long as the action is necessary, in that no non-violent alternative will achieve that end, there should be no additional requirement of imminence. Imminence of harm can be a factor to be considered in making judgments of necessity, but it should not be an independent requirement in addition to necessity. In New Zealand, imminence is an evidential presumption and not a rule of law. It is useful because in the

⁵⁸ *R v Wang*, above n 45, 535.

⁵⁹ *R v Wang*, above n 45, 536.

⁶⁰ Elizabeth Hore, Janne Gibson and Sophy Bordow *Domestic Homicide* (Family Court of Australia, Canberra, 1996) 29–30, 45–49; Mahoney, above n 42; Morris, above n 1, 54; Kenneth Polk *When Men Kill* (Cambridge University Press, Cambridge, 1994) 28; Patricia Weiser Easta *Killing the Beloved: Homicide between Adult Intimates* (Australian Institute of Criminology, Canberra, 1993) 59–65, 85–87. See also the studies cited in Hore, Gibson and Bordow, this n, 12–13; *Sex and Gender in the Legal Process*, above n 6, 374 and McDonald, above n 41, 680. While much of this research is foreign, it comes from countries (Australia, the United States, Canada and Britain) that are very similar to New Zealand socially and culturally.

⁶¹ *R v Tepe* (11 December 1998) unreported, High Court, Wellington Registry, T 889/98, records that the defendant killed his girlfriend because she reported his beating of her to the police. The defendant had successfully argued provocation at trial.

⁶² Ruth Busch, *Protection from Family Violence: a Study of Protection Orders Under the Domestic Protection Act 1992* (Abridged) (Victims Task Force, Wellington, 1982). However, note that Morris, above n 1, x, found that over two-thirds of the women whose partners had been dealt with by the police were “very satisfied” or “satisfied” on the last occasion this occurred.

⁶³ See the cases discussed in Ruth Busch “Don’t Throw Bouquets at Me . . . (Judges) Will Say We’re In Love: an Analysis of New Zealand Judges’ Attitudes Towards Domestic Violence” in Julie Stubbs (ed) *Women, Male Violence and the Law* (Institute of Criminology and Sydney University Law School, Sydney, 1994) 104.

⁶⁴ Robert F Schopp *Justification Defenses and Just Convictions* (Cambridge, Cambridge University Press, 1998) 99–102.

absence of imminent danger, there is usually no necessity for defensive force, as the danger can be avoided in other ways. However, as Schopp points out, necessity can exist without imminence if the danger is unavoidable. In some situations, inevitability may be a better tool for assessing the need for defensive action.

- 45 The Court of Appeal has noted that in a hostage situation, the use of pre-emptive force against a threat that was not going to be carried out immediately might be reasonable, as the hostage is not free to seek protection in other ways.⁶⁵ This raises questions about the reasonableness of the alternatives open to victims of domestic violence. Is it reasonable to require them to move to a new town and take on a new identity if this is the only way of avoiding the danger? Or to leave the country?⁶⁶ We do not have answers to these questions but we see them as examples of the issues that may arise in assessing the reasonableness of defensive action against domestic violence.
- 46 Stubbs and Tolmie suggest that evidence on the following topics would be relevant and helpful in assessing a battered defendant's claim that his or her use of force was necessary and therefore reasonable:⁶⁷
- what was the nature and extent of the violence that the defendant suffered in the relationship?
 - how many times had the defendant called the police and what was the result?
 - had the defendant tried to enlist the protection of the criminal justice system or other agencies and what was the result?
 - how many times had the defendant tried to leave?
 - if the defendant returned, what were the factors that influenced that decision?
 - did the defendant have a safe and affordable place to go?
 - how had the abuser responded to other efforts at self-protection in the past?
 - had the abuser intimated what he or she might do to the defendant in the future?
 - was there anything about the defendant's cultural circumstances that made it particularly difficult to detach from the abuser, negotiate the relationship or seek outside help?

⁶⁵ *R v Wang*, above n 45, 539.

⁶⁶ About four or five families or people facing serious domestic violence are relocated overseas by WINZ every year. The criteria for eligibility are (a) the applicant's safety is under an on-going threat of severe violence from another person; (b) all other options of relocating within New Zealand to avoid the threat have been exhausted; (c) intention to reside in Australia until the threat is averted; and (d) the Police support the application for assistance and confirm that it is necessary for the applicant's safety to relocate outside New Zealand. "Winz Pays for At-Risk People to Shift to Aussie" *The Dominion*, Wellington, New Zealand, 30 May 2000, 1 and personal communication with WINZ 22 June 2000.

⁶⁷ Stubbs and Tolmie, above n 49, 194.

Proportionality

- 47 The force used in self-defence is unlikely to be reasonable if it is out of proportion to the danger threatened. To take an extreme example, it would not be reasonable to shoot a big bully to death in order to prevent him from pulling one's hair.
- 48 Battered defendants who claim to have acted in self-defence are generally women who have retaliated against male abusers. Women tend to have less physical strength than their partners and may not be socialised to fight in the way that some men are. Thus, they may need to defend themselves in a seemingly disproportionate way. For example, they may use a lethal weapon in response to a bare-handed attack. The courts have taken a realistic approach: in *R v Oakes*, the Court of Appeal said that a woman's "physical limitations" should be taken into account when assessing the reasonableness of her response.⁶⁸
- 49 Other aspects of proportionality, however, raise unresolved issues for battered (and other) defendants. The first issue is whether deadly force is necessarily disproportionate to anything less than the threat of death or serious bodily harm. For example, is it reasonable to use deadly force if that is the only way to escape from imprisonment or to prevent a sexual assault that does not amount to serious bodily harm? The second issue concerns repetitive violence. Can it ever be reasonable to kill if there is no other way of escaping from repeated assaults that do not amount to serious bodily harm?
- 50 Again, we do not think there are answers that will fit all cases. What is reasonable will depend on the facts of the particular case. But these are further questions that may arise in assessing the reasonableness of the force used in self-defence against domestic violence.

Intent to act in self-defence

- 51 Even when battered defendants genuinely intend to act defensively, their behaviour can be misinterpreted. Disparities in physical strength may mean that any defensive action would require pre-planning to be successful. Sometimes this will involve the use of deadly weapons.⁶⁹ The need to avoid a direct confrontation that they are likely to lose may lead them to choose a method such as poisoning. They may have expressed relief rather than remorse after the killing. The impression given is that the defendant's motive was cold-blooded revenge rather than defensive.

⁶⁸ *R v Oakes*, above n 55, 676.

⁶⁹ In an analysis of spousal killings in England and Wales between 1989 and 1993, Edwards found that males were significantly more likely than females to use the body as a deadly force. A similar gender divide was found in Canada and Australia: *Sex and Gender in the Legal Process*, above n 6, 368–370. Compare the study by Anderson of murder between sexual intimates in New Zealand between 1988–1995 (22 female offenders and 83 male offenders) in which 13 per cent (3) of female and 8 per cent (7) of male offenders killed by a manual assault: Tracey Anderson *Murder between Sexual Intimates in New Zealand between 1988–1995* (Research submitted to the Victoria University of Wellington in fulfilment of the requirements for the Applied Degree of Masters in Criminology, 1997) 31.

- 52 Of course, the source of such behaviour may in fact be a motive other than defence. But, where appropriate, alternative explanations compatible with self-defence should be made available to the jury.

ISSUES FOR REFORM

- 53 Our discussion of self-defence has identified two issues for possible reform, on which we seek the readers' views.

Leaving self-defence to the jury

- 54 It will be recalled that the Court of Appeal in *Wang* upheld the trial judge in his refusal to allow the jury to consider self-defence for the reason that no jury could properly regard Wang's use of lethal force to be reasonable. It can be argued that, contrary to the Court of Appeal's ruling in *Wang*, whenever the evidence points to a reasonable possibility that the defendant intended to act defensively, the question of whether the force used was reasonable should *always* be left to the jury. Ideas of what is reasonable change over time and, with regard to victims of domestic violence, have changed considerably over recent years.⁷⁰ To withdraw the issue from the jury is to deprive the legal system of what has traditionally been regarded as the most appropriate arbiter of community values. On the other hand, it may be said that a judicial filter will help to guard against wholly unreasonable verdicts.

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?

Imminence or inevitability

- 55 We refer to the discussion in paragraphs 37 to 46.

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?

⁷⁰ The considerable literature in the area would seem to indicate this.

4

Excessive self-defence

56 **T**HE PARTIAL DEFENCE OF EXCESSIVE SELF-DEFENCE reduces murder to manslaughter where the defendant intended to act in self-defence but in doing so used more force than was reasonable. It was introduced to Australian law by the High Court of Australia in *R v Howe*,⁷¹ rejected by the Privy Council in *Palmer v R*⁷² (on appeal from the Jamaican Court of Appeal), re-established by the High Court of Australia in *Viro v R*⁷³ (not following the Privy Council), re-considered by the High Court of Australia in *Zecevic v R*⁷⁴ and abolished by a five to two majority. Currently it is available in South Australia (by statute),⁷⁵ in India (as part of the Penal Code),⁷⁶ in Sudan (as part of its Penal Code),⁷⁷ and in Ireland (as a common law defence).⁷⁸

57 The underlying rationale for the defence is:⁷⁹

... to be found in a conviction that the moral culpability of a person who kills another in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder. The notion that a person commits murder in these circumstances should be rejected on the ground that the result is unjust. It is more consistent with the distinction which the criminal law makes between murder and manslaughter that an error of judgment on the part of the accused which alone deprives him of the absolute shield of self-defence results in the offence of manslaughter.

58 Various forms of the defence have been proposed, a number of which are set out below.

59 In the Australian High Court case of *Viro v R*, Mason J set out a jury direction for excessive self-defence:⁸⁰

(1) (a) It is for the jury first to consider whether when the accused killed the deceased

⁷¹ *R v Howe* (1958) 100 CLR 448 (HC).

⁷² *Palmer v R* [1971] AC 814 (PC).

⁷³ *Viro v R* (1978) 141 CLR 88 (HC).

⁷⁴ *Zecevic v R* [1987] 162 CLR 645 (HC).

⁷⁵ Section 15 of the Criminal Law Consolidation Act 1935 (SA).

⁷⁶ *Unrestrained Killings and the Law*, above n 6, 119.

⁷⁷ *Unrestrained Killings and the Law*, above n 6, 127.

⁷⁸ *Unrestrained Killings and the Law*, above n 6, 165.

⁷⁹ *Viro v R*, above n 73, 139, per Mason J.

⁸⁰ *Viro v R*, above n 73, 146–147, per Mason J.

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.

60 The Criminal Law Revision Committee of England and Wales, having recommended that the common law defence of self-defence be codified along the lines of section 48 of our Crimes Act 1961, also recommended a new defence reducing murder to manslaughter:⁸¹

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.

A similar formulation appears in the draft Criminal Code⁸² and has the support of the House of Lords Select Committee on Murder and Life Imprisonment.⁸³

61 Section 15 of the Criminal Law Consolidation Act 1935 (South Australia) provides:

- (1) It is a defence to a charge of an offence if –
 - (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and
 - (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.
- (2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if –

⁸¹ Criminal Law Revision Committee *Offences against the Person*, 14th report, (HMSO, London, 1980) Cmnd 7844, recommendation 73, 138.

⁸² Law Commission (England and Wales) *Criminal Law: A Criminal Code for England and Wales, Law Com No 177* (HMSO, London, 1989) 68, s 59 of the draft code: “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 circumstances which he believes to exist”.

⁸³ House of Lords Select Committee on Murder and Life Imprisonment *Report of the Select Committee on Murder and Life Imprisonment* (HMSO, London, 1989) HL78-I, para 89.

- (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but
- (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

62 A New Zealand provision could be drafted around the words of section 48 of the Crimes Act 1961. For example:

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

Advantage of the defence

63 The advantage of the defence is that it recognises that a person who kills, believing (wrongly) that this is necessary in self-defence, is less culpable than a person who kills with no such belief. A partial defence of excessive self-defence would take into account the subjective perception that prompted the defendant's action, without abandoning the boundaries of acceptable conduct that society has a right to expect from all citizens.

64 It has been said that a qualified defence may prevent a jury giving a complete acquittal out of sympathy in cases where it considers that the defendant acted honestly but unreasonably.⁸⁴ This argument is particularly strong where there is a mandatory sentence of life imprisonment for murder.

Disadvantage of the defence

65 The Model Criminal Code Officers Standing Committee was of the opinion that, while simple tests for excessive self-defence could and had been developed, such tests offered insufficient guidance to a jury.⁸⁵ Attempts to develop guidance for judges directing juries on excessive self-defence have resulted in complicated formulae more apt to confuse than assist. A major factor in the abolition of the doctrine by the Australian High Court in *Zecevic* was that the instruction devised in *Viro* was too difficult for juries to understand. The author of the test, Mason J, did not think that a reformulation of his propositions would help and that, accordingly, there was a serious risk of the doctrine not operating the way it was intended.⁸⁶

Is the defence necessary?

66 It has been suggested that a partial defence of excessive self-defence is unnecessary because the facts giving rise to such a defence may well also go to prove provocation.⁸⁷ Further, the Crown has to prove that the defendant's

⁸⁴ Noel O'Brien "Excessive Self-Defence: A Need for Legislation" (1983) 25 Crim LQ 441, 453.

⁸⁵ 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*].

⁸⁶ *Zecevic v R*, above n 74, 653, per Mason J.

⁸⁷ *Zecevic v R*, above n 74, 664, per Wilson, Dawson and Toohey JJ.

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.⁸⁸

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

⁸⁸ *Zecevic v R*, above n 74, 654, per Mason J.

5

A new defence
for battered defendants

67 **B**ECAUSE OF THE DIFFICULTY OF RELYING ON SELF-DEFENCE, some commentators have recommended developing a new defence based on the circumstances of battered defendants. For instance, the South Australian Domestic Violence Council has recommended:⁸⁹

[t]hat a new complete defence be created which can be acted upon by a defendant charged with murder where the elements of such a defence are a proven history of personal violence by the deceased against the accused or against any child or children of the accused's household.

68 This chapter outlines three defences that have been proposed. They differ from other "new" defences, such as excessive self-defence and diminished responsibility, in that they are not currently defences in any jurisdiction and also in that they are aimed specifically at the use of force by those in abusive or tyrannical relationships. No common law jurisdiction has enacted a special defence for battered defendants. The main question is whether a special defence can offer anything that cannot be achieved by reforming or adopting existing defences, and introducing a sentencing discretion for murder.

69 The three proposals discussed in this chapter are representative and not the only alternatives that have been developed (for example, there are several versions of self-preservation). They represent three different approaches: a partial defence based on self-defence, a complete defence based on self-defence and operating parallel to it, and a broader defence that is not confined to battering relationships and which focuses not on physical abuse but on the relationship of domination.

SELF-PRESERVATION

70 A defence of self-preservation, has been proposed in New Zealand,⁹⁰ the United Kingdom,⁹¹ and Australia.⁹² Proponents have put it forward in the United Kingdom and Australia as a complete defence, and in New Zealand

⁸⁹ South Australian Domestic Violence Council *Domestic Violence* (Women's Adviser's Office, Department of Premier and Cabinet, Adelaide, 1987) recommendation 100, 91.

⁹⁰ Proposed by the former Women for Justice for Women Trust, based in Christchurch.

⁹¹ Proposed by the Rights of Women Organisation, based in London.

⁹² Proposed in submissions to the Australian Law Reform Commission, as reported in *Equality Before the Law: Justice for Women: R69* (Sydney, 1994) 277.

as a partial defence reducing murder to manslaughter. One proposed New Zealand version of the partial defence would be available to:⁹³

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.

- 71 Self-preservation assesses the circumstances of the defendant objectively: did the defendant have a relationship of a certain type with the deceased and did the deceased subject the defendant to abuse and intimidation? However, the need for the use of force is assessed subjectively according to the belief of the defendant.
- 72 This proposal may be subject to a number of criticisms. The defence is gender specific,⁹⁴ although it is not invariably the case that domestic violence is perpetrated by men against women. Male children may be subject to domestic violence and there is also evidence of domestic violence in homosexual relationships. The type of abuse and intimidation that would attract the defence is very wide: racial, sexual and physical. It is not clear what would amount to racial abuse in the context of self-preservation. Beri suggests that it would cover making derogatory remarks to a woman about her race,⁹⁵ but it is hard to accept that this should excuse killing. No objective threshold of abuse is necessary before the defence becomes available. The defence is triggered by the subjective belief that killing is necessary for the defendant's self-preservation, yet self-preservation is not defined.
- 73 On the other hand, it can be argued that a partial defence should be broadly drawn, as its purpose would be to open up a range of sentencing options for victims of domestic violence who killed their abuser in mitigating but not justifiable circumstances. The public is likely to accept the defendant's genuine belief that it was necessary to kill to escape domestic violence at the hands of the deceased as a mitigating circumstance. The gendered nature of the defence, while problematic, does acknowledge the fact that the majority of women who kill their partners do so after experiencing years of domestic violence, while men who kill their partners generally do so in an attempt to control their partners and often after subjecting them to domestic violence.⁹⁶

WESTERN AUSTRALIA PROPOSAL

- 74 The Taskforce on Gender Violence set up by the Chief Justice of Western Australia has proposed a new complete defence that would extend the

⁹³ Beri, above n 4, 114.

⁹⁴ The United Kingdom defence was not gender specific.

⁹⁵ Beri, above n 4, 116.

⁹⁶ Anderson notes that the domestic violence results from her study found that men had the most violent tendencies among both victims and offenders: Anderson, above n 69, 42. Leibrich, Paulin and Ranson, refer to a 1991 study by Fanslow, Chalmers and Langley that found that between 1978 and 1987, 47 per cent of the 193 female homicide victims were killed by an existing or former male partner and there was a history of abuse in 56 per cent of these cases: Leibrich, Paulin and Ranson, above n 1, 28.

concept of self-defence and exist alongside traditional self-defence. The new defence proposes that:⁹⁷

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.

- 75 The Taskforce did not consider that traditional self-defence could easily be reformed to take account of the situation of battered women. The Taskforce feared that an objective assessment of the reasonableness of the defendant's use of force would be problematic, even when applied to the circumstances as perceived by the defendant, and that the meaning of "circumstances" was likely to be confined narrowly to single incident situations.⁹⁸
- 76 A new definition of self-defence for situations where there is a history of domestic violence may be justified on the ground that the danger posed by repeated violence is qualitatively different from that posed by a single incident of violence and should be assessed by a different standard. A history of personal violence is highly predictive of future violence.⁹⁹ The threat to the victim and the proportionality of the victim's response cannot be judged solely against the immediate threat, as it can where the danger is limited to a single incident. Alternatives to the use of force that may be reasonable and realistic in a situation of one-off danger may not be so in a situation of repeated violence. However, while a broader view of the danger facing the defendant is to be welcomed, it does not follow that the necessity for the use of force should be assessed solely on the basis of the defendant's perception. Where the defendant's reaction is objectively unreasonable it may be seen as unacceptable to excuse the defendant's act completely, even if he or she genuinely believed it was necessary. A partial defence may be more acceptable.

TYRANNICIDE

- 77 A very different defence, tyrannicide, has been proposed by Jane Cohen.¹⁰⁰ This defence is not intended to include all battered defendants but is specifically aimed at those who are attempting to free themselves from what she calls "private tyrants". This defence is based on objective criteria and would operate as a complete defence.
- 78 The defence has two requirements. First, proof of a regime of private tyranny. Cohen considers that a private tyranny exists where one person maintains control of another through social isolation, violence and threats of violence to the subject and those important to the subject, and, further, uses these means to prevent the subject from freeing him or herself from the tyrant's control. Second, the killing of the tyrant must be reasonably necessary for

⁹⁷ *Report of the Chief Justice's Taskforce on Gender Bias* (Perth, 1994) 214.

⁹⁸ The Taskforce was commenting on the Model Criminal Code version of self-defence. This lists five situations in which self-defence may occur: defending oneself or another, preventing or ending unlawful imprisonment, protection of property and prevention or termination of trespass.

⁹⁹ Hore, Gibson and Bordow, above n 60, 30; Eastal, above n 60, 73, 91–92.

¹⁰⁰ 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.

the subject to escape from the tyranny, employing the traditional standards of “necessity” and “reasonableness”.

- 79 Cohen argues that where an individual has created a regime of private tyranny, it is morally justifiable for a subject to kill the tyrant if there is no other reasonable way for him or her to escape from the tyranny. When determining what is reasonable, the risks to the subject of choosing an alternative to killing the tyrant, and the availability and efficacy of the community’s own efforts to end such tyrannies, should be taken into account.
- 80 The main advantage of this defence is that it addresses the degree of violent control the batterer had over the defendant and also the dangers that the defendant would have run, at the hands of the batterer, if he or she had attempted to escape the batterer’s control. Self-defence may be inadequate to address these issues. The creation of a separate defence designed to assess these factors objectively allows self-defence to be confined to circumstances of imminent danger.
- 81 The disadvantage of the defence is that it does not set out with precision what level of tyranny and danger is required to justify killing the tyrant.

CONCLUSION

- 82 A specific defence for victims of continuing domestic violence would take into account the circumstances of battered defendants without unacceptably broadening the existing defences. But, as Fiona Manning notes,¹⁰¹ such a defence raises a number of issues:
- should it be a partial or complete defence?
 - should it be available only to women or should it be gender neutral?
 - should it apply only to heterosexual relationships?
 - should it be available only for homicides or also for assaults?
 - should it be based on physical or psychological aspects of self-preservation?
 - would the mental state of the defendant be relevant or is the preceding history of domestic violence the crucial and determinative factor?

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?

¹⁰¹ Fiona Manning *Self-defence and Provocation: Implications for Battered Women who Kill and for Homosexual Victims* (New South Wales Parliamentary Library, 1996) 23.

6 Provocation

- 83 **P**ROVOCATION WAS DEvised BY THE COMMON LAW as a partial defence to a capital crime. It has been retained to reduce from murder to manslaughter the verdict upon a killer who is not justified in his or her action, but who is arguably less blameworthy because he or she acted under provocation. The modern form of the defence seeks a compromise between competing policies: that every citizen should be required to maintain a reasonable level of self-control (entailing an objective test), and the need to make allowance for those whose characteristics make them more susceptible to provocation than others (entailing a subjective test).
- 84 The subjective element of the common law defence requires actual loss of self-control due to the provocation. As the defence developed, case law established that the defendant must have acted in the heat of passion in response to sudden provocation.¹⁰² The objective element requires that the provocation must have been sufficient to cause the reasonable man to have lost self-control. The response to the provocation also had to be proportionate.¹⁰³ The objective element in provocation came to be interpreted in an increasingly strict manner, a trend culminating in *Bedder v Director of Public Prosecutions*.¹⁰⁴ In *Bedder*, the House of Lords held that the peculiar characteristics of the accused could not be taken into account when assessing the response of the reasonable man to the provocation.
- 85 A statutory defence of provocation was first enacted in New Zealand in section 165 of the Criminal Code Act 1893 (subsequently re-enacted as section 184 of the Crimes Act 1908). This codified the common law and specifically required that the defendant act “in the heat of passion caused by sudden provocation”. However, dissatisfaction with the decision in *Bedder* led the New Zealand legislature to enact a substantially more liberal form of the defence in section 169 of the Crimes Act 1961.¹⁰⁵

SECTION 169

- 86 Section 169 of the Crimes Act 1961 provides:
- (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

¹⁰² *R v Duffy* [1949] 1 All ER 932n (CCA). This was a case in which a woman killed an abusive husband who had assaulted her and prevented her from leaving him. After he went to sleep she killed him with a hatchet and a hammer.

¹⁰³ *Mancini v Director of Public Prosecutions* [1942] AC 1, 9 (HL).

¹⁰⁴ *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119 (HL).

¹⁰⁵ (3 October 1961) 328 NZPD 2681.

- (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.

87 Section 169 only required that the defendant act “under provocation”, not “in the heat of passion caused by sudden provocation”: the previous legislative test. Section 169 also reformed the objective test by incorporating into it a subjective element: the provocation must have been sufficient to have caused a person having the power of self-control of an ordinary person but otherwise having the characteristics of the offender, to lose control. This became known as the “hybrid person test”.

THE HYBRID PERSON TEST

- 88 The hybrid person test was intended to temper the harshness of the purely objective test applied by the common law, while still retaining a standard of self-control. However, a mixed subjective/objective test has proved difficult to apply. 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.¹⁰⁶ This interpretation meant that the Court had to place limitations on the type of characteristics that may be relevant if the test was not to become completely subjective.
- 89 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 also have a sufficient degree of permanence.¹⁰⁷ Physical qualities, mental qualities and more indeterminate attributes such as colour, race and creed could all be characteristics.¹⁰⁸ With regard to mental characteristics, it was not sufficient to be merely mentally deficient

¹⁰⁶ *R v McGregor* [1962] NZLR 1069, 1081 (CA).

¹⁰⁷ *R v McGregor*, above n 106, 1081.

¹⁰⁸ *R v McGregor*, above n 106, 1081.

or weak-minded.¹⁰⁹ 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.¹¹⁰

- 90 This interpretation caused difficulties and in subsequent cases¹¹¹ was not always followed. Finally, in *R v McCarthy*,¹¹² the Court of Appeal abandoned the position it had taken in *McGregor*. The question to be asked in a case of provocation was “whether a person with the ordinary power of self control would in the circumstances have retained self control, notwithstanding such characteristics”.¹¹³ The suggestion that the provocation must be directed at the characteristic was disapproved. In *R v Campbell* the Court of Appeal said, by way of clarification, 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.¹¹⁴
- 91 However, it is not clear that the Court of Appeal has found an answer to the difficulties of the hybrid person test. With regard to mental characteristics, it may often be difficult to separate the effect of the characteristic on the gravity of the provocation from its effect on the power of self-control. Orchard points out that there are decisions, including *McCarthy* itself, that are difficult to reconcile with the Court of Appeals’ statement that mental abnormality is relevant only to an evaluation of the provocative effect of the conduct.¹¹⁵

PROVOCATION AND BATTERED DEFENDANTS

Actual loss of self-control

- 92 Section 169 only required that the defendant act “under provocation”, not “in the heat of passion caused by sudden provocation”. Nevertheless, the requirement of actual loss of self-control means that much of the old law is still relevant. A sudden and temporary loss of self-control remains essential to exclude premeditated acts.¹¹⁶ This effectively confines the defence to acts done in the heat of passion.

¹⁰⁹ *R v McGregor*, above n 106, 1082.

¹¹⁰ *R v McGregor*, above n 106, 1082.

¹¹¹ See the cases and criticism cited by the Court of Appeal in *R v McCarthy* [1992] 2 NZLR 550, 557 (CA).

¹¹² *R v McCarthy*, above n 111.

¹¹³ *R v McCarthy*, above n 111, 558.

¹¹⁴ *R v Campbell* [1997] 1 NZLR 16, 25 (CA). On the other hand, the English Court of Appeal has held that the mental characteristics of the defendant are relevant to both the gravity of the provocation and the hypothetical reasonable person’s loss of self-control see *R v Smith (Morgan)* [1999] QB 1079 (CA).

¹¹⁵ Gerald Orchard *Culpable Homicide*, in AP Simester and Warren J Brookbanks, *Principles of Criminal Law* (Brookers, Wellington, 1998) 471, n 234. See also *Unrestrained Killings and the Law*, above n 6, 56–63 for a discussion of the problems caused by a mixed objective/subjective “ordinary person”.

¹¹⁶ *Adams*, above n 47, para CA169.06B (updated 5 February 2000).

- 93 Thus, immediacy of response, although not a rule of law, remains relevant to the determination of whether there was actual loss of self-control.¹¹⁷ Although courts have accepted that a defendant might react to provocation with a “slow burn”,¹¹⁸ that a comparatively minor incident after cumulative provocation may be the “final straw” which causes loss of self-control,¹¹⁹ and that earlier provocation may be revived some days later,¹²⁰ the longer the delay between provocation and retaliation, the easier it will be to negate the defence.
- 94 Anger is the emotion most commonly associated with sudden loss of self-control. However, women who kill their violent partners tend to do so because of fear and despair, rather than anger.¹²¹ Although fear and despair may also affect self-control, they are less likely to lead to a sudden explosive reaction immediately following the provocation. Many battered defendants who kill their abusers behave in an outwardly calm and deliberate manner.¹²² More importantly, research¹²³ and case law¹²⁴ indicate that victims of domestic violence often do not react to the abuse with immediate retaliation. If there is a disparity in physical strength, it is often unsafe to meet force with force.

¹¹⁷ *R v McGregor*, above n 106, 1078–1079.

¹¹⁸ *R v Ahluwalia* [1992] 4 All ER 889 (CA).

¹¹⁹ 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* (1998) 159 ALR 170, 185 (HC), the Australian High Court accepted the “last straw” argument with regard to cumulative provocation. The English Court of Appeal has recently held 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, 1030 (CA). In *Luc Thiet Thuan v R* [1997] AC 131, 147 (PC: Hong Kong), a case that 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 that 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.

¹²⁰ *R v Taaka* [1982] 2 NZLR 198, 201–202 (CA).

¹²¹ *Provocation and Responsibility*, above n 6, 190–191. Horder did not conduct a research study but based this claim on his extensive reading of the cases.

¹²² *Provocation and Responsibility*, above n 6, 190–191.

¹²³ 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; Tarrant, above n 50, 588–589, 593.

¹²⁴ 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 Women Who Kill” (1990) 140 *NLJ* 1380.

“Battered Woman Syndrome” as a characteristic

- 95 The courts in several jurisdictions have sought to respond to the plight of battered defendants by treating “BWS” as a characteristic.¹²⁵ The New Zealand Court of Appeal has held that “the heightened awareness of or sensitivity to threats or threatening behaviour that is a feature of the syndrome may be a relevant characteristic in the light of which the accused’s response is to be judged”.¹²⁶ That is, a battered woman may perceive an incident as being more serious than would a person who had not been subjected to domestic violence. Consequently, when determining whether the provocation was sufficient to deprive an ordinary person of the power of self-control, the fact-finder must take account of the battered woman’s sensitivity to threats.
- 96 The English Court of Appeal has held that BWS may constitute a significant characteristic relevant to the issue of whether the hypothetical reasonable woman possessing the appellant’s characteristics would have reacted to the provocative conduct in the way the appellant did.¹²⁷ The High Court of Australia has stated that a battered woman’s heightened awareness of danger and the history of an abusive relationship may be relevant to the gravity of the provocation.¹²⁸
- 97 Despite these developments, provocation remains a difficult defence for battered women because they are seldom in a position to respond to provocation with spontaneous violence, which is the strongest evidence of sudden loss of self-control.

PROVOCATION OPERATES TO EXCUSE PERPETRATORS OF DOMESTIC VIOLENCE

- 98 The defence of provocation 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,¹²⁹ or were found in a compromising situation with another man,¹³⁰ or had taunted the husband with sexual or other inadequacies.¹³¹ The current law on provocation can be said to protect the perpetrator of domestic violence more effectively than the victim. As Horder noted:¹³²

One must now ask whether the doctrine of provocation, under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women’s* natural aggressors. Unfortunately, the answer to that question is yes.

¹²⁵ Although we consider “expert evidence on domestic violence” to be a more correct description (see paras 25–27), we have used the term “BWS” where that term is used by a court or commentator.

¹²⁶ *R v Oakes*, above n 55, 676.

¹²⁷ *R v Thornton* (No 2), above n 119, 1182–1183.

¹²⁸ *R v Osland* (1998), above n 119, 185.

¹²⁹ *R v Tepu*, above n 61.

¹³⁰ See the cases referred to in Elisabeth McDonald “Provocation, Sexuality and the Actions of ‘Thoroughly Decent Men’” (1993) 9 *Women’s Studies Journal* 126 [“Provocation, Sexuality and the Actions of ‘Thoroughly Decent Men’”].

¹³¹ Minnitt *The Evening Post*, Wellington, New Zealand, 5 August 1980, 34.

¹³² *Provocation and Responsibility*, above n 6, 192.

SHOULD PROVOCATION BE RELEVANT ONLY TO SENTENCING?

- 99 The general difficulties with the defence have led to several calls for its abolition, both in New Zealand and overseas.¹³³ In 1976 the Criminal Law Reform Committee recommended abolishing the mandatory life sentence for murder and, with it, the provocation defence.¹³⁴ Provocation was to be a matter for the judge to take into account when sentencing.
- 100 The Committee made this recommendation because:
- Provocation is not a defence to any other crime, such as wounding or assault, but is taken into account when sentencing. Thus, provocation as a defence to a charge of murder is an anomaly and, with the abolition of the death penalty, the original reason for its existence is largely gone.
 - Provocation is limited by its historical roots and cannot, without considerable straining, include many instances of homicide where public opinion today would call for a merciful sentence.¹³⁵
 - The standard of the person with the self-control of an ordinary person but the characteristics of the offender is a difficult concept for juries (and judges) to understand and apply.
 - If the mandatory life sentence for murder were abolished the need for a defence of provocation would no longer exist.
- 101 The Criminal Law Reform Committee's recommendations were embodied in the Crimes Bill 1989. The Crimes Consultative Committee, which reported on the Bill, supported the proposal that the mandatory life sentence for murder be replaced with a sentencing discretion, and (with one dissension) that the defence of provocation be abolished, with matters of provocation going solely to mitigate sentence.¹³⁶
- 102 The Crimes Consultative Committee agreed with the Criminal Law Reform Committee's assessment of the defence of provocation as "difficult" and "technical". It considered that it was difficult to justify the special place of provocation in murder trials if the mandatory life sentence for murder was removed. Those who kill under provocation nonetheless have an intention to kill. There was no particular reason why provoked killers should be convicted of a lesser offence than other groups of killers to whom mitigating

¹³³ *Model Criminal Code*, above n 85, 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).

¹³⁴ New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (Wellington, 1976). The members of the committee were Mr RC Savage QC (Chairman), Associate Professor BJ Brown, Professor ID Campbell, Mr WV Gazley, Inspector R McLennan, Mr PGS Penlington, Mr KL Sandford, Mr PB Temm QC, Mr DAS Ward, Ms PM Webb, Mr JC Pike (Secretary).

¹³⁵ For example, the defendant in *R v Albury-Thomson* (31 July 1998) unreported, High Court, Palmerston North Registry, T37/97, who killed her autistic 17-year-old daughter, the defendant in *R v Novis* (5 February 1988), unreported, High Court, Hamilton Registry, T 42/87, who shot his terminally ill father, and the defendant in *R v Stead* (1991) 7 CRNZ 291 (CA) who killed his mentally ill mother.

¹³⁶ Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991) 45–46.

factors may apply, but who nonetheless may be convicted of murder. The Crimes Consultative Committee also thought it possible that the removal of provocation as a jury issue may increase the number of guilty pleas where responsibility for a killing is not disputed. The change would also remove the possibility of “sympathy” verdicts where the proper verdict would be murder.

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?

PROVOCATION REVISITED: *R V RONGONU I*

- 103 Since the final draft for this paper was written, the Court of Appeal has once again addressed the application of the hybrid person test in section 169. In *R v Rongonui*,¹³⁷ the defendant and the victim were neighbours in a block of flats. On the morning of 24 June 1998 Rongonui stabbed the victim to death in a frenzied attack in which more than 150 wounds were inflicted, many to the face. The defence was based on lack of intent for murder and alternatively on the partial defence of provocation. On provocation, the trial judge gave the jury the *Campbell* direction (see paragraph 90 above). Rongonui was convicted of murder. Although the Court of Appeal were unanimous in allowing the appeal and ordering a new trial, it split three to two on the question whether the jury direction on provocation based on *Campbell* was wrong.
- 104 The majority¹³⁸ held that the *Campbell* direction was correct, that is, 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*.¹³⁹
- 105 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:¹⁴⁰

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

¹³⁷ *R v Rongonui*, (13 April 2000) unreported, Court of Appeal, CA 124/99.

¹³⁸ Richardson P, Blanchard and Tipping JJ.

¹³⁹ *R v Rongonui*, above n 137, 87.

¹⁴⁰ *R v Rongonui*, above n 137, 47.

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.

- 106 This interpretation was based on two main factors. First, it was unfair to impose a standard that the accused could not possibly attain in the circumstances of the provocation given, due to his or her particular characteristics. Second, it is 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 confuse and mystify. Indeed, the majority judges acknowledged that a literal interpretation of section 169(2)(a) led to a very complex and difficult test, and thought the law in need of reform.
- 107 The interpretation proposed by the Chief Justice in *Rongonui* would simplify the “ordinary person” test by essentially dispensing with it where the defendant has a characteristic that affects his or her power of self-control. The case did not raise, and therefore did not address, the other criticisms of the defence made by the Criminal Law Reform Committee and the Crimes Consultative Committee, discussed in paragraphs 99–102. Nor did it address what this paper has identified as the major impediment for battered defendants in accessing the defence: the requirement of actual loss of self-control of which the strongest evidence is immediate retaliation.
- 108 The judgments of the Court of Appeal in *Rongonui* do not change our analysis of the issues.
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Diminished responsibility

- 109 **D**IMINISHED RESPONSIBILITY IS A PARTIAL DEFENCE. 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. Diminished responsibility is not a defence in New Zealand. It is a statutory defence in England,¹⁴¹ New South Wales,¹⁴² Australian Capital Territory,¹⁴³ Queensland,¹⁴⁴ Northern Territory,¹⁴⁵ Singapore,¹⁴⁶ the Bahamas,¹⁴⁷ Barbados,¹⁴⁸ Hong Kong¹⁴⁹ and in 14 states in the United States of America.¹⁵⁰
- 110 We discuss diminished responsibility because battered defendants have relied on it overseas¹⁵¹ and, on at least one occasion, a New Zealand court has said that the defence may well have been available to a battered defendant if it had existed in New Zealand.¹⁵² Commentators have called for its introduction in New Zealand to ameliorate what is seen as the inability of the current criminal law to accommodate battered women.¹⁵³
- 111 The defence has its origins in Scottish common law. The first reported case occurred in 1867 and concerned a defendant who suffered from epilepsy, was a heavy drinker and had attacks of the delirium tremens.¹⁵⁴ The defendant

¹⁴¹ Homicide Act 1957 (UK), s 2.

¹⁴² Crimes Act 1990 (NSW), s 23A.

¹⁴³ Crimes Act 1990 (ACT), s 14.

¹⁴⁴ Criminal Code 1961 (QLD), s 304A.

¹⁴⁵ Criminal Code (NT), s 37.

¹⁴⁶ Exception 7 to s 300 of the Penal Code (Singapore). A conviction for murder carries a mandatory death penalty in Singapore.

¹⁴⁷ Bahama Islands (Special Defences) Act 1959, s 2.

¹⁴⁸ Offences Against the Person Amendment Act 1973 (Barbados), s 3.

¹⁴⁹ Homicide Ordinance (Cap 339) (Hong Kong Special Administrative Region of the PRC), s 3.

¹⁵⁰ Susan Hayes "Diminished Responsibility: The Expert Witness' Viewpoint" in Yeo (ed) *Partial Excuses to Murder* (Federation Press, Sydney, 1990) 145, 146.

¹⁵¹ *R v Hobson* [1997] Crim LR 759 (CA).

¹⁵² *R v Gordon* (1993) 10 CRNZ 430, 441 (CA), per Hardie Boys J.

¹⁵³ Judith Ablett Kerr "A Licence to Kill or an Overdue Reform?: The Case of Diminished Responsibility" (1997) 9 Otago LR 1 ["A Licence to Kill or an Overdue Reform?"].

¹⁵⁴ *HM Advocate v Dingwall* (1867) 5 Irvine 466.

was on trial for the murder of his wife. Lord Deas held that a weakened state of mind might well be an extenuating circumstance reducing murder to culpable homicide (manslaughter).

112 Diminished responsibility was adopted into English statute law by the enactment of section 2 of the Homicide Act 1957. The initial impetus for the defence arose out of pressure for the abolition of capital punishment. A finding of manslaughter, rather than murder, would allow the judge to avoid giving the mandatory death sentence in cases where the jury considered that mental responsibility was reduced. The English defence (which has been adopted by several Australian jurisdictions) provides as follows:

- (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.¹⁵⁵

113 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:¹⁵⁶

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 an act is right or wrong, but also the ability to exercise will power to control physical acts, in accordance with that rational judgment.

114 This is a broad definition. It has been held to include psychosis, organic brain disorder, schizophrenia, psychopathy, epilepsy, hypoglycaemia, endogenous and reactive depression, post-traumatic stress syndrome, chronic anxiety and personality disorders.¹⁵⁷ In her review of the operation of section 2 of the Homicide Act 1957 (UK), Susanne Dell found that the great majority of diminished responsibility offenders were diagnosed with psychosis, personality disorders or depression.¹⁵⁸ She found that the last two categories covered a very wide range of conditions, including cases where the defendant would hardly have attracted the diagnosis had it not been for the existence of the defence.¹⁵⁹ Dell noted that doctors had difficulty in trying to assess where abnormality of personality began.¹⁶⁰ They also found it difficult to determine where stress ended and milder forms of mental illness began.¹⁶¹ Later commentators have criticised “abnormality of mind” as

¹⁵⁵ 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.

¹⁵⁶ *R v Byrne* [1960] 2 QB 396, 403 (CCA).

¹⁵⁷ New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide: DP 31* (Sydney, 1993) para 4.11 [NSWLRC DP 31].

¹⁵⁸ Susanne Dell *Murder into Manslaughter* (Oxford University Press, Oxford, 1984) 33.

¹⁵⁹ Dell, above n 158, 33.

¹⁶⁰ Dell, above n 158, 35.

¹⁶¹ Dell, above n 158, 35.

lacking coherent limits¹⁶² and as an ambiguous and not particularly meaningful term.¹⁶³

- 115 The English diminished responsibility defence is available only where the abnormality of mind arises from arrested or retarded development, inherent causes, disease or injury. This factor must be established by expert evidence.¹⁶⁴ These four causes or aetiologies have no defined or agreed psychiatric meaning,¹⁶⁵ and can lead to a great amount of disagreement among expert witness.¹⁶⁶
- 116 The third requirement of the defence, substantial impairment of mental responsibility, is not a clinical question but a legal or moral one.¹⁶⁷ Nevertheless, medical experts routinely give opinions on the question.¹⁶⁸ Mental responsibility has been criticised as a nebulous concept with no clear definition emerging from the cases.¹⁶⁹

CAN THE DEFENCE BE REFORMED?

- 117 The difficulties with the diminished responsibility defence have led to various proposals for its reform. In England, the Butler Committee recommended that the defence should be replaced with a sentencing discretion for murder.¹⁷⁰ However, in the event of the mandatory sentence being retained, it recommended that the defence be reformed.¹⁷¹ The Committee recommended replacing the requirement for abnormality of mind caused by one of the four specified causes, with a requirement that the defendant was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1959 (UK): that is, “mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication”. The Committee also recommended replacing the requirement that mental responsibility be substantially impaired with a requirement that “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”.¹⁷²
- 118 The Criminal Law Revision Committee was in broad agreement with the Butler report but preferred a formula requiring that “the mental disorder was such as to be a substantial enough reason to reduce the offence to

¹⁶² Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility: R 34* (Melbourne, 1990) para 142.

¹⁶³ New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility: R 82* (Sydney, 1997) paras 3.34–3.35, 3.49 [NSWLRC R 82].

¹⁶⁴ *R v Byrne*, above n 156, 403.

¹⁶⁵ Dell, above n 158, 39.

¹⁶⁶ NSWLRC R 82, above n 163, para 3.39.

¹⁶⁷ Dell, above n 158, 29.

¹⁶⁸ Dell, above n 158, 29.

¹⁶⁹ *Model Criminal Code*, above n 85, 121.

¹⁷⁰ Butler Committee *Report of the Committee on Mentally Abnormal Offenders* (HMSO, London, 1975) Cmnd 6244, para 19.14.

¹⁷¹ Butler Committee, above n 170, para 19.17.

¹⁷² Butler Committee, above n 170, para 19.17.

manslaughter”.¹⁷³ The English Law Commission’s Draft Criminal Code substantially adopted the Criminal Law Revision Committee’s recommendation, although “mental abnormality” was preferred to “mental disorder”.¹⁷⁴

119 The New South Wales Law Reform Commission has also recommended that the defence be reformed. New South Wales has a sentencing discretion for murder. Nevertheless, the New South Wales Law Reform Commission thought that the defence was sufficiently useful to retain. The principal reason for this was that the partial defences allowed community involvement in deciding culpability.¹⁷⁵

120 The New South Wales Law Reform Commission proposed the following defence:¹⁷⁶

- (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.

121 The term “abnormality of mental functioning arising from an underlying condition” was intended to overcome some of the confusion amongst experts as to what exactly is intended by the word “mind” in the term “abnormality of mind”.¹⁷⁷ It was also intended to require experts to consider the way in which an accused’s mental processes were affected by reason of some underlying or pre-existing condition,¹⁷⁸ although there is no requirement that a particular cause be established. The exclusion of transitory conditions was directed at temporary states of heightened emotion, such as “road rage”. It was not intended to exclude mental or physiological conditions such as depression, which may not be permanent.¹⁷⁹ It simply requires that the condition be more than of an ephemeral or transitory nature.

¹⁷³ Criminal Law Revision Committee, above n 81, para 93.

¹⁷⁴ Law Commission (England and Wales), above n 82, s 56(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.

¹⁷⁵ NSWLRC *R 82*, above n 163, para 3.11.

¹⁷⁶ NSWLRC *R 82*, above n 163, viii.

¹⁷⁷ NSWLRC *R 82*, above n 163, para 3.50.

¹⁷⁸ NSWLRC *R 82*, above n 163, para 3.50.

¹⁷⁹ NSWLRC *R 82*, above n 163, para 3.51.

- 122 The reference to the impairment of the defendant's capacity to understand events, judge the rightness of his or her actions or exercise self-control, sets out in statutory form Lord Parker's definition of "abnormality of mind" in *R v Byrne*.¹⁸⁰ The New South Wales Law Reform Commission acknowledged that the inclusion of "capacity to control" was controversial because it is often difficult for experts to state with any certainty whether a person was incapable of controlling their actions, or whether that person simply chose not to do so.¹⁸¹ The possible application of the defence to people suffering from psychopathy or anti-social personality disorders was also noted.¹⁸² However, the New South Wales Law Reform Commission did not consider it could omit this component because omission might exclude defendants who were brain damaged, hypomanic or suffering from auditory hallucinations.¹⁸³
- 123 The defence also requires the fact-finder to determine that the impairment is substantial enough to warrant reducing murder to manslaughter. Like the Butler Committee's reformulation, this is intended to make it clear that this is a moral determination to be made by the jury and not the expert witness.
- 124 The New South Wales Law Reform Commission's recommendation has been enacted as section 23A of the Crimes Act 1990 (NSW) with one change: the term "abnormality of mind" has been substituted for "abnormality of mental functioning".

THE SITUATION IN NEW ZEALAND

- 125 New Zealand currently has no defence of diminished responsibility.¹⁸⁴ There was a proposal to introduce the defence into New Zealand in the Crimes Bill 1960. Clause 180 of the Bill provided that murder should be reduced to manslaughter where the jury were "satisfied that at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible". Where diminished responsibility was successfully argued, the sentence was to be detention during Her Majesty's Pleasure.¹⁸⁵ However, the clause was dropped from the Crimes Act 1961 because the abolition of the death penalty was deemed to render the defence unnecessary.¹⁸⁶
- 126 The Crimes Consultative Committee also discussed the defence in its report on the Crimes Bill 1989.¹⁸⁷ It noted that the operation of the defence in England had attracted criticism. It considered that, as with provocation, matters relating to diminished responsibility could be adequately dealt with as mitigating factors in sentencing. It stated that in general:¹⁸⁸

¹⁸⁰ *R v Byrne*, above n 156.

¹⁸¹ NSWLRC *R 82*, above n 163, para 3.54.

¹⁸² NSWLRC *R 82*, above n 163, para 3.54.

¹⁸³ NSWLRC *R 82*, above n 163, para 3.54.

¹⁸⁴ Although, to some extent, provocation has taken on the role of a diminished responsibility defence; *R v McCarthy*, above n 111, 558.

¹⁸⁵ Crimes Bill 1960, clause 187(2).

¹⁸⁶ (3 October 1961) 328 NZPD 2680.

¹⁸⁷ Crimes Consultative Committee, above n 136, 48–49.

¹⁸⁸ Crimes Consultative Committee, above n 136, 49.

... a range of matters can, in justice, amount to mitigating circumstances on a charge of homicide. It is not useful to single out particular types of circumstances and elevate them into special defences. In the case of the diminished responsibility defence, the difficulties involved in special treatment are exacerbated by complexities in achieving sufficiently precise wording for the statutory defence.

SHOULD NEW ZEALAND ADOPT A PARTIAL DEFENCE OF DIMINISHED RESPONSIBILITY?

Arguments in favour

- 127 Under existing law, a mentally disordered defendant who intentionally commits homicide must come within the insanity defence or be found guilty of murder and sentenced to life imprisonment (if the other defences are not applicable). Section 23 of the Crimes Act 1961 sets a very high threshold for the insanity defence. Diminished responsibility would recognise a reduced culpability for a range of mental disorders that do not amount to insanity.¹⁸⁹
- 128 Even if a sentencing discretion for murder were to be introduced, the defence might still be useful. Like the defence of provocation, it allows the less culpable killer to avoid the label of “murderer”.
- 129 Psychiatric evidence about the defendant can be subjected to examination and cross-examination in the course of the trial. This allows the issue to be more thoroughly examined than if the psychiatric evidence is presented in a report to the sentencing judge.¹⁹⁰
- 130 It has been common practice in England since 1960 for trial judges to accept manslaughter pleas where medical evidence of abnormality of mind is uncontested¹⁹¹ and 80–90 per cent of diminished responsibility cases are disposed of in that way.¹⁹² This suggests the availability of diminished responsibility as a defence can save time and money, assuming the charge would otherwise have been defended.
- 131 Where the defence is contested, the community is involved, by way of the jury, in making decisions on culpability and this enhances community acceptance of a reduced sentence for intentional killings.¹⁹³ On the other

¹⁸⁹ Arguably, if New Zealand were to introduce a diminished responsibility defence, there would be no need for the infanticide provision found in s 178 of the Crimes Act 1961. However, the Crimes Consultative Committee did not favour abolition of s 178, even if a diminished responsibility defence was to be introduced. This was because abolition would significantly increase the maximum penalty for this class of offender. Since infanticide is an offence as well as (effectively) a partial defence, it would also remove a choice that is now available to the prosecution.

¹⁹⁰ The Canadian Law Reform Commission thought that this point could be met by procedural reforms.

¹⁹¹ The practice was approved by the Court of Appeal in *R v Cox* (1968) 52 Cr Ap R 130 (CA).

¹⁹² RD MacKay *Mental Condition Defences in the Criminal Law* (Clarendon Press, Oxford, 1995) 181.

¹⁹³ NSWLRC R 82, above n 163, para 3.11. However, note Dell’s finding that in 80 per cent of cases a plea of guilty to diminished responsibility manslaughter is accepted by the trial judge. Therefore, there would only be a jury trial in 20 per cent of cases. A significant number of New South Wales cases are also decided on a guilty plea or are tried by a judge alone: G Griffith and H Figgis *Crimes Amendment (Diminished Responsibility) Bill 1997: Commentary and Background* (New South Wales Parliamentary Library Research Service, 1997) 10 in Fran Wright “Does New Zealand Need a Diminished Responsibility Defence?” (1998) 2 Yearbook New Zealand Jurisprudence 109, 114 [“Does New Zealand Need A Diminished Responsibility Defence?”].

hand, it may be a criticism of this approach that standards are fixed, not by the law, but by an ad hoc selection of citizens that compose that jury.

Arguments against

- 132 The English version of diminished responsibility has been the subject of strong and continuing criticism.¹⁹⁴ The elements of the defence are vague and have no clear psychiatric meaning. Psychiatrists interpret the requirements of the defence differently, leading to inconsistency and unpredictability.¹⁹⁵ “Abnormality of mind” has been given a very broad definition and, controversially, includes personality disorders and cases of sexual psychopathology. The defence has been criticised as amounting to trial by expert rather than by jury.¹⁹⁶ Some commentators see problems in distinguishing diminished responsibility from insanity.¹⁹⁷ The reformed New South Wales defence answers some, but not all, of these criticisms.
- 133 The defence may serve to partially excuse domestic killings arising from jealousy and possessiveness. Dell found that 38 per cent of diminished responsibility pleas in England were wife killings arising, in the majority of cases where the offender was not psychotic, from “amorous jealousy or possessiveness”.¹⁹⁸
- 134 A conflict may arise between the desire to acknowledge reduced culpability and the need to preserve the public from danger in the case of defendants whose abnormality of mind is such that they pose a danger to the public.¹⁹⁹

DIMINISHED RESPONSIBILITY AND BATTERED DEFENDANTS

- 135 It has been argued that there is a danger that stereotypes about women could lead to the overuse of this defence at the expense of a more appropriate use of either self-defence or provocation.²⁰⁰ Commentators have also criticised the way in which the defence concentrates on the apparent infirmity of mind of the battered defendant rather than the violent behaviour of the abusive partner.²⁰¹
- 136 The forensic psychiatrists we consulted expressed the view that, while domestic violence may lead to a range of psychological responses in the

¹⁹⁴ “Does New Zealand Need a Diminished Responsibility Defence?”, above n 193, 120.

¹⁹⁵ E Griev “The Future of Diminished Responsibility” [1988] Crim LR 75, 78.

¹⁹⁶ “Does New Zealand Need a Diminished Responsibility Defence?”, above n 193, 121.

¹⁹⁷ Model Criminal Code, above n 85, 123.

¹⁹⁸ Dell, above n 158, 11. No motive was recorded for psychotic offenders because of the difficulties of attributing motives to the psychotic.

¹⁹⁹ See, for example, the *Veen* cases in Australia: *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 465.

²⁰⁰ “Does New Zealand Need a Diminished Responsibility Defence?”, above n 193, 123–126; Susan Edwards “Battered Woman Syndrome” (1992) 142 NLJ 1350; Donald Nicolson and Rohit Sanghvi “Battered Women and Provocation: The Implications of *R v Ahluwalia*” (1993) Crim LR 728.

²⁰¹ “Does New Zealand Need a Diminished Responsibility Defence?”, above n 193, 123–126; Zoe Rathus *Rougher than Usual Handling: Women and the Criminal Justice System* (Women’s Legal Service, Brisbane, 1995) 102.

victim, it does not commonly cause the victim to develop abnormality of mind to the degree required by the defence of diminished responsibility.²⁰² We know of no research as to whether the victims of domestic violence who kill are more likely to have developed abnormality of the mind.

- 137 Nevertheless, the adoption of the defence has been recommended as a way of recognising the lesser culpability of some battered women of infirm mind who kill.²⁰³ It is possible that some of the battered defendants who have been found guilty of murder would have succeeded in pleading diminished responsibility if the defence had been available in New Zealand. For example, in *R v Gordon*, a case concerning a defendant who had suffered years of violence at the hands of the deceased, Hardie Boys J said:²⁰⁴ “[w]ere the defence of diminished responsibility available in this country, it may well have been availed of here”. The defendant was suffering from a significant depressive illness at the time her husband was killed and had been diagnosed as suffering from BWS. In England, a diagnosis of BWS has sufficed to establish abnormality of mind for the purpose of diminished responsibility.²⁰⁵

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

Question 8: If the answer to question 8 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 1959²⁰⁶ 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.

²⁰² However, note that 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: “A Licence to Kill or an Overdue Reform?”, above n 153, 9.

²⁰³ “A Licence to Kill or an Overdue Reform?”, above n 153.

²⁰⁴ *R v Gordon*, above n 152, 441.

²⁰⁵ *R v Hobson*, above n 151.

²⁰⁶ Defined as a mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

- (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 1959 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?

(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?
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8

Sentencing for murder

SENTENCING DISCRETION FOR MURDER

138 **N**EW ZEALAND JUDGES CURRENTLY HAVE NO DISCRETION in sentencing a defendant who has pleaded or been found guilty of murder. The penalty for murder is mandatory: a sentence of life imprisonment with a non-parole period of at least 10 years.²⁰⁷ Until 1961, the mandatory penalty for murder was death. The partial defence of provocation mitigated the harshness of the mandatory death sentence by reducing murder to manslaughter. Provocation and infanticide²⁰⁸ now play this role with regard to the mandatory life sentence.

139 Several law reform bodies have recommended replacing the mandatory sentence for murder with a sentencing discretion.²⁰⁹ In New Zealand, the Criminal Law Reform Committee recommended abolishing both the mandatory life sentence for murder and the partial defences (with the exception of infanticide).²¹⁰ 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.²¹¹ It considered that the principal arguments in favour of a sentencing discretion for murder (and the abolition of partial defences) were:²¹²

²⁰⁷ This is subject to the proviso that a member of the Parole Board may bring a case before it and may direct that the offender be released before the expiration of this period under s 97(5) and s 97(9) of the Criminal Justice Act 1985.

²⁰⁸ Infanticide may operate to reduce a charge of murder or manslaughter to infanticide, as well as forming a stand alone charge.

²⁰⁹ Attorney-General's Department, above n 133, para 13.56; *Model Criminal Code*, above n 85, 65; Butler Committee, above n 170, 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 83, para 118. Several Australian state law reform bodies have also recommended discretionary sentencing for murder and four states have introduced it.

²¹⁰ New Zealand Criminal Law Reform Committee, above n 134, para 2.

²¹¹ Crimes Consultative Committee, above n 136.

²¹² Crimes Consultative Committee, above n 136, 44. Other law reform agencies have also recommended a sentencing discretion for murder and the abolition of all partial defences. For example, the *Model Criminal Code*, above n 85, recommended abolition of all partial defences and the introduction of discretionary sentencing; the Law Reform Commission of Canada proposed law of homicide contained no partial defences and had discretionary sentencing for first degree murder: Law Reform Commission of Canada *Homicide: WP33* (Ottawa, 1984) [*Homicide WP33*].

- it recognised the varying degrees of culpability that exist among those who commit homicide and who are outside the defence of provocation;
- a sentencing discretion may well encourage guilty pleas where the offender does not contest liability for the killing; this would reduce the length and expense of such trials;²¹³
- a sentencing discretion should reduce the temptation for a jury to bring in a lesser verdict when the appropriate verdict, on a proper consideration of the law, would be murder;
- the culpability attaching to murder is not so inherently different by comparison with other grave crimes of violence as to require a mandatory penalty. It is often a matter of chance whether a person faces a charge of attempted murder or serious wounding rather than murder.

140 On the other hand, those who support the mandatory life sentence for murder argue that it recognises the gravity of the crime.²¹⁴ It also is said to give better protection to the public because assessment of dangerousness is made by a parole board before release and there is a life-long power of recall.²¹⁵

141 Discretionary sentencing does not appear to result in substantially shorter time actually spent in prison as compared with mandatory life sentencing.²¹⁶

142 The introduction of a sentencing discretion for murder would not necessarily require the abolition of the partial defences, although it does remove the main reason for having them. Both the House of Lords Select Committee on Murder and Life Imprisonment²¹⁷ and the Criminal Law Revision Committee²¹⁸ recommended that diminished responsibility and provocation be retained whether or not the sentence for murder was to become discretionary.

²¹³ The Law Reform Commission of Victoria's *Prosecutions Study* suggests that the change in that jurisdiction in the penalty for murder from a mandatory to a discretionary penalty may have influenced some offenders to plead guilty. However, the number involved in the study was small: Law Reform Commission of Victoria *Homicide: R40* (Melbourne, 1991) para 286 [*Homicide R40*]. When the general discretion replaced the limited discretion in New South Wales, guilty pleas increased substantially: Judicial Commission of New South Wales *Sentenced Homicides in New South Wales 1990–1993* (Sydney, 1995) 87.

²¹⁴ Criminal Law Revision Committee, above n 81, para 44.

²¹⁵ Criminal Law Revision Committee, above n 81, paras 44, 51, 52.

²¹⁶ The Law Reform Commission of Victoria reviewed all cases of murder in that jurisdiction between June 1986 (when the mandatory penalty was removed) and February 1991. It found that of 92 people convicted of murder, nine received life sentences and 83 received fixed terms. Nevertheless, the average actual prison term served under the new system was longer than under the mandatory life system: 14.7 years (before even being eligible for release) compared with 13.7 years (before actually being released), *Homicide R40*, above n 213, para 218. In New South Wales, prior to the abolition of the death penalty in 1955, most death sentences were commuted to either life imprisonment or to a fixed term. Between 1940 and 1974, the 156 prisoners whose death sentence had been commuted in this way served an average of 13 years and seven months: Arie Freiberg and David Biles *The Meaning of Life: a Study of Life Sentences in Australia* (AIC, Canberra, 1975) 53–54. A study by the Judicial Commission of New South Wales found that of a study of 36 murderers convicted under the limited discretionary sentencing regime, 29 received the mandatory life sentence and seven, for whom mitigating circumstances were found, received a minimum sentence ranging from eight to 12 years, with full terms ranging from 10 to 16 years. Under the full discretionary regime, six of 93 offenders received sentences of “natural life” and the typical sentence for the remaining 87 was a minimum of 12 years and an additional term of six years: Judicial Commission of New South Wales, above n 213, 74–76.

²¹⁷ House of Lords Select Committee on Murder and Life Imprisonment, above n 83, para 83.

²¹⁸ Criminal Law Revision Committee, above n 81, para 76.

The four Australian states²¹⁹ that have introduced a sentencing discretion for murder have also retained various partial defences.²²⁰

143 The main argument in favour of retaining the partial defences is that they permit the community, as represented by the jury, to make judgments about an individual's level of culpability for intentional homicide. This is said to enhance the public's confidence in the criminal justice system and increase community acceptance of sentences imposed. Mitigating facts will be more thoroughly explored if they are elements of a partial defence than if they were relevant to sentencing only.²²¹ It is also argued that it is harsh to label the offender a murderer when there are mitigating circumstances.²²²

144 Arguments for abolishing partial defences are:

- that they are not necessary in the absence of a mandatory penalty for murder;²²³
- the defences themselves have been the subject of criticism (as discussed above);
- the labelling argument is overstated and the time and expense involved in running complicated defences simply to avoid the stigma of a murder conviction is unwarranted;²²⁴
- the current procedure for exploring provocation and other mitigating factors at sentencing is adequate.²²⁵

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

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?

²¹⁹ 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 1900 (ACT) ss 12(2), 442). The New South Wales 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.

²²⁰ All the state jurisdictions have a provocation defence; New South Wales and the Australian Capital Territory, have a diminished responsibility defence; New South Wales, Victoria, and Tasmania have an infanticide defence.

²²¹ NSWLRC DP 31, above n 157, para 2.34. The Law Reform Commission of Canada suggested that new rules of procedure and evidence could be implemented to meet this problem (Homicide WP33, above n 212, 74).

²²² NSWLRC DP 31, above n 157, para 2.17.

²²³ Crimes Consultative Committee, above n 136, 49.

²²⁴ NSWLRC DP 31, above n 157, para 2.18.

²²⁵ At sentencing, the offender may assert mitigating facts by way of submissions by counsel. If the defence alleges a mitigating fact that is not beyond the bounds of reasonable possibility, the burden of proof lies on the Crown. Either party may call evidence to support its version of the disputed fact. However, if there has been a trial the judge will usually be able to resolve any disputed fact by reference to evidence given at the trial.

EXISTING DISCRETION

- 145 Currently, judges can increase the non-parole period to more than the 10 year minimum when sentencing for murder. One way of giving judges a sentencing discretion without abolishing the mandatory life sentence would be to allow them to also set 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.

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?

DEGREES OF MURDER BILL

- 146 This Bill was introduced in 1996. It defines as murder in the first degree, culpable homicide that is intended and is committed in a particularly sadistic, heinous, malicious or inhuman manner. Murder in the second degree is defined in the same terms as the existing definitions of murder. Murder in the third degree is culpable homicide committed under provocation or the influence of alcohol or drugs. Manslaughter is defined as culpable homicide not amounting to murder in the first, second, or third degree.
- 147 The primary aim of this categorisation is to distinguish among different levels of culpability and to allow for “bands” of sentencing. First degree murder would attract a mandatory penalty of imprisonment for the rest of the offender’s natural life. Second degree murder would attract a mandatory penalty of life imprisonment and be subject to the existing parole provisions. Third degree murder would attract a maximum penalty of life imprisonment. Manslaughter would attract a maximum penalty of 10 years imprisonment.
- 148 The Bill would permit the jury, in a homicide case, to make recommendations about the length of sentence and the terms and conditions of an offender’s detention and parole. The judge would be required to have regard to the jury’s recommendations.
- 149 The Bill does not address any of the issues discussed above relating to battered defendants. In the main, it merely replicates current legal concepts of culpability. The Bill could, in fact, worsen the position of some battered defendants, as there are certain features of homicides committed by battered defendants, such as premeditation and the use of particular modes of killing, which may be interpreted as coming within the definition of first degree murder.
- 150 We mention this Bill for completeness, but do not favour its implementation for the reasons given in our 1996 submissions:
- ... the Bill in its current form would create new problems in an already complex area of the law. The proposed redefinition of murder and manslaughter complicates the law by introducing difficult distinctions. This complication, coupled with a wide power for juries to make statements related to sentencing, increases the danger of inconsistent and compromised verdicts. It also significantly changes the role of juries and makes their task more difficult. Significant problems in the existing law of homicide

are not addressed by the Bill, and in some cases are compounded. Reform of the law of homicide needs greater consideration than is achieved by the Bill.

The amendments²²⁶ to the Bill proposed in the interim report of the Justice and Law Reform Committee do not alleviate these concerns.²²⁷

Ministry of Justice sentencing project

- 151 The Ministry of Justice is currently undertaking a comprehensive review of all aspects of sentencing and there will be a Sentencing Reform Bill before the House of Representatives in 2001. We understand that penalties for murder will be addressed in the context of that review.
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²²⁶ These amendments remove the clauses relating to jury recommendations and statements, statements by the family of the victim and attendance at Parole Board proceedings by a victim's representative. They also offer three options for defining the different degrees of murder.

²²⁷ Justice and Law Reform Committee "Interim Report on the Degrees of Murder Bill" [1999] AJHR I8B.

9

Duress

- 152 **F**OR CENTURIES THE COMMON LAW HAS RECOGNISED a defence of duress by threats.²²⁸ This defence has been available where the defendant has committed an offence because he or she was threatened with death or serious bodily harm by another human being 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.²²⁹ 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. An example is a defendant who trespasses in order to escape from a rabid dog.
- 153 The defence of duress may be relevant to battered defendants who are compelled to commit a criminal offence either because of threats by the batterer or because of circumstances arising from the battering relationship.

RATIONALE OF THE DEFENCE

- 154 Duress²³⁰ has sometimes been treated as negating the mens rea of the offence.²³¹ However, it is now generally accepted that when a person commits an offence under duress all the elements of the offence are present but the presence of duress prevents the law from treating what the defendant did as a crime.²³² The defence of duress instead acts as an excuse on the grounds that the law should show compassion for human weakness in the face of pressure that overstrains human nature and that no one could withstand.²³³
- 155 Duress of circumstances is sometimes referred to as necessity and the terms are often used interchangeably. However, some commentators use the term necessity more broadly to indicate a situation in which a person is faced with two evils, one involving committing an offence and the other some

²²⁸ JC Smith and Brian Hogan *Criminal Law* (7th ed, Butterworths, London, 1992) 232.

²²⁹ Smith and Hogan, above n 228, 232.

²³⁰ Discussions of the rationale for duress by threats and duress by circumstances are treated as interchangeable.

²³¹ *R v Steane* [1947] KB 997 (CCA); *R v Bourne* (1952) 36 Cr App R 125 (CCA).

²³² *R v Howe* [1987] AC 417, 428 (HL) per Lord Hailsham.

²³³ Aristotle *The Nicomachean Ethics* (Rees Translation) 49, cited in *Perka v R* (1985) 14 CCC (3d) 385, 398 (SCC).

greater evil to that person or others.²³⁴ This concept of necessity encompasses and goes beyond duress of circumstances. We discuss this broader concept in paragraphs 204–205 but otherwise our discussion of the defence of necessity is limited to duress of circumstances and the term has that meaning in this paper.

PRINCIPLES OF DURESS

- 156 The common law defence of duress requires that the defendant act under extreme pressure: he or she must have been in fear of death or of serious bodily harm.²³⁵ The danger may have been to the defendant or (possibly) another person.²³⁶ The threat must be of immediate or imminent harm,²³⁷ or there must be no reasonable opportunity of getting effective police protection.²³⁸ The defendant must have reasonably believed in the existence of the threat, this belief must have amounted to good cause for the defendant's fear, and the defendant's response must be one which might have been expected of a sober person of reasonable firmness.²³⁹ The defendant's criminal behaviour must be a reaction to the duress.²⁴⁰ Those who voluntarily put themselves in the position of being subject to duress cannot avail themselves of the defence.²⁴¹ Duress is not a defence to murder or some forms of treason.²⁴²

ONE DEFENCE OR TWO?

- 157 As noted above, duress of circumstances and duress by threats seem to differ only as to the source of the peril. Lord Hailsham of Marylebone has pointed out that this distinction between them is:²⁴³

²³⁴ Smith and Hogan, above n 228, 245. An example of a defence based on such a concept of necessity is found in the American Model Penal Code s 3.02:

- (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged; and
 - (b) neither the Code nor other law defining the offence provides exceptions or defences dealing with the specific situation involved; and
 - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

²³⁵ Smith and Hogan, above n 228, 237–238.

²³⁶ Smith and Hogan, above n 228, 238.

²³⁷ Smith and Hogan, above n 228, 238.

²³⁸ *R v Hudson and Taylor* [1971] 2 QB 202 (CA).

²³⁹ *R v Howe*, above n 232.

²⁴⁰ *R v Martin* [1989] 1 All ER 652, 653 (CA).

²⁴¹ *R v Fitzpatrick* [1977] NI 20 (CCA); *R v Shepherd* (1988) 86 Cr App R 47 (CA); *R v Sharp* [1987] QB 853 (CA).

²⁴² *R v Hudson and Taylor*, above n 238, 206.

²⁴³ *R v Howe*, above n 232, 429.

without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other.

- 158 The similar nature of the defences has been noted by other commentators. For example, Lord Simon of Glaisdale observed in his dissenting judgment in *Director of Public Prosecutions v Lynch*:²⁴⁴

In the circumstances where either “necessity” or duress is relevant, there are both actus reus and mens rea. In both sets of circumstances there is power of choice between two alternatives; but one of those alternatives is so disagreeable that even serious infraction of the criminal law seems preferable. In both the consequence of the act is intended, within any permissible definition of intention. The only difference is that in duress the force constraining the choice is a human threat, whereas in “necessity” it can be any circumstance constituting a threat to life (or, perhaps, limb).

- 159 This suggests that there is no reason to bifurcate the defence of duress according to the source of the peril. However, legislative development in New Zealand has continued the separation of the two types of duress. Section 24 of the Crimes Act 1961 creates a defence of “compulsion” that replaces the common law defence of duress by threats. Because of the need to discuss the effect of section 24, we divide the rest of the discussion into a chapter on duress by threats (which we will refer to as compulsion) and a chapter on duress of circumstances (which we will refer to as necessity). Nevertheless, we consider that any reform of the law should be based on recognition of the essential similarity of the two species of duress.

²⁴⁴ *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 692 (HL).

10 Compulsion

160 **S**ECTION 24 OF THE CRIMES ACT 1961 provides:

- (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.
- (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.

161 Commentators have criticised the inflexibility of the statutory defence (while acknowledging the benefits of its certainty) when compared with the development of the defence at common law. Nevertheless, New Zealand courts have interpreted the section strictly and have resisted arguments that the section should follow the common law approach.²⁴⁵ In *R v Maurirere* the Court of Appeal commented that:²⁴⁶

... there are strong policy reasons for confining the defence of compulsion. Because the section protects a person who would otherwise be guilty of committing a criminal offence from responsibility for that offence, the defence is only to be available if a person has satisfied the strict requirements of the section.

²⁴⁵ *R v Witika* [1993] 2 NZLR 424 (CA).

²⁴⁶ *R v Maurirere* (2 March 2000) unreported, Court of Appeal, CA461/99, 5.

ELEMENTS OF THE DEFENCE

- 162 In *R v Teichelman*, the Court of Appeal explained the effect of section 24(1) as follows:²⁴⁷

First, there must be a threat to kill or cause grievous bodily harm. Second, it must be to kill or inflict that serious harm immediately following a refusal to commit the offence. Third, the person making the threat must be present during the commission of the offence. Fourth, the accused must commit the offence in the belief that otherwise the threat will be carried out immediately. It is that belief in the inevitability of immediate and violent retribution for failure on his part to comply with the threatening demand which provides the justification for exculpation from criminal responsibility. The subsection is directed essentially at what are colloquially called standover situations where the accused fears that instant death or grievous bodily harm will ensue if he does not do what he is told.

SECTION 24 AND BATTERED DEFENDANTS

- 163 In this part we examine the implications for victims of domestic violence who offend under coercion.

Particular kind of threat associated with a particular demand

- 164 Section 24 excuses offending under compulsion by threats in limited circumstances. The Court of Appeal has said that the threat “need not be in words . . . but it must be a particular kind of threat associated with a particular demand”.²⁴⁸ Victims of domestic violence may offend in response to general fearfulness of their abuser, rather than in response to “a particular kind of threat associated with a particular demand”. For example, in *Runjanjic and Kontinnen*,²⁴⁹ there appears to have been no specific articulated threat. Rather the two defendants did what they were told in fear of the consequences if they did not do so. The relationship between the two female defendants and their abuser was marked by habitual violence. He prevailed on both women to work as prostitutes. They were expected to attend to his every need and the price of disobedience was a severe beating. The availability of an excuse in such circumstances would seem consistent with the rationale of the defence, yet the facts would probably not satisfy the requirements of section 24, as interpreted by the Court of Appeal, because there was no specific threat associated with a particular demand to commit an offence.

Actual existence of a threat

- 165 Section 24 appears to require the actual existence of a threat, although there is no definitive case law on the point,²⁵⁰ but only an honest belief that

²⁴⁷ *R v Teichelman* [1981] 2 NZLR 64, 66–67 (CA).

²⁴⁸ *R v Raroa* [1987] 2 NZLR 486, 493 (CA). The requirement that the threat be associated with a particular demand was not necessary for deciding the case and so is only obiter dictum.

²⁴⁹ *Runjanjic and Kontinnen* (1991) 56 SASR 114 (SC). Although the appeal in this case concerned the admissibility of expert evidence related to “BWS”, the evidence was offered as relevant to the defence of duress.

²⁵⁰ Adams points out that, although the Court of Appeal appears to suggest in *Raroa* that a genuine and reasonable but mistaken belief in the existence of a threat will not suffice, this was unnecessary to decide the case: *Adams*, above n 47, CA24.05 (updated 30 May 1996).

the threat will be carried out. It has been argued that an honest belief in the existence of a threat should be sufficient as “the pressure on the accused is the same whether or not his belief is correct”.²⁵¹ On the other hand, to do away with the requirement of an actual threat would make the defence available on entirely subjective grounds. It may be preferable to follow the common law and require reasonable grounds for the belief.²⁵²

The identity of the victim of the threat

- 166 There is nothing in the wording of section 24 that would prevent a defendant relying on the defence where another person had been threatened (for example, the defendant’s child). Such an interpretation is consistent with the common law developments in overseas jurisdictions,²⁵³ but we have been unable to find any New Zealand case law on point. The issue may be important to victims of domestic violence who may act, or fail to act, in order to protect children or other family members. Legislative expression will clarify the issue.

The presence of the threatener when the offence is committed

- 167 In *R v Witika* the Court of Appeal upheld the trial judge’s decision not to allow compulsion to go to the jury on the basis that “the evidence did not disclose a credible case of excuse for the failure to secure medical care” by the defendant for her young daughter, who died after severe physical abuse.²⁵⁴ *Witika* alleged that she was too frightened to get help for her daughter because of the violence she had suffered at the hands of her male partner Smith. The trial judge had held that:²⁵⁵

[Section] 24 ceased to be available when there was a failure or omission at a time when Smith as the alleged maker of the threat was not present, presence at the time of the commission of the offence being an essential requirement . . . Assuming . . . that her failure to get medical help was capable of being excused under s 24 while Smith was present, she lost that ground of exemption from liability when he was no longer present and she had the opportunity to get help.

The Court of Appeal agreed with this reasoning, adding:²⁵⁶ “[w]hile those periods continued she failed in her duty. Her situation was no different from that of a person who has an opportunity to escape and avoid committing acts under threat of death or serious injury”.

- 168 More recently, in *R v Richards*,²⁵⁷ the Court of Appeal dismissed another appeal relating to the application of section 24 in the context of domestic abuse. The Court held:²⁵⁸

²⁵¹ Gerald Orchard “The Defence of Compulsion” (1980) 9 NZULR 105, 113 [“The Defence of Compulsion”].

²⁵² This would be consistent with the defence of necessity – see para 186.

²⁵³ *R v Hurley* [1967] VR 526, 543 (SC) per Smith J dissenting.

²⁵⁴ *R v Witika*, above n 245, 436.

²⁵⁵ *R v Witika*, above n 245, 435–436 (as cited by the Court of Appeal).

²⁵⁶ *R v Witika*, above n 245, 436.

²⁵⁷ *R v Richards* (15 October 1998) unreported, Court of Appeal, CA 272/98.

²⁵⁸ *R v Richards*, above n 257, 2.

The appellant incontestably was suffering from Battered Women's Syndrome.²⁵⁹ She sought to argue that this amounted to a compulsion situation within s 24. The difficulty was that her abusive partner was not present at the time of the offending on either occasion concerned. Counsel contended for a so-called "constructive presence" due to the Battered Women's Syndrome condition. The argument cannot succeed. We refer to the plain words of the statute which require actual presence and the established line of authority comprising in particular *R v Teichelman* . . . *R v Raroa* . . . *Kapi v Ministry of Transport* . . . *R v Witika* . . .

- 169 Yet in the earlier case of *R v Joyce*, while categorically affirming the requirement of actual presence, the Court of Appeal nevertheless seemed to have suggested there may be room for some flexibility:²⁶⁰

[T]here is no justification for concluding that the Legislature . . . intended to include as a good defence anything less than threats by a person actually present when the accused committed such acts as were alleged against him, for the very object of the section is to provide a defence to persons who commit offences under "immediate" threats of death or grievous bodily harm from persons who are in a position to execute their threats. *This may sometimes be a matter of degree depending on the particular circumstances of the case including the means adopted in making the threat.* [Emphasis added.]

The italicised sentence is capable of being read as suggesting that the real question should be whether the threatener is in a position to carry out the threat, rather than whether he or she was actually present.

- 170 In another context, Thomas J in the Court of Appeal has recognised the pernicious and pervasive control that an abusive partner can exert in a battering relationship:²⁶¹

[T]he battered woman relationship is characterised by the batterer exerting excessive control over the woman. The abuser generally exerts not only physical control but financial and social control as well. Women in these relationships are frequently kept without money, are not allowed friends, and are forbidden to move outside the house without the knowledge of the dominant party.

- 171 Victims of such relationships would require neither an actual threat nor the actual presence of their abuser to be coerced into offending. It is arguable that the current wording and application of section 24 limit – in a way which is contrary to the rationale of the defence – the availability of the defence for victims of domestic violence and others²⁶² who commit offences under duress.

PROPOSALS FOR REFORM

- 172 In its 1991 report on the Crimes Bill 1989, the Crimes Consultative Committee proposed a revised clause 31:

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 the person or any other person from a person who he or she believes is immediately able to carry out that threat.

²⁵⁹ As to the use of the term "BWS", see n 125.

²⁶⁰ *R v Joyce* [1968] NZLR 1070, 1077–1078 (CA).

²⁶¹ *Ruka v Department of Social Welfare*, above n 37, 171.

²⁶² See, for example, *R v Raroa*, above n 248.

- (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.

- 173 The revised clause addresses some of the issues outlined in the previous discussion. Exclusion of the defence based on a voluntary association is more clearly expressed in subclause (2) than in section 24(1). The strict application of subclause (2) may exclude victims of domestic violence who fail to leave a violent relationship, although the words “knowingly and without reasonable cause” should allow expert evidence to explain why a victim of domestic violence remains in a battering relationship.
- 174 However, subclause (1) still requires the presence of a threat, which current case law interprets as “a particular threat associated with a particular demand”. As discussed in paragraphs 164 and 171 above, victims of long-term domestic violence may respond to a demand even if it is not accompanied by a “particular threat” because of a fear of the predictable consequences of refusal based on the pattern of past abuse.
- 175 The words “who he or she believes is immediately able to carry out the threat” replace the current presence requirement. While these words would cover hostage situations they may not significantly alter the availability of the defence to victims of domestic violence. If the defence is intended to excuse those who act out of fear of dire consequences, it does not logically need to be limited to immediate retaliation. Behaviour brought about by the honest belief that the threatened retaliation will inevitably occur is nonetheless coerced behaviour. The use of the word “inevitably” rather than immediate may therefore be preferable.
- 176 Like section 24, clause 31 does not require the defendant’s belief that the threat will be carried out to be reasonable, only that it be genuine. Arguably, a genuine but unreasonable belief will have just as strong an effect on a defendant as a reasonably based belief. On the other hand, since the defence offers a complete excuse for committing what would otherwise be a criminal offence, it may be preferable to follow the common law and only excuse those who act on reasonably based beliefs.
- 177 Subclause (3) drastically reduces the existing list of excluded offences in section 24(2). In the words of the Crimes Consultative Committee, “[t]he formulation in the bill dispenses with the arbitrary list of offences to which the defence does not at present apply”.²⁶³ The submissions on the Bill were consistent with the academic criticism of the existing list²⁶⁴ and the proposed revision was well supported. However, we question whether any form of duress should be a defence to serious personal injury. While the defendant may have committed the crime under great pressure, a complete defence for those offences listed in section 24(2) and other shocking offences such as rape and torture²⁶⁵ (which are inexplicably not listed in the section) may lessen public faith in the criminal justice system. In such cases, it may be preferable to rely on a plea of mitigating circumstances on sentencing. We seek submissions on the subject.

²⁶³ Crimes Consultative Committee, above n 136, 21.

²⁶⁴ See, for example, “The Defence of Compulsion”, above n 251, 108.

²⁶⁵ Crimes of Torture Act 1989.

Question 13: Should section 24 of the Crimes Act 1961 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?
-

11

Necessity

IS THERE A DEFENCE OF NECESSITY IN NEW ZEALAND?

- 178 **I**N NEW ZEALAND, there is no codified general defence of necessity.²⁶⁶ Until fairly recently, it has been unclear whether a general common law defence of necessity is recognised in New Zealand. In *R v Woolnough*,²⁶⁷ Richmond P referred to the extreme vagueness of necessity as a general defence in English criminal law and observed that such a defence, if it existed at all, would be available by virtue of section 20 of the Crimes Act 1961. Section 20 preserves all common law justifications and excuses except so far as they are altered by or are inconsistent with the Crimes Act 1961 or any other enactment.²⁶⁸ Necessity (in the form of duress of circumstances) is now more firmly established as a common law defence.²⁶⁹ The main area of debate is the extent to which the defence survives codification of one species of duress (duress by threats or compulsion) in section 24 of the Crimes Act 1961.
- 179 The Court of Appeal addressed this question in *Kapi v Ministry of Transport* but did not provide a definitive answer.²⁷⁰ Kapi was charged with failing to stop after an accident. He relied on the defence of necessity, 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, as section 24 provides a defence of compulsion (or duress) 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

²⁶⁶ However, there are a number of statutory provisions that make necessity a defence to specific offences. Section 187A(3) of the Crimes Act 1961, for example, provides a defence to the offence of procuring a miscarriage under section 183 and 187A “where it is necessary to save the life of the woman or girl”. Section 3(2) of the Trespass Act 1980 provides a necessity defence to the offence created in section 3(1) of trespassing and failing to leave after being warned by the occupier. Section 117(2) of the Hazardous Substances and New Organisms Act 1996 provides a necessity defence to certain offences created by that Act.

²⁶⁷ *R v Woolnough* [1977] 2 NZLR 508, 516 (CA).

²⁶⁸ In every case it will be a matter of statutory construction of the legislation creating the offence to determine whether there is any room for the application of necessity as a defence in that class of offence: *Tifaga v Department of Labour* [1980] 2 NZLR 235, 243 (CA) per Richardson J.

²⁶⁹ AP Simester and Warren J Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 1998) 355–358.

²⁷⁰ *Kapi v Ministry of Transport* (1992) 8 CRNZ 49 (CA).

threat or fear of death or grievous bodily harm from a person who is not present. The logical implication would appear to be that section 24 precludes a defence of necessity where the peril arises from the likelihood of serious harm at the hands of a person.²⁷¹ The Court of Appeal left open the question of whether a defence of necessity might be available in other circumstances.

- 180 The Court of Appeal considered necessity again in *R v Lamont*.²⁷² The defendant in *Lamont* was charged with causing death by careless use of a motor vehicle. The defendant argued that he drove in a reckless manner to avoid a collision with a car travelling behind him. The trial judge accepted that the common law defence of necessity was not excluded by section 24 but held that it was not available on the facts and should not be put to the jury. The Court of Appeal upheld the trial judge's decision on the facts. The Court also said:²⁷³

In *Kapi* this Court held that a defence of duress of circumstances could not be regarded as open by virtue of the operation of s 20 of the Crimes Act in respect of threats by persons not present, when s 24 had been enacted and limited to threats by persons present at the time. That decision did not exclude the defence of necessity or duress of circumstances in other situations . . .

- 181 District Court judges have decided cases on the basis that the common law defence is available in New Zealand. In *R v Atofia*,²⁷⁴ the defendant was charged with fraudulently claiming a domestic purposes benefit while working. She had a child with an abusive ex-partner. The ex-partner was required to pay money to the Inland Revenue Department under a paternity order. The ex-partner disputed paternity and demanded \$100 a fortnight from her, with threats that if she did not pay she would be beaten. Atofia 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. Although the trial judge considered that the evidential basis for the defence of necessity in the particular case was extremely weak,²⁷⁵ he ruled that expert evidence on battered woman syndrome²⁷⁶ was admissible in support of the defence of necessity. His ruling was upheld by the Court of Appeal.²⁷⁷

- 182 In *NZ Police v Anthoni* the defendant was charged with assaulting a child under section 194(a) of the Crimes Act 1961.²⁷⁸ He successfully pleaded necessity, as he had to strike the child in order to dislodge him from a rubber tube that was likely to be swept onto rocks, causing the child serious injury.

²⁷¹ *Kapi v Ministry of Transport*, above n 270, 54–55.

²⁷² *R v Lamont* (27 April 1992) unreported, Court of Appeal, CA 442/91.

²⁷³ *R v Lamont*, above n 272, 6.

²⁷⁴ *R v Atofia* [1997] DCR 1053.

²⁷⁵ *R v Atofia*, above n 274, 1057.

²⁷⁶ As to the use of the term “BWS”, see n 125.

²⁷⁷ *R v Atofia* (15 December 1997) unreported, Court of Appeal, CA 53/9, CA 455/97.

²⁷⁸ *NZ Police v Anthoni* [1997] DCR 1035.

183 In *NZ Police v Kawiti*,²⁷⁹ the defendant was charged with driving with excess blood alcohol and driving while disqualified. She raised the defence of necessity, arguing that she was forced to drive in order to get to hospital to get treatment for her injuries after being assaulted. The issue went to the High Court as a case stated on questions of law. Salmon J held:²⁸⁰

it is a reasonable conclusion to be drawn from *Kapi* and the subsequent decision of *R v Lamont* . . . that the defence of necessity of circumstances is available in New Zealand, but only where the perceived threat is one of imminent death or serious injury to the defendant or some other person.

184 The Judge held that the defence of duress of circumstances is available where the duress is not that of persons,²⁸¹ and that the ingredients of the defence are at least those set out by the Court of Appeal in *Kapi*.²⁸²

ELEMENTS OF THE DEFENCE OF NECESSITY

185 In *Kapi*, the Court of Appeal opined that the defence, if it existed in New Zealand, would require at least:²⁸³

. . . a belief formed on reasonable grounds of imminent peril of death or serious injury. Breach of the law then is excused only where there was no realistic choice but to act in that way. Even then the response can be excused only where it is proportionate to the peril.

These requirements are discussed below, with particular reference to battered defendants. We also discuss the limits of the defence.

A belief formed on reasonable grounds of imminent peril of death or serious injury

Reasonable grounds for belief

186 For the defence to be available under current New Zealand law, the defendant must believe in the existence of peril on reasonable grounds. In *Kapi*, the

²⁷⁹ *NZ Police v Kawiti* (28 July 1999) unreported, High Court, Whangarei Registry, AP 29/99.

²⁸⁰ *NZ Police v Kawiti*, above n 279, 8.

²⁸¹ This ratio may be limited by the fact that the Judge was answering a specific question: "Whether in a criminal prosecution pursuant to the Transport Act 1962 the defence of necessity is available to a defendant".

²⁸² *NZ Police v Kawiti*, above n 279, 10. The Judge also noted that Simester and Brookbanks had synthesised the New Zealand case law on necessity with such English case law as is consistent and had made the following observations about the operation of the defence of necessity in New Zealand:

- 1 The perceived threat must be one of imminent death or serious injury.
- 2 The defendant's perception must be either correct or reasonably based.
- 3 Defendant's action must be in response to that perceived threat.
- 4 Defendant's response to the threat must be proportionate in the sense that a sober person of reasonable firmness sharing certain characteristics of the defendant, would have responded in like manner. (The qualifying characteristics remain to be determined in New Zealand.)
- 5 The defence is not available to murder or attempted murder.
- 6 The defence is not available whenever the source of the threat is another person (such cases being covered by s 24). Simester and Brookbanks, above n 269, 377, cited in *NZ Police v Kawiti*, above n 279, 9.

²⁸³ *Kapi v Ministry of Transport*, above n 270, 57. When *Kawiti* returned to the District Court, Judge Everitt found that the defendant had a defence of necessity based on the elements set out in *Kapi*: *NZ Police v Kawiti* (4 November 1999) unreported, District Court, Kaikohe, CRN 8027003705, 8027008070-1.

Court of Appeal rejected the defendant's argument (based on an analogy with the subjective belief requirement in section 24) that an honest belief in peril should be enough. The Court pointed to the complete lack of precedent and refused to expand the law, noting Edmund Davies LJ's comment that "necessity can very easily become simply a mask for anarchy".²⁸⁴ A reasonableness test for belief in peril is required by most jurisdictions.²⁸⁵

Imminent peril of death or serious injury

- 187 The feared peril must be of imminent death or serious injury. The imminence requirement, like the immediacy requirement under section 24, may limit the availability of the defence for victims of domestic violence. The "peril" sought to be avoided may not be imminent but it may be inevitable. For example, battered defendants have raised necessity as a defence to benefit fraud. In these cases, the peril of not being able to provide for themselves and their children may not amount to imminent death or serious injury. But the long-term effects of being unable to provide for children (malnourishment and poor health) may, in some cases, provide reasonable grounds for a belief in *inevitable* serious injury.

No realistic choice other than to commit the offence

- 188 The requirement that the defendant must have no reasonable legal alternative to offending is, on its face, an objective test. However, in *R v Lalonde*²⁸⁶ a battered woman charged with benefit fraud successfully relied on the Canadian defence of necessity based on her honest belief that she had no reasonable alternative.²⁸⁷ In *R v Lalonde*, Trainor J applied the elements of the Canadian defence as stated in *Perka*:²⁸⁸

²⁸⁴ *London Borough of Southwark v Williams* [1971] 2 All ER 175, 181 (CA), cited in *Kapi v Ministry of Transport*, above n 270, 55.

²⁸⁵ *R v Conway* [1989] QB 290, 298 (CA); *Perka v R* (1985) 14 CCC (3d) 385, 406 (SC); *R v Loughnan* [1981] VR 443, 448 (SC).

²⁸⁶ *R v Lalonde* (1995) 22 OR (3d) 275.

²⁸⁷ The Canadian defence of necessity has different requirements to those set out in *Kapi*. For example, there is no requirement that the peril be death or serious bodily harm. Dickson J, in *Perka v R*, above n 285, 405–406, summarises a number of conclusions as to the Canadian defence of necessity in terms of its nature, basis and limitations:

- 1 the defence of necessity could be conceptualised as either a justification or an excuse;
- 2 it should be recognised in Canada as an excuse, operating by virtue of s 7(3) of the Criminal Code [similar to s 20 of the Crimes Act 1961 of NZ];
- 3 necessity as an excuse implies no vindication of the deeds of the actor;
- 4 the criterion is the moral involuntariness of the wrongful action;
- 5 this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure;
- 6 negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;
- 7 actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
- 8 the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
- 9 the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril;
- 10 where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

²⁸⁸ *R v Lalonde*, above n, 286.

The court [in *Perka*] listed ten conclusions about the defence of necessity. The eighth and ninth raise some difficulties in the facts of this case. They stipulate that there must not be a reasonable alternative available and that there must be imminent risk or peril to justify the unlawful act. In my view, the answer for Lise Lalonde, a battered wife, lies in the fact that she had, *in her mind* no reasonable alternative and putting food on the table for her children, in her financial circumstances, was pressing. [Emphasis added.]

- 189 If an objective test is applied, the defence will not easily be available to victims of domestic violence whose assessment of realistic options may differ from that of an “ordinary” reasonable person who is not subject to domestic violence.

Proportionality of response

- 190 The majority of the Court in *Perka* discussed this element of the defence in the following way:²⁸⁹

No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil. In such circumstances we expect the individual to bear the harm and refrain from acting illegally. If he cannot control himself we will not excuse him.

- 191 Proportionality has not to date raised issues peculiar to victims of domestic violence. One issue that may arise in the future, which may be particularly relevant to victims of domestic violence, is whether it is excusable to cause serious harm to another in order to protect one’s child from less serious harm.

Reasonable foreseeability of actions leading to emergency

- 192 The Canadian Supreme Court in *Perka*, held:²⁹⁰

If the necessitous situation was clearly foreseeable to a reasonable observer, if the actor contemplated or ought to have contemplated that his actions would likely give rise to an emergency requiring the breaking of the law, then [there is] doubt whether what confronted the accused was in the relevant sense an emergency.

- 193 This element has not been discussed in any of the New Zealand cases. However, it is likely to apply to the defence given that the closely related defence of duress by threats is not available to those who join or remain in associations knowing that they are likely to be subject to duress.²⁹¹

- 194 As pointed out in paragraph 173, a strict application of this test may have implications for victims of domestic violence who “choose” to stay in a violent relationship. It may well be “clearly foreseeable to a reasonable observer” that women who stay in a violent relationship may be forced to break the law in order to protect themselves or their children, but denying a defence on this basis may cause inequities. The real issue here is whether the woman had a realistic alternative to remaining in the relationship. The Crimes Consultative Committee’s formulation of this test, discussed in paragraph 173 above, should allow expert evidence to explain why a victim of domestic violence remains in a battering relationship.

²⁸⁹ *Perka v R*, above n 285, 400–401.

²⁹⁰ *Perka v R*, above n 285, 403.

²⁹¹ This is true for both the common law defence and s 24 of the Crimes Act 1961.

LIMITS TO THE DEFENCE

Necessity is not a defence to murder or attempted murder

- 195 Under the common law, no form of duress is a defence to murder.²⁹² The Queensland and Western Australian emergency defences do not exclude any specific offences.²⁹³ The Crimes Consultative Committee proposed that both compulsion and necessity should be a defence to all offences except murder and attempted murder. As noted in paragraph 177 above, we question whether any form of duress should be a defence to serious personal injury.

The defence is not available whenever the source of the threat is another person

- 196 A threat posed by persons may be instrumental (intended to compel the victim to do something) or non-instrumental (an end in itself). For example, a lynch mob poses a threat to the intended victim, not because it wishes to compel the victim to commit a crime, but because it desires to kill the victim. Under current law, the victim would apparently have no defence if he or she committed an offence to escape from a non-instrumental threat posed by humans (such as a lynch mob). Section 24, as interpreted in *Raroa* and *Teichelman*, does not provide a defence, as there is no particular kind of threat associated with a particular demand (see the discussion in paragraph 164). The manner in which section 24 has been interpreted in *Kapi* and *Kawiti* would exclude the defence of necessity, as the danger is posed by persons (see paragraph 184).
- 197 There appears to be no reason based in policy for treating a non-instrumental danger posed by humans differently from a non-instrumental danger that has a non-human source. This issue would be relevant to many types of defendants.

REFORM

- 198 As the English courts have recognised, necessity and compulsion are each a species of duress. The separate codification of compulsion in New Zealand has led to unfortunate divergences in the two defences in this country. Codification of both defences along the same lines would achieve compatibility. The Crimes Bill 1989 contained both a compulsion and a necessity defence.²⁹⁴ The Crimes Consultative Committee revised both defences, partly in order to more closely align them. The revised compulsion defence has been discussed at paragraphs 172–177 above. The revised necessity defence (clause 30) follows:

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

²⁹² *R v Howe*, above n 232; *R v Dudley and Stephens* (1884) 14 QBD 273.

²⁹³ Criminal Code (Qld) s 25, Criminal Code (WA) s 25.

²⁹⁴ This defence was broadly based on cl 46 of the English Law Commission's Criminal Code and on s 3.02 of the Model Penal Code (USA).

- (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.
- 199 Clause 30 follows the common law in setting a peril threshold of death or serious bodily harm to the defendant or another person. 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 could be a factor under (1)(b). A threat posed by persons that is not intended to compel the defendant to commit an offence is not excluded from the defence.
- 200 The requirement of an emergency may be problematic because an incident of violence within a relationship of recurring violence may not be seen as an “emergency”.

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 paragraph 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?

A single defence of duress?

- 201 If the answers to questions 13 and 14(a) in paragraph 177 are yes, a possible formulation of the defence of compulsion (duress by threats) could be:
- (1) A person is not criminally responsible for any act done or omitted to be done because of fear of inevitable death or serious bodily harm to the person or any other person from a person who he or she reasonably believes is able to inflict such harm.
 - (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 danger.
 - (3) Subclause (1) does not apply to the offences of
- 202 If the answer to questions 15 to 17 is yes, a possible formulation of the defence of necessity (duress of circumstances) could be:
- (1) 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.

(2) . . .

(3) . . .

203 It seems to us that, thus formulated, the defence of necessity encompasses the defence of compulsion so as to make the latter superfluous.

Question 18: If a defence of necessity as set out in paragraph 202 is enacted, is there a need for a defence of compulsion as set out in paragraph 201?

Question 19: If the answer is yes, what elements of the defence of compulsion as set out in paragraph 201 are in your view not encompassed in the defence of necessity as set out in paragraph 202?

Question 20: Should the belief in paragraph 201(1) and paragraph 202(1)(a) be required to be reasonably based or should an honest belief be sufficient?

Question 21: What offences (if any) should be excluded?

Should a defence of duress be available where the peril is moderate but the response to the peril is proportionate?

204 There are instances where, in order to avoid physical abuse or harm not amounting to serious bodily harm, battered defendants commit offences not involving physical danger to others. For example, battered defendants may commit social welfare fraud because they and their children are not provided for by the abusive partner and they cannot legally claim a benefit because of the existence of the partner. It is arguable that battered (and other) defendants should not be criminally liable in such situations, provided the evil they do is less than the evil they seek to avoid. However, as noted in paragraph 186 “necessity can very easily become simply a mask for anarchy” unless limited to very special circumstances.

205 It may be that a hierarchy of offences could provide the right balance. First, there are the serious offences (presently listed in section 24(2)) for which no defence of duress is or should be available. Mitigation of sentence may, of course, be appropriate (assuming there is a sentencing discretion for murder). Second, for lesser but still serious offences a defence of duress is and should be available if the defendant was in danger of death or serious bodily harm. Finally, for minor offences (for example, offences not involving bodily injury) a defence of duress could be available even if the defendant was faced with harm that was less than death or serious bodily harm, provided the harm caused by the offence is less than the harm sought to be avoided. We ask for submissions on this question.

Question 22: Should a defence of duress be available where the harm threatened is less than death or serious bodily harm?

Question 23: If the answer to question 22 is yes:

- (a) For what offences should the defence be available?
- (b) In what circumstances should the defence be available? (For example: where the harm caused by the offence is less than the harm sought to be avoided.)

Appendix

Homicidal heirs and battered defendants

- A1 **I**N 1997 THE LAW COMMISSION published a report that considered the issue of succession law in circumstances where the beneficiary to a will or the heir on an intestacy has unlawfully killed the person from whom they would, in ordinary circumstances, inherit.²⁹⁵ The Commission recommended codification of the established law: that a killer is not entitled to take any benefit under a victim's will, or on a victim's intestacy.²⁹⁶ Although the killer is barred from profiting from his or her act, the killer's prior and independent rights are preserved by section 10 of the draft Succession (Homicide) Act.
- A2 The Commission considered that the criminal law should define the killings that bar killers from profiting. Consequently, the proposed draft Succession (Homicide) Act defines a killer as "a person ... who ... is guilty of the homicide of the victim" and homicide as "the killing of a person ... by another person, ... that is ... an offence against an Act."²⁹⁷ However, negligent killings, assisted suicides, suicide pacts and infanticide are all excluded from the definition of homicide.
- A3 Under the proposed draft Succession (Homicide) Act, a battered defendant who deliberately killed his or her abusive partner would be excluded from inheriting unless he or she was found to have a complete defence. Some of the options discussed in this paper would make it easier for battered defendants who killed their abusive partners to plead a full defence successfully, thus allowing them to inherit. Other options that relate to the partial defences would not have any effect on the inheritance rights of killers.
- A4 The Commission noted that there might be sympathy for a battered defendant who killed the abuser and who could establish a partial defence arising from the abuse. However, it considered that the question came down to whether there is any principled basis for not applying to a battered defendant the bar on profiting that applies to every other killer who establishes a partial defence. We cannot discern a principled basis for distinguishing between different classes of wrongful killers within each partial defence.
- A5 Non-probate assets are those assets that do not pass by will or the rules of intestacy but by survivorship. An example of a non-probate asset is property held as a joint tenancy by the deceased and any other person. Normally, on

²⁹⁵ New Zealand Law Commission *Succession Law: Homicidal Heirs: NZLC R38*, (Wellington, 1997).

²⁹⁶ New Zealand Law Commission, above n 295, para 1.

²⁹⁷ Draft Succession (Homicide) Act s 6.

the death of a joint tenant, the property passes to the surviving tenant or tenants. The draft Succession (Homicide) Act completely disentitles a killer to any property interest in any non-probate assets of the victim. Under section 8, non-probate assets are distributed as if the killer had died before the victim. The reasons for this recommendation are set out at length in paragraphs 18 to 20 of the 1997 report.

- A6 The Matrimonial Property Amendment Bill would permit surviving spouses to make a claim against a deceased spouse's estate under the Matrimonial Property Act 1976.²⁹⁸ The De Facto Relationships (Property) Bill would provide people in de facto relationships of three or more years duration with a right to make a similar claim on the death of a de facto spouse. These rights would be preserved by section 10 of the draft Succession (Homicide) Act.
- A7 However, neither Bill will affect the dis-entitlement to non-probate assets that results from the application of section 8 of the draft Succession (Homicide) Act. Clause 80 of the Matrimonial Property Amendment Bill states that any property passing to a spouse by survivorship is not to be automatically treated as the surviving spouse's separate property and its status is to be determined according to the status it would have had if the deceased spouse had not died. Clause 20 of the De Facto Relationships (Property) Bill has a similar effect. As section 8 prevents non-probate property passing to the killer spouse, neither of these clauses can apply to such non-probate property.

²⁹⁸ A supplementary order paper to the Matrimonial Property Amendment Bill (SOP 25) is currently under consideration by the Justice and Electoral Select Committee. The supplementary order paper would extend the application of the Matrimonial Property Act 1976 and the changes in the Matrimonial Property Amendment Bill to de facto heterosexual and same sex relationships. The committee is due to report back by 4 September 2000.

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