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"A CRITIQUE OF THE NEW ZEALAND LAW COMMISSION'S DECISION TO NOT INTRODUCE A PARTIAL DEFENCE FOR VICTIMS OF FAMILY VIOLENCE WHO COMMIT HOMICIDE."

LAWS 489

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ABSTRACT

This paper discusses the Law Commission of New Zealand's report R139 on "Understanding Family Violence: Reforming the Criminal Law Relating to Homicide." In addition to discussion on reforming the self-defence provision of the Crimes Act 1961 (section 48), and the increased educational measures to aid the profession in their understanding of family violence, the Law Commission also rejected the idea of the creation of a partial defence for victims of family violence who commit homicide. I argue that despite the arguments submitted by the Law Commission there is merit in the creation of a partial defence of excessive self-defence for that specific group of victims. Despite the Law Commission's proposed reforms there is still a lacuna in the law on the treatment of reasonable and proportionate force that leaves victims vulnerable to unjust treatment.

Key Words

Law Commission - Domestic Violence- Self Defence – Reasonable Force - Imminence

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I Introduction

The situation facing victims of family violence who commit homicide is, "one of the gravest positions a person can face, the killing of another person in order to protect their own life or the life of another. This is even more so when the person they are protecting themselves from is family member."[1] With the prevalence of domestic violence in New Zealand this is an unfortunate reality for a number of New Zealanders.

The Government tasked the Law Commission to conduct a re-examination on self defence and the creation of a partial defence to homicide on the back of the Family Violence Death Review Committee's Fourth Report.[2] That report concluded that New Zealand's criminal justice system is out of step with how it responds to victims of family violence when they face criminal charges for killing their abusive partner.[3]

Part One of this paper will examine the Law Commission's Report. It will provide context to the discussion on the adequacy of the criminal law and its response to these victims through examining the Law Commission's previous work in this area, the basic principles of self defence and a brief analysis on the Law Commission's conclusion on imminence in relation to self defence.

Part Two of this paper will then turn to an analysis on the creation of a partial defence to homicide. This part of the paper will be split into two sections. The first section will discuss "in principle arguments" raised in favour and against the creation of a partial defence generally. Supporters argue that the defence promotes fair labelling, enhances the role of the jury and has the potential to positively impact charging and sentencing practices. This paper will also canvas those arguments against the creation of a partial defence including, that partial defences are anomalous in the criminal law, tend to go hand in hand with mandatory sentencing for murder and that they tend to have undesirable or perverse effects.

Building on the basic argument that in principle partial defences could tenably form part of the criminal law the second section will discuss possible formulations of practically what a partial defence could look like within the New Zealand legal system. This section will involve a discussion of four different types of partial defences by drawing on international jurisdictions. The four types of partial defence discussed will be; provocation based partial defences, diminished capacity based partial defences, trauma based partial defences and defence based partial defences. Throughout this analysis I contend that case law illustrates the Law Commission erred in its decision not to create a partial defence of excessive self defence for victims of family violence who commit homicide.[4]

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[1] Law Commission Understanding Family Violence (NZLC R139) at 1.

[2] Family Violence Death Review Committee Fourth Annual Report: January 2013 to December 2013.

[3] At 5.2.

[4] *R v Reti* HC Whangarei CRI-2007-027-002103, 9 December 2008; *R v Reti* [2009] NZCA 271; *R v Rihia*[2012] NZHC 2720; *R v Wihongi* HC Napier CRI 2009-041-002096, 30 August 2010 and *R v Neale* [2010] NZCA 167.

II Part One: The Law Commission Report: "Understanding Family Violence; Reforming the Criminal Law relating to Homicide."

A Previous Law Commission work and the impetus for the report

In 2001 the Law Commission published a report examining the legal defences available to protect those who commit criminal offences as a reaction to domestic violence, "Some Criminal Defences with Particular Reference to Battered Defendants LCR73."[5] Of particular note the Report recommended the repeal of the partial defence to murder of provocation,[6] an amendment to the defence of self defence[7] and abolition of the mandatory life sentence of imprisonment for murder.[8] In 2002 Parliament introduced discretionary sentencing in murder cases subject to a presumption in favour of life imprisonment.[9]

In 2007 the Law Commission published a second report, "The Partial Defence of Provocation LCR98."[10] The report again recommended the repeal of this partial defence. The Commission concluded that its major deficiency was that the partial defence had been primarily used by violent offenders in respect of unwelcome advances or slights against their honour.[11] It was seldom available to victims of family violence. Given this conclusion the Commission re-examined whether the defence of self defence should be amended to ensure it was available to victims of family violence in appropriate cases. In answering that question the Commission noted the conclusion of the 2001 Report. That work concluded that an amendment to section 48 of the Crimes Act was not required to meets the needs of battered defendants and that the section was regarded to be working well.[12] In 2009 Parliament repealed section 169 of the Crimes Act which had provided for the partial defence to murder of provocation.[13]

Since the 2009 repeal the Family Violence Death Review Committee has been gathering data on family violence homicides in New Zealand. In its Fourth Annual Report published in 2014 the Committee concluded that New Zealand is out of step in how the criminal justice system responds to victims of family violence when they face criminal charges for killing their abusive partner.[14] To address this the Committee recommended the government re-examine options for amending the defence of self defence and introducing a targeted partial defence for murder.[15] It was that recommendation that has brought about the current report R139 which this paper critiques.

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[5] Law Commission Some Criminal Defences with Particular Reference to Battered Defendants (NZLC R73, 2001)

[6] At 120.

[7] At 42.

[8] At 170.

[9] Sentencing Act 2002, s102.

[10] Law Commission The Partial Defence of Provocation (NZLC R98, 2007).

[11] At 183.

[12] At 124.

[13] Crimes (Provocation) Repeal Amendment Bill 2009.

[14] Family Violence Death Review Committee, at 5.2.

[15] At 5.2.

It is first important to understand the legal landscape which a partial defence could act in, this can be identified through an analysis of how self defence has been interpreted by the courts, the suggested reform and the gaps that interpretation creates.

B The Self Defence Provision, section 48.

Self defence recognises that a person is justified in using reasonable force in defence of themselves or another. It is contained in section 48 of the Crimes Act 1961.

> **S48. Self defence and defence of another**
>
> Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Self defence is a complete defence resulting in acquittal if successful and involves three elements.[16] The first element is whether the defendant used the force for the purpose of defending himself or another,[17] followed by a subjective inquiry as to what were the circumstances as the defendant believed them to be[18] and finally was the force reasonable in the circumstances.[19] The third element is an objective enquiry based on the subjective view of the defendant on the circumstances of the situation.[20] In relation to reasonable force, case law illustrates three considerations that are taken into account: the perceived imminence or seriousness of the attack or threatened attack;[21] whether there were alternatives reasonably available that the defendant was aware of;[22] and whether the defensive action was reasonably proportionate to the perceived danger.[23]

C Law Commission's recommended amendments to section 48

Central to the inquiry of the Law Commission was whether the law of self-defence accommodates the circumstances of victims of family violence who kill their abusers. Self-defence is often claimed in these circumstances but is unsuccessful. It has become trite to point out that the defence does not equitably accommodate the circumstances in which victims of family violence kill their abusers.[24]

The inequity in the self-defence provision to these victims can be captured quite succinctly. It is said to arise because the law developed as a response to the stereotypical one-off violent confrontations of two male strangers of equal

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[16] Crimes Act 1961, s48

[17] AP Simester and Warren Brookbanks Principles of Criminal Law (4th ed, Thomson Reuters, Wellington, 2012) at ch 15.

[18] "Principles of Criminal Law" at ch15.

[19] At ch 15.

[20] At ch 15.

[21] At ch 15.

[22] At ch 15.

[23] At ch 15. .

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

strength.[25] This not being the situation of the class of victims of ongoing intimate partner violence, the elements of immediacy of the threat and proportionality of the response have emerged as central concepts. Due to physical disparities women will typically use a weapon to defend themselves responding with considerable force to an apparently minor assault because the threat to them is one of an ongoing nature.[26] Conversely other women may not respond immediately when attacked but will wait for a time when the attack will be more effective.[27] It is the two elements of immediacy and reasonable or proportionate force that preclude self-defence from being successful in this line of cases.

After a complete analysis of section 48 the Law Commission settled on the below recommendation;[28]

A reform of section 48 in a new provision adopted in the Crimes Act 1961. The intended effect of such a provision would be to reverse the presumption in R v Wang that a victim of family violence who kills their abusive partner is not acting in self-defence unless the threat is capable of being carried out immediately. It is a clarification of how the requirement should be applied and is limited to defendants responding to family violence. It clarifies that self-defence is available to those victims even if the threat is not imminent so long as the defendant believed their actions to be necessary and the response to otherwise be reasonable.

In relation to the concept of proportionality the Law Commission concluded:[29]

The Law Commission are of the view that in relation to the concept of proportionality that the law of self-defence is capable of accommodating the experiences of victims of family violence who use a level of force during an immediate confrontation that may not be strictly proportionate to the force used or threatened against them. We are concerned therefore that clarifying the operation of section 48 in respect to proportionality would do little to change the substantive approach. We are also aware of the risk that the clarification could invite confusion and risk a suggestion that unreasonable excessive force could be considered legitimate self-defence.

It is this conclusion of the Law Commission in relation to the element of reasonable force and proportionality that I contend is incorrect. Through an analysis of arguments on the introduction of a partial defence and discussion on the concept of excessive self-defence. I contend the Law Commission erred in their finding that case law appropriately deals with the issue of reasonable force.

III Part Two: An Analysis of the creation of a Partial Defence

A What is a Partial Defence

Partial defences are only available in homicide cases. They apply in certain circumstances that but for the defence, the actions of the convicted would constitute murder. The successful use of a partial defence would usually result in a lesser

[25] Above n 17, at ch 15.

[26] Above n 17, at ch 15.

[27] At ch 15.

[28] Understanding Family Violence, above n 1, at 7.6.

[29] At 7.42.

charge of manslaughter.[30] Prior to its repeal the criminal law of New Zealand contained the partial defence of provocation.[31] The partial defence implied that while it might be morally wrong to kill someone for provoking action, a person is in some way excused for taking punitive action against someone who has intentionally caused great moral offence.[32]

B In Principle Analysis

1 Fair Labelling

The Law Commission illustrated that the fundamental premise behind fair labelling is the concept that for some intentional killing, "murder" is not the right description and that in these instances the law should permit such killings to be categorized as manslaughter.[33] Beyond labels as a purely descriptive tool there is a need to differentiate between different levels of criminal conduct.[34] Labelling was discussed as being important in the interest of fairness to offenders to communicate the level of societal disapproval of their conduct, in addition to having ramifications on how the offender is viewed by the public, agencies within and outside the criminal justice system and the victim.[35] It is this element of fair labelling which is essential to the advancement of the case in principle for the introduction of a partial defence. The distinction between murder and manslaughter endures. Murder remains the most serious form of culpable homicide and although only a few jurisdictions retain punishment by death, a mandatory, or presumption of a, life sentence in prison is no light punishment. Stigma can have a large negative impact on someone's life.[36] The experience of stigma emerges from an interactive process in which negative values and aspects of an individual's life come to dominate his or her social identity and self-concept.[37] This is a powerful social label that operates as a master status.[38] Giving these particular victims the label of murderer sends a message to them that despite the violence and abuse they were subjected to that society condemns them completely for their defensive actions in trying to preserve their lives and publically brands them with a label that society believes what they did was wrong.

It was argued by the Law Commission that partial defences are too blunt a tool for the purpose of labelling as they do not delineate enough between the different societal attitudes that attach to different murders and manslaughters.[39] It was the Law Commission's opinion that Fair Labelling would be better served by separate

[30] Above n 5, at 87.

[31] Crimes Act 1961, s 169.

[32] A J Ashworth "The Doctrine of Provocation" (1976) 35 Cambridge LJ 292 at 307.

[33] James Chalmers and Fiona Leverick "Fair Labelling in Criminal Law" (2008) 71 MLR 217 at 220..

[34] Andrew Ashworth and Jeremy Horder Principles of Criminal Law (7th ed, Oxford University Press, Oxford, 2013) at 77.

[35] Above n 33, at 223.

[36] Goffman, Erving. *Stigma: Notes on the management of spoiled identity*. Simon and Schuster, 2009.

[37] *Stigma: Notes on the management of spoiled identity.*

[38] *Stigma: Notes on the management of spoiled identity.*

[39] Andrew Ashworth and Barry Mitchell (eds) Rethinking English Homicide Law (Oxford University Press, Oxford, 2000) 107 at 130.

offences or subsets of homicide instead of a partial defence.[40] For the Law Commission the purpose of a partial defence as a labelling tool would be better served by mitigating circumstances at sentencing.[41] In regards to this proposition of the Law Commission there is a failure to comprehend that sentencing cannot adequately achieve the same tangible acknowledgment of mitigating circumstances and will not suffice to counteract the enormous stigma of a murder conviction.[42] Whilst the circumstances can be taken into account at sentence this will not serve the purpose that fair labelling sets out to achieve as that information is not readily available in comparison to the conviction label entered on a criminal record. In addition to that factor, due to the large amount of mitigating and aggravating factors that can influence a sentencing decision it would be hard for the lay person to separate what elements of culpability reduced the sentence the defendant receives.

Not only have the Law Commission discussed the concept of fair labelling in this report but it has been referenced in several reports preceding this. In the 2007 report the Commission concluded:[43]

The reality is probably that in the absence of legal guidance the only delineation would be the extent to which a jury sympathises with various defendants and their predicaments. This has the potential to reduce a homicide to a lottery, it is an invitation for jurors to dress up their prejudice as law and substantially increase the weight that will be placed on jury composition and the advocacy of the defence counsel rather than legal merits of the case.

One of the final arguments that was not raised by the Law Commission in relation to fair labelling and the concept of partial defences is the concept of a hierarchy of defences.[44] The hierarchy of defences breaks down defences into different levels of conduct that are justified or excusable for different reasons. The top level of hierarchy is justification, such as self defence, which signifies as a label that someone did the right thing in the situation they faced.[45] A step down is excuse defences such as necessity and duress, these illustrate that someone acted unacceptably but cannot be held to account for their actions due to the circumstances they faced.[46] The final level is lack of capacity defences which would apply to those of diminished capacity and with any characteristics reducing capacity such as age and mental illness.[47] The hierarchy of defences acts as a labelling tool to illustrate the level of culpability attaching to the various justifications or excuses for peoples actions. This is relevant in discussion on partial defence as partial defence logic is rooted in some characteristic, element of the offence or circumstance that should be justified, excused or reduce the culpability of the defendant.

[40] Above n 1, at 10.19.

[41] At 10.18.

[42] Above n 1, at 10.14.

[43] The Partial Defence of Provocation, above n 10, at 166.

[44] "Fair Labelling in Criminal Law" (2008), above n 33, at 244.

[45] At 244.

[46] At 244.

[47] At 244.

In relation to victims of family violence who kill their abusers the most pertinent question is whether it is fair to label their actions as murder. It is this crucial connection between the victims of family violence and the concept of fair labelling that was not emphasised with clarity in the Law Commission report. A helpful aid in this regard is the statement by Potter J in *R v Woods* describing the archetypal situation we are analysing, which aids thought on whether it right to label these kind of defendants as murderers:[48]

> In each case the offender is female, has been in a volatile relationship with the deceased, has been involved in a domestic dispute immediately preceding the stabbing and was under the influence of alcohol and was most likely to have used a fatal weapon such as a knife to stab the deceased with death being the unintended result.

2 The Role of Juries and Jury Nullification

The second argument is the idea of an enhanced role for the jury and the concept of jury nullification. The jury is responsible for both legal and moral considerations in some cases where they decide that, "a greater offence is made out in law but the jury feel that it is morally inappropriate to convict. Here the jury will be tempted to convict of a lesser offence, or perhaps more likely, to acquit perversely. This can be seen as the jury taking steps to nullify oppressive law."[49]

Due to the closed door nature of jury discussion we will never know the true reasons why juries are returning lesser convictions or fully acquitting defendants.[50] That is the central issue with running an argument based on jury nullification - conclusions are likely to be inductive and based on the speculation of the sentencing judge as to what led to the jury's verdict. This may at times lead to false speculation where rather than a partial defence not founded in law, the conclusion was actually based on the inability of the Crown to prove to the elements of the offence beyond reasonable doubt.[51]

Instances of jury nullification are often seen in isolation and as pertaining to the facts of the specific case before the jury.[52] However if a pattern of acquittals or lesser sentences emerges in response to repeated attempts to prosecute a certain statutory offence or in regard to a defendant with certain characteristics this can have the effect of invalidating a statute or illustrating strong public opposition to it.[53]

Despite limitations in the conclusiveness of this argument it could be argued in the case of victims of family violence who commit homicide that there are case law examples that may illustrate a quasi-form of jury nullification where the jury could be said to apply an informal partial defence that does not exist at law. *R v Rakete* is a good example of this occurring. Ms Rakete hit the deceased over the head with a pepper grinder which caused him to hit his head on the kitchen bench in the

[48] *R v Woods* HC Gisborne CRI-2011-016-000048, 10 June 2011 at [27].

[49] Martin Wasik "Partial Excuses in the Criminal Law" (1982) 45 MLR 516 at 518–520.

[50] Steve Friess "Behind Closed Doors" The Advocate USA, Issue 748, 12/09/97, 48.

[51] R v Erstich (2002) 19 CRNZ 419 (CA) at [2].

[52] Martin Wasik "Cumulative Provocation and Domestic Killing" [1982] Crim L Rev 29 at 32–34.

[53] "Cumulative Provocation and Domestic Killing" at 32-34.

context of an argument.[54] She was found guilty of manslaughter. This was an obvious case of "excessive self defence."[55] However it could also be said that the jury found lack of intent.[56] In these situations the defendant should be able to rely on an exemption to the reasonableness standard rather than whether or not the Crown can prove the salient elements of an offence.

The jury without a legal avenue to lessen culpability through a partial defence may at times be left with only two extreme choices, acquit someone who is partially liable for their conduct, or convict them of murder even when there is a reason their conduct should be partially excused or justified.[57] The risk of acquittal of undeserving defendants exists to a greater extent in New Zealand since the repeal of provocation.[58] It is concern over the two extreme risks of acquittal or murder conviction that should encourage the creation of a partial defence as a legal avenue for the jury to legitimately reduce the conviction to manslaughter in those deserving cases.

3 Effect on Sentencing Practices

The basis of the next argument is the ability to achieve fairer sentencing outcomes for victims who are convicted of or are at risk of being convicted of murder. There is no doubt that a murder conviction imports a sentence that is longer than manslaughter.[59] The Law Commission believed that the mitigation role that partial defences play is better dealt with solely in sentencing rather than in discussion on charges, convictions and relative sentencing.[60]

As mentioned several times the Law Commission believes the elements which partial defences focus on to reduce culpability from murder to manslaughter would be better dealt with at sentencing.[61] There are a large number of circumstances that could mitigate a defendant's conduct and it would never be a tenable suggestion to have a partial defence for each circumstance that could ever be seen to be mitigating.[62]

The central thesis of this paper is that the creation of partial defence of excessive defence will ameliorate the injustice faces by victims of family violence who commit homicide, due to strict interpretation of section 48. I contend that mitigation in sentencing would not be able to adequately address the inability of victims of family violence to run a successful self defence claim resulting in their murder conviction and therefore a higher sentence. As previously mentioned in relation to other in principle arguments, mitigation of sentencing illustrates a recognition of reduced culpability but not to the same extent that a reduced conviction does, if fair labelling is accepted as the central argument to give

[54] R v Rakete [2013] NZHC 1230 at [3].

[55] Above at [44].

[56] Above at [35].

[57] *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 at [12].

[58] Above n 2, at Appendix 1

[59] Above n 2, at 121.

[60] Above n 10, at chs 4 -6.

[61] Above n 10, at chs 4 -6.

[62] Above n 10, at 72

appropriate justice to the defendants then the conviction matters more than the sentence.[63]

4 Effect of a Mandatory Life Sentence for Murder

Looking at overseas jurisdictions there is a clear pattern that the existence of partial defences goes hand in hand with a mandatory sentence of life for murder.[64] This has been continually noted in overseas law reform bodies, and the Law Commission of New Zealand when discussing the creation or removal of partial defences.[65]

The strongest argument against this assertion by the Law Commission is the comparable jurisdiction of Western Australia.[66] Not only are the self defence provisions analogous but Western Australia also has a presumption in favour of a life sentence that is not mandatory. This is in addition to having a partial defence of excessive self defence which illustrates at least some acceptance for a partial defence in a jurisdiction that also only has a presumption of mandatory life imprisonment for murder.[67]

Additionally when looking at the facts of sentencing there has not been the reduction in sentencing that is associated with the removal of mandatory life sentences, especially in regard to victims of family violence.[68] New Zealand has a presumption of life imprisonment for murder. This means that since the abolition of provocation a battered defendant who is unable to argue self defence will be facing life imprisonment unless they are able to overturn the presumption. [69] When the mandatory life sentence was abolished cases where battered defendants killed their perpetrators were considered archetypal cases in which such a presumption would be overturned. However a review of New Zealand cases involving battered defendants found that of the four cases involving a murder conviction in only one was the presumption of life imprisonment overturned.[70] This suggests that despite New Zealand holding a presumption instead of a mandatory requirement that the practicality of the situation is not so different from those jurisdictions still maintaining the mandatory life sentence of imprisonment for murder.[71]

Any argument based on the retention or abolition of the mandatory life sentence focuses on the sentence passed to the defendant as the element of the most importance. As contended earlier if accepted that the conviction label and related stigma are the most important elements in the discussion of victims of family violence who commit homicide then regardless of the sentence the label will be inequitable to that particular defendant.

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[63] Andrew Ashworth "Reforming the Law of Murder" [1990] Crim L Rev 75 at 83.

[64] Law Commission of England and Wales, above n 797, at 43–44; and Queensland Law Reform Commission, above n 820, at 9–10.

[65] Law Reform Commission of Ireland Defences in Criminal Law (LRC 95, 2009) at 112.

[66] Criminal Code Act Compilation Act 1913 (WA).

[67] Criminal Code Act Compilation Act 1913 (WA) s 483(3) and s 279(4).

[68] Above n 2, at Appendix One.

[69] Above n 2, at Appendix One.

[70] Above n 2, at Appendix One.

[71] Above n 2, at Appendix One.

5 Anomalous nature of partial defences

An argument raised by the Law Commission against the creation of partial defences is how anomalous they are.[72] In every other offence, proof of the elements of the offence are enough for conviction and yet despite this culpable homicide is the only crime, where despite all the elements being made out, a lesser conviction can be achieved.[73] The only retort to this element of argument is that just because partial defences are unique in the criminal law context they are present internationally through a large number of jurisdictions and this would evidence their utility in being able to cater to a unique legal situation that but for the presence of partial defences would see a defendant being treated unjustly.

6 Unintended or perverse consequences

The final argument advanced was that the creation of partial defences inevitably lead to undesirable or perverse effects. Relevant to this discussion was the repeal of provocation which has created a loophole in the criminal justice system that was abused by perpetrators of violence when faced with provocation from their partners.[74] Two potential perversities were noted, the first, that it could undermine the operation of self defence.[75] The second that it would create unintended consequences when utilised by undeserving defendants.[76]

In combating this argument it is necessary to point out that a partial defence would have the same qualification that the amendment suggested by the Law Commission had, that the reform was only available to those who fall within the definition of family violence.[77] For the purpose of clarity the definition of family violence accepted by the Law Commission, the Family Violence Death Review Committee, and this report is:[78]

A broad range of controlling behaviours, commonly of physical, sexual and/or psychological nature, which typically involve fear, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between partners, parents and children, siblings and in other relationships where significant others are not part of the physical household but are part of the family and/or fulfilling a function of the family.

This means that both alternatives open themselves up to the same abuse from perpetrators of violence who fit within the definition and may use the partial defence for perverse means. In this regard it is up to the judge to regulate who has access to both the amended form of self defence and any additional partial defence.[79] In relation to undermining the application of self defence, it has already

[72] Law Commission of England and Wales s Murder, Manslaughter and Infanticide (Law Com No 304, 2006) at 48.

[73] Ashworth and Horder, above n 32, at 250.

[74] *Clayton Weatherson v R* [2011] NZSC 105.

[75] Law Reform Commission of Western Australia Review of the Law of Homicide: Final Report (Project 97, September 2007 at 294.

[76] Victoria Law Reform Commission Defences to Homicide: Final Report (2004) at viii.

[77] Above n 2, at 13.

[78] Above n 2, at 13, citing Ministry of Social Development "Background to family violence indicators".

[79] Angelica Guz and Marilyn McMahon "Is Imminence Still Necessary? Current Approaches to Imminence in the Laws Governing Self-Defence in Australia" (2011) 13 Flinders LJ 79 at 101.

been illustrated that case law has not justly been serving these defendants and through that logic it is hard to undermine a defence provision aimed at protecting women in precisely these kinds of situations, when the provision has been shown to fail at protecting them.

Concluding on the in principle discussion of partial defences, it is clear that while the Law Commission do raise good arguments both in favour and against the creation of a partial defence that when examined closer and centralised on the fundamental premise of fair labelling and justice to the defendant there is, in principle, good support for the creation of a partial defence.

C Practical Analysis

This paper will now turn to look at the practicalities of introducing a partial defence and what a formulation of that partial defence would look like in New Zealand. The labelling of these four options of partial defence is consistent with the wording of the Law Commission. The phrasing reflects the element of the offence, circumstances or characteristic of the defendant which the defence is targeting to justify or excuse.

1 Provocation Based Partial Defences

A "provocation based partial defence" focuses on the circumstances that confronted the defendant immediately preceding the attack on the deceased.[80] It claims that external circumstances and the conduct of another provoked the defendant to lose self-control and carry out the attack. The defence claims that in these circumstances the defendant's conduct should be partially excusable.

Provocation varies from jurisdiction to jurisdiction but a traditional formulation of the partial defence requires that: the defendant lost control;[81] the loss of control was caused by the provocation; [82] and the provocation would have been sufficient to deprive a person with the same characteristics as the defendant but a normal degree of tolerance or the ordinary person's power of self-control, of the power of self-control.[83]

As previously mentioned provocation was previously a partial defence in New Zealand until it was repealed in 2009.[84] The report by the Law Commission in relation to Provocation in 2007 illustrated that the partial defence had become "irretrievably flawed."[85] The report identified a large number of issues that had been plaguing the courts and their application of the partial defence. Provocation was no longer fulfilling the public policy purposes it was created to achieve; recognizing human frailty,[86] the issue of bifurcation in the defendant's perception of provocation based on their perception of the circumstances and their capacity for ordinary self-control.[87] It also assumed the existence of the phenomenon of

[80] Law Commission of England and Wales, above n 72.

[81] Above n 10, at 82.

[82] Above n 10, at 82.

[83] Above n 10, at 82.

[84] Above n 13.

[85] Above n 10, at 77.

[86] Above n 10, at 79a.

[87] Above n 10, at 79b.

loss of self-control which is controversial in the academic world[88] and that when someone faces grave provocation they resort to homicidal violence.[89] Concluding on the basis of the inherent flaws in the formulation and application of the partial defence of provocation the Law Commission suggested its repeal.

In R139 the Law Commission found no empirical evidence in its case review to conclude that the repeal of provocation in New Zealand has practically adversely effected the position of victims of family violence who kill their abuser.[90] Given the weight and relatively recent discussion by the Law Commission and New Zealand Parliament on the matter of provocation, I agree with the conclusion of the Law Commission in the report that a reintroduction of a provocation based partial defence is, neither desirable or likely as a way of responding to victims of family violence who kill their abusive partner.

2 Diminished Capacity Based Partial Defences

A diminished capacity based partial defence focuses on the capability of the particular defendant and specifically on the mental function of the defendant that impaired their capacity to judge self-control correctly. It claims that this specific characteristic of the defendant should enable their conduct to be partially excused or justified.

Similarly to provocation the wording of a diminished capacity partial defence varies depending on the jurisdiction, an example of what the defence could look like in New Zealand would separate the mental element and the effect of the mental element such as;[91]

A person who kills or is party to the killing of another is not to be convicted of murder if the defendant was suffering an abnormality of mental functioning which; arose from a recognised mental condition, substantially impaired D's ability do one or more of the things mentioned below or provides an explanation for D's acts and omissions. Those things effected could be: to understand the nature of D's conduct, to form a rational judgment or to exercise self-control.

Diminished capacity based partial defences require an abnormality of mental function that impaired the defendant's capacity to understand events and to judge whether their actions are right or wrong, or to exercise self-control.[92] This type of defence looks to the mind of the defendant to see if he or she should be judged by some lower standard than the ordinary person.[93] The defence does not share the objective requirement of provocation and rather is intended to fill the gap where the defendant does not quite meet the threshold of insanity.[94] The rationale for this is that if total mental incapacity absolves all blame, then mental incapacity short of total impairment should reduce culpability.[95]

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[88] Above n 10, at 79c.

[89] Above n 10, at 79d.

[90] Above n 1, at 35.

[91] Coroners and Justice Act 2009 (UK), s 52 (amending Homicide Act 1957 (UK), s 2).

[92] Lord Parker in *R v Bryce* [1960] 2 QB 396 403.

[93] Model Penal Code (US) § 210(3) (1985) (commentary) at 71–72.

[94] Above n 5, at 130.

[95] Above n 1, at 39.

The main problem identified by the Law Commission in regard to this type of partial defence is that they tend to entrench misleading stereotypes of primary victims of family violence who tend to be women.[96] These stereotypes are attributing the homicides of abusers to psychological disturbance or mental abnormality rather than defensive reactions or acts of desperation in response to ongoing or severe violence.[97] In relation to this kind of partial defence the Law Commission concluded that the Sentencing Act 2002 already provides scope to take account of diminished capacity of the defendant as a mitigating factor of the offence.[98]

This paper agrees with the conclusion of the Law Commission that a partial defence based on diminished capacity would not serve the purpose of addressing the needs of victims of family violence who commit homicide without importing negative consequences like damaging stereotypes about such victims.

3 Trauma Based Partial Defences

A trauma based partial defence focuses on the specific type of victim and the specific trauma that those victims face. It claims that based on the unique experience of that subset of victims that there are special reasons related to the trauma they face that should mean their conduct is partially excusable or justified.

As a new type of defence there are a variety of options about how such a defence could be formulated. The elements of the defence could include that: the defendant had been subject to repeated and serious violence (falling under the definition of family violence),[99] the defendant reacted in a state of extreme mental or emotional disturbance caused by violence,[100] and there is a reasonable explanation for the extreme mental or emotional disturbance in the circumstances as the defendant believed them to be.[101]

The defence would be tailored specifically to victims of family violence who kills their abusers.[102] The Law Commission rejected the creation of such a defence as being contrary to the criminal law principles of New Zealand and accompanying legislation.[103] There is merit in the Law Commission's concerns regarding the creation of a trauma based partial defence. Not only would its creation open the potential for a smorgasbord of trauma based partial defences on the trauma felt by distinct other groups,[104] but the reasonableness requirement would run into the same issues that the existing self defence provision contains and other options for partial defences such as provocation[105]. Unless the reasonable element is founded in

[96] Victorian Law Reform Commission, above n 76, at 239; and Law Reform Commission of Western Australia, above n 75, at 259.

[97] Above n 76, at 47.

[98] Sentencing Act 2002, section 9.

[99] Above n 93.

[100] Above n 93.

[101] Above n 93.

[102] Above n 1, at 10.46.

[103] Review of Part 8 of the Crimes Act 1961: Crimes Against the Person (NZLC R111, 2009) at 30–31.

[104] Above n1, at 10.84.

[105] S Kadish, The Model Penal Code's Provocation Proposal and its Reception in the State Legislatures and Courts of the United States of America, with Comments Relating to the Partial Defenses of Diminished Responsibility and Imperfect Self-Defence at 276.

informed judicial or societal understanding of family violence and its effect on its victims then it is likely to be abused by misunderstanding and stereotypes.[106]

Again I would agree with the conclusion of the Law Commission that the creation of a trauma based partial defence would not be effective in altering the response of the criminal law to those victims of family violence as it is plagued by the same reasonableness standard that is at issue in the section 48, self defence provision.

4 Defence Based Partial Defences

Finally I turn to look at defence based partial defences. This partial defence is rooted in the same logic of self defence, that the actions of the defendant were reactionary to a threat and in defence of themselves or another. The partial defence claims that those actions are correct in the circumstances faced by the accused and their conduct should be partially excused.

When looking at the formulation of partial defences the main requirement is an honest belief that the defendant's actions were necessary to preserve himself, herself or another.[107]

Ultimately the Law Commission concluded against the introduction of a partial defence of excessive self defence and I contend that this conclusion was incorrect. The basis of this contention is the support the partial defence has received internationally in addition to a case review that illustrates four distinct examples of defendants who have been treated unjustly due to the lack of such a partial defence, which has become necessary due to the way section 48 has been interpreted. Whilst the Law Commission's recommendation on relaxing imminence go some way to resolve the unjust application of s 48 to these victims there is still a gap in how the law applies the reasonable standard that could be resolved through the application of a partial defence.

(a) Excessive Self Defence

Excessive self defence is a partial defence either in statute or common law in a number of jurisdictions. It reduces murder to manslaughter in cases where the defendant acted in self-defence but in doing so used more force than was necessary.

If New Zealand were to introduce an excessive self defence partial defence it would likely read:[108]

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

Excessive self defence as a partial defence focuses on the use of force by the defendant in the situation that confronted them, whether the defendant had a reasonable belief that the force was required and whether the force itself was proportionate or reasonable. In a sense the law gives conflicting signals concerning the degree of force that is permissible in self defence.[109] On the one hand it states

[106] Above n 1, at 10.87.

[107] Above n 5, at 21.

[108] Above n 5, at 22.

[109] Principles of Criminal Law, above n 17, at 494.

that the defence must fail if the force used by the accused is excessive.[110] On the other hand the courts will not 'weigh to a nicety' what reasonable force is.[111]

Central to the argument of the introduction of a partial defence of excessive self defence is the concept of reasonableness and force. It is my contention that in relation to victims of family violence who commit homicide a reasonable standard is never going to be appropriate for these victims. Their experiences are unique and unimaginable and there is no way of quantifying the effect that years of abuse and violence has had on their perception. "Terrible and tragic things happen within the contexts of battering relationships, even beyond the violence and resultant injury itself. These tragedies include the death of the battered victim, the physical and psychological abuse of others, especially children, within the household, the destruction of employment situations and opportunities, the withering away of basic trust especially in intimacy and often a waste of what otherwise might have been rewarding and productive lives."[112]

Drawing on the support and experience from analogous international jurisdictions there is a convincing argument that excessive self defence could be the most effective way of resolving the injustice that victims of family violence suffer when faced with criminal charges for killing their abusive partner.

There is a large range of Australian law that supports the contention of the relevance of an excessive self defence provision. In Victoria, in the Crimes Act 1958 322M where family violence is an issue: a defendant may believe that their conduct is necessary, and the conduct may be reasonable, even if the defendant is responding to a harm that is not immediate, or the response involved the use of force in excess of the force involved in the harm or threatened harm.[113] Western Australia has a partial defence of excessive self defence where limb two of s 248(3) Criminal Code Act Compilation Act 1913 is not met. That section refers to the defendant's harmful act being a reasonable response to circumstances as the defendant believed them to be.[114] The Western Australia model is the same as New South Wales who have the partial defence of excessive self defence when s 421(b) is not met.[115] Finally this is the same as the formulation in South Australia which is engaged when s15 (2) fails.[116]

In the United Kingdom there is no partial defence of excessive self defence. The Criminal Law Revision Committee have at times recommended the introduction of a version of an excessive self defence but have favoured reformulations of provocation instead.[117] However it should be noted that as the United Kingdom provocation section stands it is capable of including the situation we are currently

[110] Above n 17, at 494.

[111] Above n 17, at 494, citing *Palmer v R* [1971] Ac 814.

[112] Jane Maslow Cohen "Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?" (1995) 57 U Pitt L Rev 757 at 762.

[113] Crimes Act 1958 (Vic), s322M.

[114] Criminal Code Act Compilation Act 1913 (WA) s248 (3)

[115] Crimes Act 1900 No. 40 (NSW), s421 (b).

[116] Criminal Law Consolidation Act 1935 (SA) s15 (2).

[117] Above n 34, at 210–211.

examining of the use of excessive force. "It is clear to us that when a battered women uses excessive force against her abusive partner only because she fears for her safety in any direct confrontation it would be wrong to rule out her plea simply because there is no loss of self-control."[118]

In the United States there is a partial defence recognised in some states called "imperfect self defence" which is analogous to an excessive self defence partial defence.[119] The imperfect self defence notes that one who uses force against another with an honest but unreasonable belief that he must use force to defend himself from an imminent attack should be entitled to the judge instructing the jury on a manslaughter conviction.

Whilst not authoritative, as the New Zealand Court of Appeal has rejected the contention that excessive self defence could be contained in the New Zealand common law, the Irish Supreme court in *Dwyer* supports a common law version of excessive self defence reducing a murder conviction to manslaughter where despite the defendant's view that the force was reasonable, the jury view the conduct as unreasonable.[120]

Negative treatment has come from Canada who has expressly rejected the idea of a partial defence. In *R v Faid* the Supreme Court unanimously held that the partial defence ought not to be recognised as it was lacking in principle, practicality and justice.[121] Explanation of this view could stem from the liberal interpretation of the self defence provision that Canadian courts have taken regarding battered defendants which differs from the New Zealand approach.

Despite the large amount of support internationally for the creation a partial defence along the lines of an excessive self defence provision, it still needs to be established that there is a need for such a defence in New Zealand. The Court of Appeal in New Zealand in *R v McNaughton* recently concluded that the concept of excessive self defence does not exist at common law in New Zealand.[122] This is not the contention of this paper, rather I contend that there is scope to implement such a partial defence within the statutory framework of the Crimes Act 1961.

The issue with any law reform in New Zealand is the small sample of case law that can be used to illustrate a need to reform the law in a certain area, in this instance 24 cases since 2001. While the Law Commission submits that case law appropriately deals with these situations in regard to reasonableness, the discussion of those four cases below will illustrate that at times the law has not appropriately responded to protect those victims of family violence. All four cases relate to murder convictions.

[118] Law Commission of England and Wales Murder, Manslaughter and Infanticide at 87.

[119] *People v. Flannel* (1979) 25 Cal.3d 668

[120] *Dwyer* [1972] IR 416 (Ireland).

[121] *R v Faid* [1983] 1 SCR 265 (Canada).

[122] *R v McNaughton* [2013] NZCA 657 at [3].

In *R v Reti* the defendant stabbed the deceased twice several hours apart, the deceased kicked her in the stomach and then she delivered the fatal blow.[123] She had earlier stabbed him in the leg.[124] The relationship was destructive and negative and aided by a history of childhood sexual and physical abuse.[125] The likely issue in this case of being able to claim self defence, or provocation which was plead would be the reasonableness of response. The presence of two distinct stabbing instances in addition to a physical assault from the deceased would have likely meant that the defendant did not act proportionately to assault of the deceased. If a partial defence of excessive self defence was introduced this may have resulted in a reduction of the conviction to manslaughter.

The utility of excessive self defence in relation to *R v Reti* is similar to the other three cases. In *R v Wihongi* the defendant stabbed the deceased in the chest twice following an argument where he demanded sex from the defendant.[126] The deceased turned to leave and she followed him downstairs and stabbed him twice. The relationship had been characterized by heavy drinking and violence towards each other. This case illustrates that in facing an imminent threat the defendant reacted in self defence but in doing so used force in excess of what was reasonable.[127] Had the partial defence of excessive self defence existed she may have been convicted of manslaughter instead.

The next case is that of *R v Rihia* who plead guilty to murder. In a relationship again characterised by alcohol and violence there had been an argument over one of Ms Rihia's children being taken by CYFS.[128] Ms Rihia threw a stereo at the deceased's head and while he lay defenseless on the couch from intoxication she stabbed him in the chest.[129] If self defence was to be pleaded in association with the expectation of violence there would have traditionally been two issues; the imminence of the threat and proportionality of the force. Even with the imminence amendment of the Law Commission *Rihia* would still not meet the threshold of claiming self defence as the response was not reasonable, this is where a partial defence of excessive self defence would aid such a defendant.

The final case is *R v Neale* where in response to an argument the defendant stabbed the deceased nine times as he got out of the shower.[130] It is unknown if that confrontation was violent but the likely conclusion is that the response was unreasonable as a proportionate response. Imminence is unlikely to have been an issue in this case due to the threat of the argument, however due to the fact the deceased was in the shower if applying a strict imminence from *Wang* of the threat being able to be carried out immediately it would not meet the threshold.[131] Even with the relaxed amendment the response cannot be said to be reasonable and the

[123] *R v Reti* HC Whanagerei CRI-2007-027-002103, 9 December 2008 at [3].

[124] At [2].

[125] At [6].

[126] *R v Wihongi* HC Napier CRI 2009-041-002096, 30 August 2010

[127] *R v Wihongi* HC Napier CRI 2009-041-002096, 30 August 2010.

[128] *R v Rihia* [1012] NZHC 2720 at [2].

[129] At at [11] and [12].

[130] *R v Neale* [2010] NZCA 167.

[131] *R v Wang* [1990] 2 NZLR 529 (CA) at 536.

defendant would only be excused to manslaughter with the introduction of the partial defence of excessive self defence.

One case example that illustrates the informal application of something analogous to an excessive self defence partial defence is *R v Wickham*.[132] Wickham shot the deceased in the chest in response to a physical assault. The defendant had made an emergency call to the police saying that her husband had threatened to hit her with a brick and had put her under the pool cover. It is arguable that the elements of murder were made out given the "reckless" nature of firing the gun and that self defence was not run successfully.[133] In this instance it could be imported that in the face of an imminent attack the defendant acted unreasonably but the jury responded through convicting her of manslaughter despite there being no formal partial defence of excessive self defence.

I contend that the main issue with the conclusion of the Law Commission is their lack of recognition of the effect that unreasonable force has on the convictions of those victims of family violence that commit homicide. It is hard to impose a reasonableness standard on conduct of a person whose experience is so different from that of the reasonable person. Until the Law Commission recognises this logic defendants in these situations will continue to be treated unjustly.

As mentioned several times throughout the report, the real failing in the criminal justice system for these victims is a lack of understanding about the situation they face. Until that education has permeated through the justice system and on to potential jurors it is nearly impossible to achieve a just result when examining defendants against an objective reasonable person standard of behaviour. Until the element of reasonableness is removed from application of self-defence through a partial defence or judicial interpretation the result cannot be said to be equitable to victims of family violence who commit homicide.

IV Conclusion

This report has acted as a critique on the Law Commission report on victims of family violence who commit homicide and the law's response to such victims. Whilst the Law Commission made some constructive headway in their recommendation to relax the imminence requirement for such victims of family violence they erred in the conclusion to not address the reasonable force element of the self-defence provision. It is this reasonable element of the provision in addition to imminence that inhibits victims of family violence who commit homicide from successfully relying on self-defence.

With this gap in the legal framework in mind the report continued to discuss the arguments of the Law Commission on the topic of partial defences. The assessment of the arguments surrounding the creation of a partial defence was split into two sections: in principle arguments and practical analysis. With the resulting conclusion being that in principle arguments in favour of partial defences carry a lot of weight when attached to the concept of fair labelling. It is this concept which lies at the crux of the whole thesis. That there is something unique and different

[132] *R v Wickham* HC Auckland CRI-2009-090-010723, 20 December 2010 at 39.

[133] At 39.

about this particular class of victims and the experiences that they face, such that it is not right to label them as "murderers" and that it is not right to impose a reasonable standard on their conduct.

In light of an assessment of the options of partial defences, I concluded that the option that is not only of sound logic but also supported by the unjust treatment of victims in a number of New Zealand cases is that of a partial defence of excessive self-defence. This would enable those victims facing a murder conviction for unreasonable responses a just outcome.

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