– MITIGATED HOMICIDE –

A PARTIAL DEFENCE TO MURDER AND A SENTENCING TARIFF FOR MANSLAUGHTER

Melanie Rose Knight Redding

A dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws (Honours)

Faculty of Law
University of Otago
Dunedin

October 2016

– ACKNOWLEDGMENTS –

To my supervisor, Professor Kevin Dawkins – thank you for your guidance and insight and your meticulous eye for detail.

To my family and friends – thank you for your constant support and patience.

– TABLE OF CONTENTS –

– INTRODUCTION –

Of all the possible crimes one can commit, homicide is universally acknowledged to be one of the most heinous. The heavy treatment of homicide in jurisdictions worldwide is indicative of this. According to Andrew Ashworth, our attitude towards homicide stems from the fact that the harm it causes is "absolutely irremediable whereas the harm caused by many other crimes is remediable to a degree."[1] Furthermore, the "finality [of death] makes it proper to regard [it] as the most serious harm that may be inflicted on another person, and to regard the culpable causing of death without justification or excuse as the highest wrong."[2]

However, as with many crimes, not all homicides are created equal. Although taking another's life can hardly be deemed "justifiable" in certain circumstances, human sympathies dictate that some instances of homicide are nonetheless seen as more wrong than others and some defendants are seen as less culpable. For the purposes of this dissertation, homicides that attract less moral culpability shall be referred to as "sympathetic homicides". The existence of sympathetic homicides necessitates the inclusion in legal systems of alternative offences to murder that are capable of recognising reduced culpability. Chief and most common among these is manslaughter, where the life of another is taken, but the requisite intention needed for murder is absent.[3]

Whereas some defences, such as self-defence, allow for the unqualified acquittal of an accused, others are only partial. Partial defences are the legal system's response to the fact that homicides come in many different forms. They do not serve to acquit the accused, but, if successful, result in the charge of a lesser offence with a lower penalty. Amongst the most common of partial defences is that of provocation. Usually, a successful provocation defence to murder will commute the offence to one

[1] A Ashworth and J Horder *Principles of Criminal Law* (7th ed, OUP, Oxford, 2013) at 237.
[2] At 237.
[3] See Crimes Act 1961, s 160(3), which states that except as provided in s 178, culpable homicide is either murder or manslaughter; s 167: "murder defined" and s 168: "further definition of murder"; s 171 states that (except as provided in s 178: "infanticide"), culpable homicide that does not amount to murder is manslaughter.

of manslaughter. This defence has existed in many jurisdictions around the world, in various forms, at one stage or another. The defence has proven to be problematic, which has lead to its abolition in a number of jurisdictions, sometimes to be replaced by a different defence, sometimes to be replaced by sentencing discretion or legislative policy.

A key issue related to provocation is that of battered defendants. A battered defendant is one who has been subjected to prolonged (usually domestic) abuse at the hands of his or her victim. The defendant kills the abuser, feeling it is the only way to extricate him or herself from the cycle of violence. They argue they were provoked, albeit not in the sudden manner ordinarily associated with the concept of provocation. Battered defendants create a curious predicament for the legal system. Their actions often fall soundly into the category of sympathetic homicide. The question, therefore, is how best to accommodate these defendants without inadvertently also accommodating less sympathetic homicides. This issue is particularly prevalent in New Zealand, which has one of the highest reported rates of intimate partner violence in the developed world.[4]

The New Zealand Parliament repealed the defence of provocation in 2009. There has been no replacement defence. Provocation is instead dealt with at the sentencing stage of the case. The first Part of this dissertation will provide an overview of the partial defence of provocation in New Zealand. The second Part will examine approaches taken towards battered defendants in some other jurisdictions around the world. A number of different partial defences have been employed. The comparative focus will be on the United Kingdom (UK), Australia and Canada, as these jurisdictions have similar origins to that of New Zealand. The third Part will look at the current approach to sentencing in the Sentencing Act 2002. It will consider the inadequacy of this approach and discuss the need for a sentencing tariff for manslaughter. Finally, Part 3 will consider what such a tariff might look like in the New Zealand context.

[4] Ministry of Justice *Discussion Document: Strengthening New Zealand's Legislative Response to Family Violence* (2015) at iii.

— PART 1 —

THE DEFENCE OF PROVOCATION IN NEW ZEALAND

Introduction

Partial defences are designed to achieve a lesser conviction in circumstances that, but for the defence, would constitute murder. They are only available in homicide cases.[5] The partial defence of provocation under s 169 of the Crimes Act 1961 served to reduce a charge of murder to one of manslaughter in circumstances where the accused felt provoked into action, losing his or her self-control. The elements of murder had to first be established before the defence could apply.[6] Section 169 was the final development in a long history of the defence, dating back to the seventeenth century.[7] In 2009 the provocation defence was repealed. Currently, the only partial defences available in New Zealand are that of infanticide and killing pursuant to a suicide pact.[8]

I The Defence At Common Law

The concept of provoked killing originated at common law. It provided a defence when there was an objectively recognised outrage to the defendant's honour. Initially, there was no generally applicable defence.[9] The law simply held that if the defendant killed in a state of passion resulting from some serious provocation, which usually required some act of violence made against them, he or she might succeed in arguing the defence.[10]

In *R v Welsh*[11], Keating J enunciated this need for "serious provocation" in the objective and generalised requirement that the provocation be "something which might naturally cause an ordinary and reasonably minded man to lose his self-control

[5] New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007) at 9.
[6] Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA169.02].
[7] At [CA169.04].
[8] Crimes Act 1961, ss 178(1), 180(1).
[9] New Zealand Law Commission, above n 5, at 19.
[10] Robertson, above n 6, at [CA169.04].
[11] *R v Welsh* (1869) 11 Cox CC 336 at 339.

and commit such an act".[12] After the adoption of this test, judges repeatedly declined to bring in reference to any particular features of the defendant's character.[13] In the case of *Bedder v Director of Public Prosecutions,*[14] the appellant killed a prostitute who teased him about his impotence. In directing the jury, the judge said that in deciding whether the taunting would have provoked an ordinary man to react in this way, the appellant's impotence was irrelevant. This was despite the fact that, firstly, a potent man would not have found himself in that situation in the first place, and secondly, that the appellant's impotence would likely have made him especially sensitive to such provocation.[15]

The strictness of this approach prompted the enactment of legislation in New Zealand. It was argued that there was no room being left for compassion in instances where it was justified. It was felt that a greater balance was needed between condemning intentional killing and allowing flexibility to be shown when necessary.[16]

II Early Legislation

Section 165 of the Criminal Code Act 1893 and later, ss 184 and 185 of the Crimes Act 1908, retained the common law concept of provocation in New Zealand. These sections required that the homicide be committed "in the heat of passion caused by sudden provocation".[17] Any "wrongful act or insult" might suffice if it was of such a nature as to be "sufficient to deprive an ordinary person of the power of self-control" and if the offender acted on it "on the sudden" before there had been "time for his passion to cool".[18] Although the essence of the common law was preserved, the introduction of clear statutory guidance was intended to provide greater clarity to judges when dealing with cases of this kind. The formulae of these earlier Acts, however, were not retained with the introduction of the new s 169 of the Crimes Act 1961.[19]

---

[12] Robertson, above n 6, at [CA169.04].
[13] At [CA169.14].
[14] *Bedder v Director of Public Prosecutions* [1954] 2 All ER 801, [1954] 1 WLR 1119 (HL).
[15] New Zealand Law Commission, above n 5, at 19.
[16] At 20.
[17] Crimes Act 1908, s 184(1).
[18] Crimes Act 1908, s 184(2).
[19] Robertson, above n 6, at [CA169.04].

III Section 169 Crimes Act 1961

When the Crimes Act 1961 entered into force, there was a shift in focus from "suddenness" and "passion" to an actual loss of control that was causally linked to the violent act.[20]

Under s 169(2) of the Crimes Act 1961, provocation was defined as "anything done or said" that, under subs (a), "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".[21] Subsection (a) has largely been identified as the most problematic part of the defence.[22] Subsection (b) required that the provocative act "did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide."[23]

It is widely agreed that Parliament intended the new statutory test to modify the wholly objective common law *Bedder* test, whilst still retaining an element of objectivity. It seems that Parliament considered that a degree of objectivity was necessary to ensure that the provocation defence would not become a licence for bad behaviour.[24]

The first case to deal with the new defence was *R v McGregor*.[25] In obiter dicta statements, North J observed that a defendant's characteristics needed to be relevant to self-control in order to provide some relief from the strictly objective *Bedder* approach. According to His Honour, the offender must be presumed to have the self-control of an ordinary person, save insofar as that power of self-control is weakened because of a personal characteristic. The characteristic needed to sufficiently differentiate the person from the ordinary person, and it needed to be sufficiently

[20] Robertson, above n 6, at [CA169.04].
[21] New Zealand Law Commission, above n 5, at 9.
[22] At 20.
[23] At 9.
[24] New Zealand Law Commission, above n 5, at 21.
[25] *R v McGregor* [1962] NZLR 1069 (CA).

permanent. There also needed to be a direct connection between the provocative act and the characteristic concerned.[26]

Most of these statements were overruled in later cases. The first case to discredit the comments in *McGregor* was *R v McCarthy,*[27] followed a few years later by *R v Campbell.*[28] The Court of Appeal in both these cases held that the *McGregor* interpretation of s 169(2)(a) disregarded the importance of the words "but otherwise". These words dictated that the defendant's characteristics were not relevant to self-control at all. Instead, they were relevant only in relation to the gravity of the provocation and their sensitivity to it.[29]

Campbell involved a young man who had suffered homosexual abuse as a child. When an older man placed his hand on Campbell's thigh and smiled, Campbell allegedly experienced a flashback to his childhood abuse, which resulted in a loss of self-control. Although the abuse and flashback were relevant in assessing Campbell's sensitivity to the provocation, they were not relevant to his power of self-control. The ordinary person, who had not experienced a flashback, would not have reacted in this way.[30]

This interpretation was reconsidered in the case of *R v Rongonui.*[31] The defendant had multiple mental disorders as well as brain damage, and was thought to have a mental age of about fifteen.[32] Any remaining self-esteem stemmed from her belief in her successful mothering of her children.[33] On the day of the homicide, she was informed that her children might be taken from her and she encountered her partner in bed with her friend. She stabbed her neighbour to death when she refused to look after the children so that Rongonui could try to prevent the taking of her children.[34]

---

[26] At 1080-1082.
[27] *R v McCarthy* [1992] 2 NZLR 550 (CA) 558.
[28] *R v Campbell* [1997] 1 NZLR 16 (CA).
[29] Robertson, above n 6, at [CA169.15].
[30] New Zealand Law Commission, above n 5, at 23.
[31] *R v Rongonui* [2000] 2 NZLR 385; (2000) CRNZ 310 (CA).
[32] New Zealand Law Commission, above n 5, at 24.
[33] Robertson, above n 6, at [CA169.15].
[34] New Zealand Law Commission, above n 5, at 24.

The trial judge criticised the *Campbell* approach. In *Rongonui,* gravity and self-control were inextricably linked in the mental processes of the accused. This made giving a direction to the jury based on the *Campbell* approach extremely difficult.[35] On appeal, a 3:2 majority upheld the distinction.[36] However, two members of the majority expressed dissatisfaction with the present law but felt bound by the wording of the statute.[37] In *R v Timoti,*[38] the Court of Appeal declined to revisit the *Rongonui* finding but observed that the division of opinion in that case accentuated the inadequacy of the statutory defence.[39]

The confusion in applying this defence began with *McGregor,* with a questionable reversal of the order of the objective and subjective considerations, and continued all the way through to *Rongonui.* The passing of almost forty years did not serve to alleviate the difficulties. It became clear that the defence, as it then stood, needed to be readdressed.

IV Movement Towards Repeal

Although as a concept the provocation defence partially justifies killing in certain circumstances, it was never going to be straightforward in its application. The movement towards repeal resulted from a combination of both practical and conceptual difficulties.

A Practical Difficulties

The statutory articulation of the ordinary person test was, as the case law shows, problematic.[40] This was ironic, given that the section was enacted in New Zealand

[35] New Zealand Law Commission, above n 5, at 24.
[36] Robertson, above n 6, at [CA169.15].
[37] New Zealand Law Commission, above n 5, at 28.
[38] *R v Timoti* [2005] 1 NZLR 466, (2004) 21 CRNZ 90 (CA).
[39] Robertson, above n 6, at [CA169.15].
[40] Julia Tolmie "Is the Partial Defence an Endangered Defence – Recent Proposals to Abolish Provocation" (2005) NZ L Rev 25 at 50.

with a view to providing greater clarity and consistency in the application of the defence. Sir Francis Boyd Adams has criticised the *McGregor* approach.[41]

The idea behind the test was that different things provoke different people. However, because a defendant's characteristics were relevant only to the gravity of the provocation, a defendant who was incapable of reaching the "ordinary" standard of self-control would fail in making out the defence. It was irrelevant that the inability to reach an ordinary standard of self-control was because of a defendant's characteristics. A victim cannot have "asked for it" or brought about his or her own fate in an objective sense, if the defendant in question had perceptions that deviated from the "normal" person. Arguably, this interpretation therefore meant that the defence was failing to achieve its objective of accommodating human weakness.[42]

The problem with the application of the objective test was not the only practical difficulty with the defence. Other minor issues were cropping up with some frequency, often resulting in retrials.[43] However, its conceptual and theoretical flaws were arguably proving even more problematic.[44]

B Conceptual Difficulties

The traditional rationale for the existence of partial defences such as provocation was to avoid the mandatory sentence for murder of life imprisonment, and before that, capital punishment. In New Zealand, the Sentencing Act 2002 abolished the mandatory sentence of life imprisonment for murder.[45] Arguably, this removed the need for the partial defence.[46]

Provocation first gained traction in a society that favoured whites, males, heterosexuals, and the middle class.[47]At common law, it was often used to protect a

[41] Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell NZ, Wellington, 1971).
[42] New Zealand Law Commission, above n 5, at 43.
[43] At 21.
[44] At 42.
[45] New Zealand Law Commission, above n 5, at 9.
[46] Tolmie, above n 40, at 28.
[47] New Zealand Law Commission, above n 5, at 46.

male's honour, often in circumstances of acts of infidelity by his partner. Initially, then, it essentially endorsed an attitude that women are the property of their husbands.[48] Although in recent times the defence was no longer successfully invoked in such instances of infidelity,[49] some felt that nonetheless the defence was based on an out-dated world-view, and therefore ought to be abolished or reformed.

Some critics also felt that the defence tended to operate against homosexual men. To allow the defence to succeed implied that the reaction that occurred was excusable. Therefore, in cases where the provocation involved a homosexual advance, a successful use of the defence implied that it is natural to feel revolted and outraged by homosexual men.[50]

Furthermore, although open-ended as to the emotions that may be induced by the provocative act, the defence was most commonly invoked in the context of homicidally violent anger. The question raised was why this particular response to adversity should be excused yet other, perhaps less fatal, responses should not be offered the same protection.[51]

Although there were some benefits and strengths offered by s 169, its flaws were therefore becoming overwhelmingly apparent. No legislative tool would be perfect. However, when a defence produces so many problems, the question will inevitably be asked as to whether retention of the provision can really be justified.

V The Clayton Weatherston Case

Clayton Weatherston was a University of Otago part-time lecturer who was in a relationship with one of his students, Sophie Elliot. On the 9th of January 2008, Weatherston went to Elliot's family home and stabbed her to death. At the trial in 2009, he admitted to the killing but claimed he had been provoked.[52] The supposed reason for his actions was the "emotional pain that she had caused him over the last

[48] Tolmie, above n 40, at 46.
[49] New Zealand Law Commission, above n 5, at 86, 88.
[50] At 49.
[51] At 50.
[52] *Weatherston v R* [2011] NZCA 276.

year"[53] and that she had insulted him and attacked him with a pair of scissors. In finding him guilty of murder, the jury were satisfied beyond reasonable doubt that the Crown had excluded the defence of provocation.

On appeal, a major issue raised was whether the media coverage during the trial, including a television interview and two magazine articles, had made it unfair. The catalyst for the media coverage was another provocation-related murder trial that same year. This was the case of Ferdinand Ambach,[54] who was charged with murdering Ronald Brown. Ambach claimed he had been provoked by Brown, who had made sexual advances toward him. The jury found that there was a reasonable possibility these sexual advances had occurred and provoked Ambach, which lead to a verdict of manslaughter.

This verdict of manslaughter was the latest in a number of cases where the defence had relied on provocation. Several of these verdicts had been controversial. Friends and families of the victims resented the assertion that their loved ones had, in some way, brought about their own death.

The cases of Weatherston and Ambach served as a catalyst for reform. Some critics have argued that because the repeal of the defence occurred shortly after these high profile trials took place, it was simply a rash decision by the House of Representatives to satiate the public outcry. However, in reality, repeal was underway for almost a decade before it was finalised in 2009. The New Zealand Law Commission Reports of both 2001 and 2007 had recommended the abolition of the provocation defence.[55] As such, the public support for abolition that accompanied these cases perhaps served as the "straw that broke the camel's back". These cases provided the incentive that Parliament needed to finally address the issue and respond to the New Zealand Law Commission's numerous recommendations.

[53] At [2] per Chambers J.
[54] *Ambach v R* [2011] NZCA 93.
[55] New Zealand Law Commission *Understanding Family Violence* (NZLC R139, 2016) at 5.

VI The Current Situation in New Zealand

The House of Representatives repealed the defence of provocation in s 4 of the Crimes (Provocation Repeal) Amendment Act 2009. In the absence of a defence, acts of provocation may be considered as a factor in the sentencing stage of murder cases. The approach was considered in *Hamidzadeh v R,*[56] in which the Court of Appeal found that the general question to be asked is whether the relevant words or conduct should be treated as reducing the offender's overall culpability.[57] Although sentencing is ultimately discretionary, there remains a presumption in favour of life imprisonment for murder that might be rebutted only if such a sentence would be "manifestly unjust".[58]

VII The Issue of Domestic Violence

Domestic violence is an issue of particular prevalence in New Zealand society. New Zealand has one of the highest reported rates of intimate partner violence in the developed world.[59] Often the perpetrator's coercive behaviour and control mechanisms make the victim feel isolated and prevent the victim's ability to see a way out of the situation. Family and cultural expectations, immigration status, and lack of understanding about violence in the home can also form a barrier to the exercise of the victim's freedom of choice.[60] It is thus within a context of isolation and desperation that instances of homicidal reaction arise. Every year, a small number of victims of family violence in New Zealand kill their abusers.[61]

In certain circumstances, such a defendant will often be charged with murder. In a small number of these cases, the defendant is able to rely on self-defence under s 48 of the Crimes Act 1961.[62] In the New Zealand Law Commission's 2016 review of cases since 2001, it was found that self-defence was claimed in ten out of sixteen cases that went to trial where victims of family violence killed their abusers and was

[56] Hamidzadeh v R [2013] 1 NZLR 369, (2012) 26 CRNZ 245.
[57] At [53] per Randerson J.
[58] Sentencing Act 2002, s 102(1).
[59] Ministry of Justice, above n 4, at iii.
[60] At 6.
[61] New Zealand Law Commission, above n 55, at 12.
[62] At 4.

successful in three. All ten cases involved women who killed their male abuser. The difficulty is that self-defence, developed primarily in the context of male violence and male standards of reasonableness, fails to recognise the different ways in which women tend to respond to violence.[63]

The typical, male-inspired scenario is that of a one-off violent confrontation between two males. Accordingly, "immediacy" of the threat combined with the proportionality of the response have become central concepts in the successful invocation of self-defence.[64] Women, however, tend to respond to violence differently. Due to disparity in strength, women might employ a weapon against an unarmed aggressor; they might respond with disproportionate force because the real threat is an ongoing one; and, they might react in a "slow burn" capacity. Rather than acting immediately, they wait for the opportune moment to attack. These factors tend to preclude the use of self-defence.[65]

There has been discussion in New Zealand of the possible introduction of a defence of "excessive self-defence". In *McNaughton v R,*[66] it was submitted for the appellant that such a partial defence should be recognised at common law where the defendant intended to act in self-defence but surpassed the reasonable amount of force in doing so.[67] The Court did not accept this. It was noted that the New Zealand Law Commission discussed the possibility of the introduction of a defence of excessive self-defence,[68] but decided against endorsing it. Instead, it opted to propose a sentencing discretion for murder.[69]

When successfully used in cases where victims of domestic violence killed their abusers, the partial defence of provocation could be viewed as doing the work of a non-existent defence of "excessive self-defence".[70] In *R v Gordon*[71] and *R v Oakes,*[72]

[63] At 71.
[64] New Zealand Law Commission, above n 55, at 7.
[65] At 7.
[66] *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467.
[67] At [56] per Harrison J.
[68] New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at 20.
[69] New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at 25-26.
[70] Tolmie, above n 40, at 38.

battered woman's syndrome could be a relevant "characteristic" under s 169 of the Crimes Act 1961. Battered woman's syndrome is usually associated with prolonged abuse within a relationship.[73] Although the syndrome is most commonly associated with women, it would perhaps be more aptly named "battered defendants syndrome", as it is not gender exclusive in its application.

However, although the provocation defence had the capacity to accommodate victims of domestic abuse, over time it was found that s 169 of the Crimes Act 1961 was unlikely to be successfully invoked by women in this situation.[74] Whilst the provocation defence was by no means perfect in its availability to battered defendants, the reform that has taken place in recent years and removal of the defence has resulted in an even more unsatisfactory situation for defendants that fit within this category. Following a consideration of the various available options by way of partial defences, the New Zealand Law Commission declined to adopt any of these when the provocation defence was repealed. Instead, it was decided that reduced culpability, encompassing prolonged abuse, should be taken into account during the sentencing stage of the case.[75] As will be discussed later in this dissertation, this approach has proved vastly inadequate.

Conclusion

New Zealand has been struggling with how best to accommodate cases of sympathetic homicide for over three centuries. In 2016, the only partial defences available in New Zealand are that of infanticide and killing pursuant to a suicide pact. Neither of these is applicable to battered defendants. The UK, Australia and Canada have all taken different approaches to dealing with this same issue of battered defendants. Tasmania has, like New Zealand, abolished its partial defence of provocation and declined to replace it with an alternative provision. The approaches taken in the UK, Canada, and the various other Australian states, however, provide a good point of comparison with the New Zealand approach of sentencing discretion.

---

[71] *R v Gordon* (1993) 10 CRNZ 430 (CA).
[72] *R v Oakes* [1995] 2 NZLR 673 (CA).
[73] Kevin Dawkins "Criminal Law and Procedure" (1994) NZ Recent Law Review 48 at 62.
[74] New Zealand Law Commission, above n 5, at 88.
[75] New Zealand Law Commission, above n 55, at 52.

– PART 2 –

OTHER JURISDICTIONS: PARTIAL DEFENCES

Introduction

The issue of how the criminal law should best respond to sympathetic cases of homicide is not one that is unique to New Zealand. The last twenty years have seen a significant amount of debate and law reform in jurisdictions worldwide. The issue of battered defendants has been a central focus of these reforms. This chapter will focus on the approaches taken in the UK, Australia and Canada, as these jurisdictions share comparative similarities with New Zealand. In addition, this chapter will briefly consider an interesting alternative defence contained in the US Model Penal Code.

I The United Kingdom

A Provocation Defence

Like New Zealand, the UK had a partial defence of provocation, which was contained in s 3 of the Homicide Act 1957. Where things done or said provoked a person to lose his or her self-control, and this provocation would have been enough to make a reasonable man do as the person did, the defence would be made out.[76] This defence was repealed in 2009.

The former UK defence was criticised on two main grounds. The first was that the "reasonable man" test was difficult to apply. The second was that the focus on self-control was problematic and tended to operate unfairly. It privileged sudden losses of temper but did not adequately accommodate "slow burn" reactions.[77] By extension, this often operated to exclude battered defendants.[78] These two principal concerns align with some of the problems posed by the New Zealand defence. Like New Zealand, the various problems eventually led to a process of reform. The two

[76] Homicide Act 1957 (UK), s 3.
[77] A Cornford "Mitigating Murder" (2016) 10 Crim L & Phil 31 at 32.
[78] D Ormerod and K Laird *Smith and Hogan's Criminal Law* (14th ed, Oxford University Press, London, 2015) at 577.

jurisdictions, however, took very different directions as a result of that process. Whereas New Zealand opted for sentencing discretion, the UK formulated a new and distinct defence of loss of control.

B Loss Of Control Defence

The loss of control defence is contained in ss 54 and 55 of the Coroners and Justice Act 2009 (UK). A defendant is not guilty of murder if the killing resulted from a loss of self-control that had a qualifying trigger.[79] It must be possible that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the defendant might have reacted in the same way.[80]

The first element of the loss of control defence requires that there be an actual loss of self-control. Prior to the establishment of the new defence, the Law Commission for England and Wales had proposed the abandonment of loss of self-control as an element due to the problems it created with the provocation defence. However, in formulating the new defence, the UK Parliament put in place a number of mechanisms to tackle the limitations caused by the loss of control element.

1 Qualifying triggers

The first is the qualifying trigger element. One or both of two triggers might suffice. The first trigger is a fear of serious violence from the victim against either the defendant or another person.[81] This trigger distinguishes the defence from the original provocation defence.[82] The "fear of serious violence" trigger accommodates two circumstances. The first is where the threat is not imminent but anticipated. This encompasses the circumstances of battered defendants who fear further violence. The second is where the defendant overreacts or uses excessive force in responding to a threat the defendant perceived he or she faced.[83]

[79] Coroners and Justice Act 2009 (UK), s 54(1)(a), (b).
[80] Section 54(1)(c).
[81] Section 55(3).
[82] Ormerod and Laird, above n 78, at 588.
[83] At 588.

The second trigger is that the loss of control was caused by things done or said that constitute circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.[84] Jonathan Herring argues that this addition creates a positive change from the provocation defence. If the defendant has been seriously wronged, then the other elements of the defence will be relatively easy to satisfy. Battered defendants will no longer have to rely on evidence of the psychological effects of "battered woman's syndrome", which are often ambiguous.[85] If this is the case, then the loss of control defence is much greater in scope than the former provocation defence.[86]

Section 55(6) of the Act provides some limitations on the qualifying trigger element. In determining whether a loss of self-control had a qualifying trigger, the defendant cannot claim a fear of serious violence if he incited the provocative act in order to have an excuse to use violence.[87] In addition, if the provocation constituted sexual infidelity, this is to be disregarded.[88]

The difficulty is that the Act does not define many of the terms, which it employs in the loss of control defence, and provides little guidance as to how juries should approach the questions in practice.[89] Both "sexual infidelity" and "seriously wronged" are left without statutory definition.[90] According to *Clinton v R,*[91] a person cannot claim to have been seriously wronged by sexual infidelity by a spouse or partner. However, although the act of sexual infidelity cannot constitute a qualifying trigger in its own right, it can be taken into account where the facts indicate the existence of a qualifying trigger, and whether an ordinary person would have had a similar reaction.[92] The effect of the sexual infidelity on the defendant might still be relevant.[93] Some critics point out that the effect of this is that although the new law purports to

[84] Coroners and Justice Act (UK), s 55(4).
[85] Jonathan Herring "The Serious Wrong of Domestic Abuse and the Loss of Control Defence" in Alan Reed and Michael Bohlander (ed) *Loss of Control and Diminished Responsibility Domestic, Comparative and International Perspectives* (Ashgate Publishing Ltd, Farnham, 2013) 65.
[86] Cornford, above n 77, at 35.
[87] Coroners and Justice Act (UK), s 55(6)(a).
[88] Section 55(6)(c).
[89] Ormerod and Laird, above n 78, at 594.
[90] LH Leigh "Clarifying the Loss of Control Defence" (5 July 2013) Criminal Law & Justice Weekly <http://www.criminallawandjustice.co.uk>.
[91] *Clinton v R* [2012] EWCA Crim 2.
[92] Leigh, above n 90.
[93] Ormerod and Laird, above n 78, at 595.

exclude sexual infidelity from acting as a qualifying trigger, it does not do so in practice. There are at least some circumstances where people might justifiably feel seriously wronged by an instance of infidelity.[94] Caution should be taken in allowing sexual jealousy to be a valid basis for exoneration. As discussed in relation to the history of the provocation defence in New Zealand, allowing sexual infidelity to be a provocative act (whether directly or indirectly) impacts upon issues of autonomy and possessive relationships.

2 Reformulated objective test

The second means of mitigating the issues inherent in the loss of control element is the inclusion of a reformulated objective test, which is the third element of the defence.[95] The "ordinary person" standard includes a normal degree of tolerance and self-restraint. However, there is a subjective twist on the objective test, requiring the ordinary person to have the characteristics and to be in the circumstances of the defendant.[96] It has been suggested that the use of the word "tolerance" adds new demands to the objective test. The defence now excludes reactions based on possessiveness or bigotry, which is important in relation to sexual infidelity cases. It is claimed that the new wording of the objective test works in conjunction with the trigger element to limit the scope of the defence when it comes to unsympathetic cases.[97]

Others have criticised the wording, which refers explicitly to the ordinary person having the "sex and age" of the defendant. Some critics argue that the "sex" requirement reinforces stereotypes about gender-typical reactions to provocation. Others argue that the test does not go far enough. The requirement that the person possess an ordinary level of self-restraint does not adequately account for situations where the very violence that has led to a battered defendant killing their abuser has in fact affected the level of self-restraint they possess. In such instances, the domestic

[94] Cornford, above n 77, at 35.
[95] At 34.
[96] Coroners and Justice Act (UK), s 54(1)(c).
[97] Cornford, above n 77, at 37.

abuse victim might not possess an ordinary level of self-control and would fail to make out the defence.[98]

3 Expanding "loss of control"

The final strategy used to mitigate the problems inherent in the loss of control element is to broaden the legal concept of loss of control to allow for a greater number of sympathetic cases. As discussed, the loss of control element has a tendency to exclude "slow burn" reactions. The new defence, however, explicitly states that the loss of control need not be sudden.[99] This was affirmed in *Dawes & Ors v R,*[100] where the Court of Appeal also explicitly identified that defendants act in different ways and acknowledged that a loss of control may result from "cumulative provocation" over time.[101] In theory, this accommodates the situation of battered defendants.

The difficulty with this attempt at broadening the defence is that it is difficult to imagine a loss of self-control that is not sudden and not temporary.[102] If a loss of control were prolonged, one would assume that this becomes a case of insanity.[103] Furthermore, although the qualifying triggers purport to also allow for "fear" reactions, loss of control is predominantly connected with anger. According to some, this defence will therefore continue to privilege the wrong types of reaction.[104] In New Zealand, the provocation defence was criticised for appearing to give special protection to angry, homicidally violent reactions, whilst neglecting to allow for other less fatal reactions to provocation.

These three mechanisms have therefore gone some way towards dealing with the inherent issues raised by the concept of "loss of control". Arguably, however, they still fall short. Each of these strategies designed to resolve the issues require ad hoc alternations, such as the exclusion of sexual infidelity as a qualifying trigger. Ultimately, it seems the major issue revolves around the continued emphasis on loss

[98] Cornford, above n 77, at 37-38.
[99] Coroners and Justice Act (UK), ss 54(1)(a), 54(2).
[100] *Dawes & Ors v R* [2013] EWCA Crim 322.
[101] At [54].
[102] Cornford, above n 77, at 38.
[103] Ormerod and Laird, above n 78, at 585.
[104] Cornford, above n 77, at 38-39.

of control.[105] It seems likely that, if a similar approach were taken in New Zealand, the same problems that have been observed in the UK would arise.

II Australia

Australia's criminal laws are state-based. They can be broadly grouped into two categories: code states (Tasmania, Western Australia, Queensland, the Northern Territory (NT) and the Australian Capital Territory (ACT)) and common law states (New South Wales (NSW), Victoria and South Australia).[106]

Australia's various states have taken a range of approaches towards cases of sympathetic homicide and the defence of provocation. Tasmania repealed its defence of provocation in 2003 and declined to replace it with an alternative. The other seven states, however, have either retained the defence in an altered form or abolished it and replaced it with a more targeted defence. In 2005, Victoria went even further by introducing a new offence of defensive homicide. This has since been repealed by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).

A Provocation Defence

Queensland,[107] NT[108] and the ACT[109] have retained the partial defence of provocation. The other five states have repealed it. The defences in NT and ACT are almost identical. The defences apply if the conduct causing death is the result of a loss of self-control induced by the deceased's conduct. The deceased's conduct must be of a kind that could have induced an ordinary person to react in this way. The conduct of the deceased need not have occurred immediately before that of the defendant and either words or gestures might suffice. This seems to allow for "slow burn" reactions. Although the defence is limited as conduct, of a non-violent but sexual nature, will

[105] Cornford, above n 77, at 39.
[106] Andrew Hemming "Provocation: A Totally Flawed Defence that has No Place in Australian Criminal Law Irrespective of Sentencing Regime" (2010) 14 UWSLR 1 at 1.
[107] Criminal Code Act 1899 (Qld), s 304.
[108] Criminal Code 1983 (NT), s 158.
[109] Crimes Act 1900 (ACT), s 13.

not be sufficient provocation in and of itself, it might still be a relevant factor in assessing the deceased's behaviour.

Queensland's provocation defence requires that the killing be done in the heat of passion caused by sudden provocation and before there is time for the person's passion to cool.[110] Provocation cannot be based on words alone other than in circumstances of a most extreme and exceptional character.[111] This exception is problematic because "extreme and exceptional" cases are left undefined by the Act.[112]

This section does not apply (except in circumstances of a most extreme and exceptional character), if a domestic relationship exists between the defendant and the victim and the 'provocation' is based on the victim ending the relationship or changing the nature of the relationship.[113] This limitation is not unlike the sexual infidelity limitation in the UK loss of control defence. However, in finding proof of circumstances of an extreme and exceptional character, regard may be had to any relevant history of violence.[114]

B Preservation Defence

Although Queensland's provocation defence is narrower than those in NT and ACT, Queensland also has a more targeted partial defence in addition to this. In 2010, Queensland introduced a new partial defence of "killing for preservation in an abusive domestic relationship" (the "preservation defence").[115] If the deceased has committed acts of serious domestic violence against the defendant in the course of a domestic relationship, the defendant is to be guilty only of manslaughter, not murder.[116] The defendant must believe that it is necessary for the defendant's own preservation from

[110] Criminal Code Act (Qld), s 304(1).
[111] Section 304(2).
[112] Heather Douglas "A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women" (2012) 45 Australian and New Zealand Journal of Criminology 367 at 372.
[113] Criminal Code Act (Qld), s 304(3).
[114] Section 304(6).
[115] Criminal Code Act (Qld), s 304B.
[116] Section 304B(1)(a).

death or serious harm to do the act or make the omission that causes the death.[117] This belief must be held on reasonable grounds.[118]

The idea is that a defendant can use this defence when she has killed in non-confrontational circumstances in response to an ongoing threat. It therefore accommodates defendants who cannot argue self-defence[119] under the Queensland provision. This defence has been criticised on the grounds that a defendant in circumstances like this could be acquitted in other Australian states rather than convicted of manslaughter.[120]

The Queensland approach is thus quite distinct from those taken by both the UK and New Zealand. Whilst still retaining the provocation defence in a general format, the additional defence under s 304B provides specifically for the issue of battered defendants.

C Extreme Provocation Defence

NSW has also retained the provocation defence. However, NSW has amended the defence as one of "extreme" provocation.[121] It is similar in a number of ways to the Queensland, NT and ACT defences, but it goes further in a few key respects. Firstly, it requires that the deceased's conduct that induces the provocation be a serious indictable offence.[122] In addition to the exclusion of non-violent sexual advances from the types of conduct that can constitute provocation, s 23(3)(b) of the Crimes Act 1900 also excludes conduct the accused has incited for the purpose of providing an excuse to use violence. This same exclusion is present in the UK loss of control defence. Finally, s 23(5) excludes self-induced intoxication of the defendant as a factor that can be taken into account in deciding whether extreme provocation occurred.

---

[117] Section 304B(1)(b).
[118] Section 304B(1)(c).
[119] Section 271.
[120] Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand" (2012) 34 Syd LR 467 at 480.
[121] Crimes Act 1900 (NSW), s 23.
[122] Section 23(2)(b).

D Defence Of Excessive Self-Defence

NSW[123], Western Australia[124] and South Australia[125] all have a statutory defence of excessive self-defence. This provides for circumstances where the accused honestly believes he or she must defend himself or herself with lethal force but where this belief is not reasonably held.[126] As discussed, although there has been discussion in New Zealand of the introduction of a defence of "excessive self-defence," it has not been endorsed by the New Zealand Law Commission. In Victoria, the Victorian Law Reform Commission recommended a similar approach of "excessive self-defence", but in 2005 the Victorian Parliament instead introduced a new offence of defensive homicide.[127]

E Defensive Homicide Offence

Although this provision has now been repealed in Victoria, it is a concept worth examining. In 2005, a number of reforms were implemented in Victoria through the Crimes (Homicide) Act 2005, which abolished the partial defence of provocation. Self-defence was also codified as a defence to murder and its scope was widened to better accommodate battered defendants. The Crimes (Homicide) Act 2005 also introduced a new provision that allowed the admission of evidence highlighting the social context of family violence in homicide cases involving battered defendants.[128] Finally, a new offence of defensive homicide was established.[129]

The 2010 case of *R v Middencorp*[130] prompted the first major debates about whether the new offence was desirable. The defendant was found guilty of defensive homicide after stabbing his former female partner in the back four times. He alleged that she

[123] Crimes Act (NSW), s 421.
[124] Criminal Code Act Compilation Act 1913 (WA), s 248(3).
[125] Criminal Law Consolidation Act 1935 (SA), s 15(2).
[126] Sheehy, Stubbs and Tolmie, above n 120, at 478.
[127] At 478.
[128] Madeleine Ulbrick, Asher Flynn and Danielle Tyson "The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders" (2016) 40(1) Melbourne University Law Review (Advance) at 18.
[129] Crimes Act 1958 (Vic), s 9AD. This has since been repealed by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).
[130] *R v Middencorp* [2010] VSC 202.

came at him with a knife. The decision attracted criticism for being unjust.[131] Witnesses reported hearing Middencorp state after the attack that his victim "got what she deserved".[132] There was also evidence that Middencorp was in breach of bail conditions and an intervention order.[133] Subsequently, the Victorian Department of Justice published a discussion paper calling for submissions on whether the defensive homicide offence was still justified. If so, the question was whether it should be limited. At that stage, there had only been two cases where battered women had killed their abusers since the 2005 reforms. The outcomes of these cases, according to the Department of Justice, indicated a significant improvement in the way the law was dealing with such situations.[134]

In considering whether repeal was in order, some of the criticisms levelled at defensive homicide by the Victoria Department of Justice were those previously levelled at provocation. Chief among these were that it operated to condone male violence and that it supported a culture of victim blaming.[135] At the end of 2014, defensive homicide was abolished in Victoria.[136]

III Canada

Section 232 of the Canadian Criminal Code 1985 allows murder to be commuted to manslaughter where the person who committed it did so in the heat of passion caused by sudden provocation. Provocation is defined as conduct that would constitute an indictable offence under the Act punishable by at least five years imprisonment. The conduct must have been sufficient to deprive an ordinary person of the power of self-control. The accused must have acted by sudden provocation and before their passion had time to cool.[137]

[131] Ulbrick, Flynn and Tyson, above n 128, at 20.
[132] *Middencorp,* above n 130, at [10].
[133] At [20].
[134] Ulbrick, Flynn and Tyson, above n 128, at 20.
[135] Criminal Law Review, DOJ (Vic), 'Defensive Homicide Consultation Paper' at 29-30.
[136] Ulbrick, Flynn and Tyson, above n 128 at 22.
[137] Criminal Code (R.S.C., 1985, c. C-46), s 232(2).

The key difference in the Canadian approach is the requirement that the provocative conduct be an indictable offence. This element is also present in the NSW defence of extreme provocation.[138]

IV US Model Penal Code

The US Model Penal Code contains a defence of "extreme mental or emotional disturbance". The defence commutes murder to manslaughter in instances where murder is "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."[139] Approximately one third of the US states that have codified their criminal law in response to the Model Penal Code have adopted this provision, usually doing so only partially. Some commentators suggest that this level of resistance speaks less about the virtues of the defence, and more about the state of US politics. No politician wants to be seen as taking a "soft" approach to crime, much less murder.[140]

Although this defence has some strengths, it too has been the subject of criticism. One issue that has been raised is that, in practice, the Code defence will be over-inclusive. The only limit on its availability is the "reasonable explanation or excuse" element, a limitation which is extremely broad. Commentators who have looked into how the defence has operated in jurisdictions that have adopted it have found that it has tended to result in a free-for-all. An Arkansas jury, for example, found that an accused had a "reasonable explanation" for his murder on the basis that his victim fiancée had danced with another man.[141]

Conclusion

The approaches taken by the UK, Australia and Canada are inconsistent and disparate. All three jurisdictions share common origins with that of New Zealand. If New Zealand were to adopt a new partial defence, it is essential that such a defence

[138] Crimes Act (NSW), s 23(2)(b).
[139] US Model Penal Code, s 1.12(2), cited in Cornford, above n 77, at 40.
[140] Cornford, above n 77, at 40.
[141] At 40.

succeed where the former defence of provocation failed. It seems unlikely that any of the above approaches, if adopted in New Zealand, would do so. Each of the approaches has been subject to criticism. In the New Zealand context, where domestic violence and intimate partner homicide is more prevalent, issues encountered with the defences in overseas jurisdictions would arguably be compounded if any of the defences were adopted in New Zealand. Of course, no statutory defence will be without its flaws. Parliament can formulate and reformulate a partial defence many times in order to try and achieve its aim, but the very nature of a written, statutory defence ultimately means it will be too broad or too narrow. It is the contention of this dissertation that for this reason, the adoption of a new partial defence in New Zealand might not be the right approach to take in relation to the issue of battered defendants. The next chapter will look at this in further detail and suggest that the establishment of a sentencing tariff for manslaughter might be a more apt approach.

– PART 3 –

A NEED FOR REFORM

Introduction

New Zealand has the highest reported rate of intimate partner violence in the first world. As a result of ongoing domestic violence, homicides are not uncommon.[142] According to the *Fourth Annual Report* of the Family Violence Death Review Committee (FVDRC), cases where a battered victim kills his or her abuser account for less than 5 per cent of all homicides in New Zealand.[143] Although this percentage might seem low, in comparison with other jurisdictions, New Zealand's statistics are concerning.

Although it is helpful to consider the approaches that have been taken in other jurisdictions, it is therefore important to recognise the unique social context in New Zealand. The discussion in Part 2 makes it clear that no singular approach taken in the overseas jurisdictions has been without fault. Furthermore, the problems posed by various defences in other jurisdictions, may very well be compounded in the New Zealand context. As there are a greater number of battered defendants, if the same approaches and the limitations that come with them were adopted in New Zealand, it is arguable that the issues will become more pronounced.

For now, New Zealand deals with battered defendants at the sentencing stage of the case. This chapter will therefore consider what the current approach looks like and why there is room for improvement. It will then consider possible options going forward and advocate for the adoption of a sentencing tariff for manslaughter in New Zealand.

[142] New Zealand Law Commission, above n 55, at 5.
[143] At 6.

I The Sentencing Act 2002

There are several features of the Sentencing Act 2002 that are important for understanding the process that is undertaken in the sentencing of serious offences.

A Presumption Of Life Imprisonment

Although s 102 of the Sentencing Act 2002 provides that there is a presumption of life imprisonment in relation to murder, the exception is if the sentence of life imprisonment would be "manifestly unjust".[144]

According to the case law, the "manifestly unjust" threshold will only be met in exceptional circumstances.[145] Since the enactment of the Sentencing Act 2002, there have only been six cases in which the presumption has been displaced and a finite sentence given.[146] Two murder cases in which the threshold was found to be met were *R v Wihongi*[147] and *R v Rihia.*[148] Notably, both cases involved family violence and were among the lowest sentences imposed for murder in New Zealand.[149] As *Wihongi* is a Court of Appeal case, it is binding on the High Court, which means that circumstances where victims of domestic violence kill their abusers will most probably satisfy the test.[150]

In *Wihongi,* the defendant followed the victim out of the house and stabbed him outside. When he drove away, she followed and when she reached his car, punched at him through the window.[151] For years before the homicide, the defendant had suffered physical and sexual violence from her victim and from others. She was also cognitively impaired and displayed features of post-traumatic stress disorder, anxiety and depression.[152] The threshold was satisfied and she was initially sentenced to a finite term of 8 years' imprisonment. On appeal, this was extended to a finite period

[144] Sentencing Act 2002, s 102(1).
[145] New Zealand Law Commission, above n 55, at 12.
[146] At 171.
[147] *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.
[148] *R v Rihia* [2012] NZHC 2720.
[149] New Zealand Law Commission, above n 55, at 12.
[150] At 172.
[151] New Zealand Law Commission, above n 55, at 131.
[152] *R v Wihongi,* above n 147, at [19]-[22].

of 12 years' imprisonment, but the Court of Appeal did not depart from the High Court's assessment that the "manifestly unjust" threshold was satisfied.[153]

In *Rihia,* the defendant threw a speaker at the defendant's head, causing him to fall onto a couch. She then proceeded to stab him in the chest as he lay on the couch.[154] Rihia also demonstrated significant mental impairment induced by years of alcohol abuse and physical abuse by her victim. The "manifestly unjust" threshold was satisfied, and a finite term of 10 years' imprisonment was imposed. This was calculated from a 12-year starting point which was established with reference to *Wihongi.*[155]

However, the presumption under s 102 of the Sentencing Act 2002 has not always been displaced in cases of this kind.[156] The issue was not addressed in the murder cases of *R v Neale*[157] or *R v Reti*.[158] In *Reti,* the defendant stabbed the victim in the leg following an argument. She called for help and the victim was treated. Later that day, they argued again, and the defendant stabbed the victim "with so much force that the whole blade was buried in his chest". She claimed that this was preceded by taunting statements made by the victim and that he spat in her face and kicked her in the stomach. The defendant unsuccessfully relied on provocation.[159] In *Neale,* the victim and the defendant had been in an on-again, off-again relationship. Neale went to the victim's home with a knife in her handbag and stabbed him multiple times whilst he was in the shower.[160] Her use of the provocation defence was also unsuccessful.[161] Notwithstanding the fact that the case post-dated the amendments to the Sentencing Act 2002, the judge in *Neale* stated that the mandatory sentence for murder was life imprisonment. Regardless, however, there appears to have been no suggestion that the s 102 presumption might have been displaced.[162]

---

[153] New Zealand Law Commission, above n 55, at 46.
[154] New Zealand Law Commission, above n 55, at 131.
[155] *R v Rihia*, above n 148, at [25]-[33].
[156] New Zealand Law Commission, above n 55, at 172.
[157] *R v Neale* HC Auckland CRI-2007-004-3059, 12 June 2009.
[158] *R v Reti* HC Whangarei CRI-2007-027-2103, 9 December 2008 [*Reti* (HC)]; and *R v Reti* [2009] NZCA 271.
[159] *Reti* (HC), above n 158, at [3]-[4].
[160] New Zealand Law Commission, above n 55, at 131.
[161] At 133.
[162] At 172.

Whereas in *Wihongi* and *Rihia* there was prolonged abuse that had resulted in mental impairment, *Reti* and *Neale* might be distinguished as the provocative acts, although violent, appeared to be more isolated. These cases therefore do not fit so easily into the framework of a victim who kills his or her long-term aggressor. This may account for distinct differences in sentences between the first two cases and the latter two cases.[163]

B Minimum Period

If this threshold is not met, and life imprisonment is imposed for murder, a minimum sentence must be imposed. The Sentencing Act 2002 contains a hierarchy of minimum periods of imprisonment.[164] Section 103(2) prescribes a minimum period of imprisonment of ten years. However if the murder was committed with aggravating factors under s 104(1)(a)-(h) of the Sentencing Act 2002, a minimum period of 17 years is prescribed, unless it would be "manifestly unjust". Under s 104(1)(i), the list is not exhaustive and can encompass "any other exceptional circumstances."

Although both ss 102 and 103 of the Sentencing Act 2002 use the phrase "manifestly unjust", courts have shown a willingness to depart from the 17-year presumptive sentence in a wider range of circumstances than in relation to the presumption of life imprisonment. Due to this, and also to the harshness of the 17-year sentence, more offenders are likely to meet the "manifestly unjust" threshold.[165]

C "Three Strikes" Regime

In 2010 the Sentencing Act 2002 was amended to introduce the "three strikes" provisions in ss 86A-86I. Offences that are categorised as "serious violent offences" are defined under s 86A, which makes provision for a number of offences of a particularly violent or sexual nature under the Crimes Act 1961. Offences of this kind will either be a stage-1, stage-2 or stage-3 offence under the subsequent provisions.

[163] New Zealand Law Commission, above n 55, at 172.
[164] New Zealand Law Commission, above n 55, at 172.
[165] At 172.

Under s 86B the offender must be convicted of a stage-1 offence and must be warned about the implications of a stage-2 offence. Under s 86C, if convicted of a stage-2 offence, the offender will no longer be eligible for parole and must serve the full term of imprisonment. If convicted under s 86D of a stage-3 offence, the offender must serve the maximum available sentence for that offence but also without parole unless it is subject to a "manifestly unjust" exception. Section 86E applies if the offender is convicted of a stage-2 or stage-3 murder and for manslaughter committed as a stage-3 offence.[166]

1 Stage-2 and stage-3 murder

If the commission of a murder is a stage-2 or stage-3 offence, the court must sentence the offender to life imprisonment without parole, unless this would be "manifestly unjust". If this threshold is met, a stage-2 offence attracts a minimum period of 10 years and a stage-3 offence attracts a minimum period of 20 years. If this 20 year period would again be "manifestly unjust", s 103 of the Sentencing Act 2002 applies and the minimum period must not be lower than 10 years.[167] There is no scope to impose a finite sentence.[168]

2 Stage-3 manslaughter

If an offender commits manslaughter as a stage-2 offence, the court is not limited to the imposition of a sentence of life imprisonment and retains a sentencing discretion. The offender will, however, be required to serve the length of the sentence without parole.[169] If it is a stage-3 offence, a life sentence must be imposed with a minimum sentence of at least 20 years. If this would be "manifestly unjust", the minimum sentence might be decreased to 10 years.[170] As with stage-2 and stage-3 murder convictions, the court is not able to depart from the life sentence, even if it seems "manifestly unjust".[171]

---

[166] New Zealand Law Commission, above n 55, at 175-176.
[167] Sentencing Act, s 86E.
[168] New Zealand Law Commission, above n 55, at 176.
[169] Sentencing Act, s 86C.
[170] Section 86D.
[171] New Zealand Law Commission, above n 55, at 176.

D Effects Of The Regime On Battered Defendants

The New Zealand Law Commission takes the view that the "three strikes" law could result in unjust results for battered defendants. There is the distinct possibility that a battered defendant might incur a much heavier sentence due to the "three strikes" regime. In addition, the judge does not have the ability to decline to issue a stage-1 or stage-2 warning if the judge feels that the offence should not be counted as a strike.[172]

In *Rihia,* the judge noted a previous conviction. The nature and the seriousness of this conviction are unclear in the judgment. One incident mentioned in the judgment involved the defendant hitting her husband over the head repeatedly with a table leg.[173] If this incident was the cause of Rihia's conviction, this might have been a conviction of "wounding with intent to injure", which would have qualified as a first-strike offence.[174] In *Wihongi,* there was also reference to previous history of violence by the defendant towards the deceased, though again the nature of this history is unclear.[175] If the "three strikes" regime has applied when these cases were decided, a finite term of imprisonment and the normal parole entitlements would have been precluded.[176] The results for these defendants may therefore have been drastically different.

II Sentencing Discretion

Outside of the "three strikes" regime, murder sentencing in New Zealand is a matter of discretion, although ss 102, 103 and 104 of the Sentencing Act 2002 provide some restraints.[177] In exercising their discretion, the Sentencing Act 2002 provides the New Zealand courts with a number of principles, purposes, and aggravating and mitigating factors.[178] The purposes are contained in s 7 of the Act and are directed towards ensuring the offender is held accountable, whilst also focusing on rehabilitation and the opportunity for reform. Section 8 of the Sentencing Act 2002 prescribes the

[172] New Zealand Law Commission, above n 55, at 179.
[173] *R v Rihia,* above n 148, at [16].
[174] New Zealand Law Commission, above n 55, at 179.
[175] R v Wihongi, above n 147, at [47].
[176] New Zealand Law Commission, above n 55, at 179.
[177] New Zealand Law Commission, above n 55, at 172.
[178] Sentencing Act, ss 7, 8, 9.

principles that must be considered by the court in sentencing or otherwise dealing with the offender. They include having regard to the gravity of the offending, the seriousness of the offending, and the maximum penalty of the offence concerned, among other considerations. Finally, s 9 of the Sentencing Act 2002 includes a number of aggravating and mitigating factors that must be considered in sentencing to the extent that they are applicable in the case.

Although sentencing discretion has its strengths and it can, on occasion, be an effective method of reaching a just result, it is important that sufficient guidelines are in place to ensure there is consistency. Whereas *R v Taueki*[179] provides sentencing bands for grievous bodily harm, there is no sentencing tariff for manslaughter. The maximum sentence is life imprisonment, but there is no minimum sentence and sentencing is highly fact-dependent.[180] Discretion is inherently subjective, dependent on the individual defendant in the particular case and the way that the judge considers the merits of the case.

The Court of Appeal in *Taueki* also set out the standard three-stage methodology to sentencing.[181] The first step is to fix a starting point by reference to the aggravating and mitigating features of the offending.[182] This consideration will often include looking at previous analogous cases, with a view to promoting consistency between cases and among different judges. However, where a battered defendant kills, a consideration of previous cases can also be problematic, as it risks inhibiting the consideration of more recent information about family violence.[183]

The primary issue with the current discretionary approach to sentencing of manslaughter cases in New Zealand is the lack of transparency and guidance. Although the "three strikes" regime has significantly fettered discretion, and although there is a rebuttable presumption of life imprisonment, the foregoing cases show that a wide range of sentences have been determined for manslaughter. Manslaughter comes in a variety of forms. The approach to manslaughter involving battered

[179] *R v Taueki* [2005] 3 NZLR 372 (CA).
[180] New Zealand Law Commission, above n 55, at 175.
[181] See also *R v Clifford* [2012] 1 NZLR 23 (CA).
[182] New Zealand Law Commission, above n 55, at 164.
[183] At 165.

defendants is far from clear. Consequently, sentencing decisions are not always easy to understand or to reconcile.

A Types of Manslaughter

This chapter will focus on a selection cases involving manslaughter of children due to abuse and ill-treatment and intimate partner manslaughter with a view to determining the range of sentences that have resulted in such cases.

1 Manslaughter of a child due to abuse and ill-treatment

Manslaughter of a child, especially when that manslaughter results from gross ill-treatment, tends to be viewed in an extremely negative light. Although some sentences in such cases reflect the horror of the crime, it is arguable that others do not.

R v Witika & Smith[184] was a case of horrific child abuse. The Crown case at trial was that the child was subjected to prolonged brutal violence and failure to provide necessary medical care, which resulted in her death. Both appellants had been sentenced to 16 years' imprisonment for the most serious count of manslaughter. On appeal, the court held that the length of the sentences in this case should only be imposed in the most serious cases, but that this case fell into that category. The Court of Appeal therefore upheld the sentences.

In the infamous 2006 Kahui case, Chris and Cru Kahui were rushed to the hospital by their mother after they had been abused while in the care of their father and various members of the extended family. The life-support of both twins was turned off five days after their admission into hospital. Post-mortem reports showed that the babies had died from multiple injuries and that these were caused by application of force to the babies' heads.[185] Experts ruled that the deaths could not have been accidental, and eventually, the twins' father was charged with murder. In a high-profile trial at the High Court in Auckland, a jury took less than one minute to acquit him. Ten years

[184] *R v Witika & Smith* [1993] 2 NZLR 424, (1992) 9 CRNZ 272.
[185] Isabella Clarke "A Kahui Exception? Examining the Right to Silence in Criminal Investigations" (LLB (Hons) Dissertation, University of Otago, 2007) at 2.

later, still no one has been held accountable for the twins' deaths.[186] The lack of conclusive evidence in this case lead to a devastating lack of consequences. However, it might be assumed that if the father or another family member had been found guilty of either murder or manslaughter, the sentence would have been severe.

In *R v Paea,*[187] a young mother was left alone with her seven-week-old son, who would not stop crying. After rocking and shaking him repeatedly, she noticed that he was not swallowing, and later not breathing. Despite seeking medical help, the child died and the accused was convicted of manslaughter. The post-mortem showed subdural haemorrhaging inside the baby's cranium. The cause of death was a head injury consistent with substantial shaking. With regard to decided authorities and her guilty plea, the court came to a starting point of 3 years 9 months' imprisonment.[188] Her mitigating factors earned her a reduction of 30 per cent, which combined with her guilty plea reduction, lead to an end sentence of 24 months' imprisonment. The judge declined to reduce this to a sentence of home detention, concluding that doing so would fail to address the purposes and principles of the Sentencing Act 2002.[189]

In *R v Shailer*[190] the defendants, Shailer and her partner, were convicted for the manslaughter and ill-treatment of three-year-old Moko. Moko and his sister were left in the couple's care by their mother and suffered horrendous abuse at their hands. The eventual cause of death was multiple blunt force injuries. In establishing the starting point, the judge declined to separate the two offences because both arose from a continuing course of violence and neglect. Aggravating factors included the extreme and prolonged nature of the violence, the high risk of serious harm that accompanied the attacks, and the fact that Moko was a defenceless and extremely vulnerable child, totally dependent on the couple.[191] There were a few mitigating factors, most significantly the mental health issues suffered by Shailer, but none of these was found to materially reduce the overall level of seriousness.[192] Both defendants were

[186] Anna Leask "Kahui tragedy: 'When he took his final breath, he smiled'" *The New Zealand Herald* (online ed, Auckland, 20 March 2016).
[187] *R v Paea* [2016] NZHC 822.
[188] At [14].
[189] At [15]-[18].
[190] *R v Shailer* [2016] NZHC 1414.
[191] At [27]-[32].
[192] At [33]-[37].

sentenced to life imprisonment. Shailer was entitled to a 5 per cent discount for her mental health issues and previous good character, and both were entitled to a discount for their guilty pleas. It was found that the only way to give credit for these discounts was to reduce the sentence to a finite term, resulting in an end sentence of 17 years' imprisonment, with a minimum period of 9 years. This is the highest sentence that has been imposed in New Zealand for the manslaughter of a child.[193]

Paea is one case of manslaughter of a child where the end sentence seems particularly low. The sentence seems to imply that the fact that the baby would not stop crying acted as a sort of provocation. To take such a stance would be deeply problematic. Unlike adults, who are responsible for their actions, a vulnerable baby has no control over their actions, such as crying. It is understandable that the judge wanted the sentence to reflect the distinction between a case like *Paea,* where the mother, perhaps out of exhaustion and desperation, shook her child, and a case like *Shailer,* involving ongoing abuse and neglect of the child. The issue, however, is not whether the sentence is understandable, but whether the process in reaching it is transparent. Where there is such discrepancy in sentences of cases falling under the same offence, it is essential that there is transparency in the exercise of the judge's discretion.

2 Intimate partner manslaughter

Intimate partner homicide encompasses many of the battered defendant cases which this dissertation has discussed. For this reason, it is not necessary to canvas a large number of cases in great detail here. However, examination of cases that fall in this category, at least where provocation is involved, shows that sentences tend to fall on the lower end of the spectrum.

In 2010, Dale Wickham fatally shot her husband with a shotgun. She suffered from multiple sclerosis and said she had suffered abuse by her husband for many years. She claimed that on the night that she killed him, he had thrown a bottle at her and made a number of vicious threats. She was found guilty of manslaughter on the basis that the

[193] At [63]-[65].

killing was accidental. Ellis J sentenced her to 12 months' home detention, accepting that her multiple sclerosis made her feel that fewer options were available to her.[194]

In *R v Tagatauli*[195] the defendant pleaded guilty to manslaughter when she stabbed her partner in the course of an incident of domestic violence. She had been subjected to prolonged abuse and was a mother of five children. On this particular occasion, Tagatauli had come into possession of two kitchen knives. During an ongoing argument she stabbed her partner once in the chest and once in his right shoulder. When he tried to leave by going downstairs, she followed him and proceeded to stab him in the thigh, fatally severing his femoral vein. Two important and relevant factors were the lack of intention to cause serious harm and the fact that the serious harm (the severing of a very narrow artery) was highly unlikely. A starting point of 3 years and 9 months' imprisonment was reached.[196] There were a number of mitigating factors, including that the defendant was suffering from post-traumatic stress disorder and that, at the time of her partner's death, she was pregnant. She was not aware of this at the time but went on to have the child after the events took place. These factors, combined with her guilty plea and an allowance for her remorse, resulted in a provisional end sentence of 22 months' imprisonment which was commuted to a final sentence of 12 months' home detention.[197]

III Reform in New Zealand

Following the reform of the provocation defence in 2009, the situation in New Zealand is less than ideal. Unlike other jurisdictions, New Zealand did not opt for an alternative defence (or offence) to replace the provocation defence. Instead, for the last seven years, provocation and the plight of battered defendants has been dealt with on a case-by-case basis at sentencing. As discussed, it has been suggested that the "three strikes" regime has the potential to disadvantage battered defendants as it limits judges' ability to show leniency where it is deserved. Furthermore, it is still unclear whether the presumption of life imprisonment will be displaced in instances of

[194] Brenda Midson "Coercive Control and Criminal Responsibility: Victims who kill their abusers" (2016) Crim Law Forum 1 at 9-10.
[195] *R v Tagatauli* [2016] NZHC 757.
[196] At [30].
[197] At [41]-[44].

prolonged domestic violence, though the case for this is strong following *Wihongi*. In the exercise of judicial discretion, there is a lack of transparency of approach and sometimes an apparent inconsistency between different judges' decisions in the above cases.

In 2016, the New Zealand Law Commission published a report addressing the law in respect of battered defendants. The report recognises that sentencing discretion has proved an inadequate solution, and considers alternative approaches that might be adopted. It is but one part of a broader package of possibilities that are currently before Parliament. It does, however, have the potential to instigate significant change in this area of the law in New Zealand. The package of recommended reforms in the report is focused on education about family violence, self-defence, and sentencing.[198]

The report does not, however, discuss the possibility of establishing a sentencing tariff for manslaughter. This dissertation asserts that, in addition to some of the suggestions made by the New Zealand Law Commission as to law reform in this area, a sentencing tariff for manslaughter might give the sentencing process some much-needed clarity.

Although other jurisdictions have opted for the adoption of other partial defences, it has proven very difficult to formulate a defence that achieves the desired result. This is seen in the variety of partial defences that have been adopted in order to deal with the same issue. There is constant disagreement about how best to formulate a defence that accommodates sympathetic homicides, without leaving room for other less sympathetic cases to slip through. Although the current sentencing regime in New Zealand has also proved insufficient, if a sentencing tariff were established, cases of sympathetic homicide might be better accommodated. Before considering what such a tariff might look like, however, it is worth considering why it might be preferred to the establishment of a new or revised partial defence.

[198] New Zealand Law Commission, above n 55, at 45.

A Partial Defences

The very concept of partial defences is an anomaly. Culpable homicide is the only kind of offence where, even if the elements of murder are made out, a person may be convicted of a lesser offence if the defence applies.[199] Homicide is an area where the stakes are high. If convicted of murder, this is the most serious offence with which one can be charged. On the other hand, if a jury feels that the defendant should not be charged with murder for sympathetic reasons, this does not mean that the jurors want an acquittal through a complete defence such as self-defence. Where there are two extreme results, a partial defence has the ability to provide an attractive pathway to a middle-ground verdict of manslaughter.[200]

However, a compelling argument considered by the New Zealand Law Commission in the lead up to producing its 2007 report[201] is that partial defences are not the best way of accounting for mitigating circumstances. There is a wide range of circumstances that mitigate culpability. Provocation caused by ongoing domestic abuse is just one of those. Unless it is suggested that there be a partial defence for every type of mitigating circumstance, then its application to provocation is simply arbitrary.[202]

Part 2 considered a range of approaches that have been taken in overseas jurisdictions. The UK has adopted a loss of control defence. Some Australian states have retained the provocation defence, with NSW modifying this to a defence of "extreme" provocation. Canada retains the provocation defence, although the Canadian version shares features with NSW's defence of extreme provocation. Whereas Queensland introduced a new partial defence of preservation, NSW, Western Australia and South Australia have adopted a defence of excessive self-defence. For a period, Victoria had an entirely separate offence of defensive homicide, though this has since been repealed. Uniquely, the US Model Penal Code contains a defence of "extreme mental or emotional disturbance".

---

[199] New Zealand Law Commission, above n 55, at 144.
[200] At 141.
[201] New Zealand Law Commission, above n 5.
[202] New Zealand Law Commission, above n 55, at 144.

Ultimately, it is very unlikely that a partial defence will be infallible. If any one jurisdiction had found the right approach, other jurisdictions would be likely to follow that lead. As it stands, a wide range of partial defences is in place across jurisdictions that are relatively similar to one another in their operation and in their law. The constant repeal and reform processes further indicate that perhaps the partial defence approach simply is not working. Many of these defences have been subject to criticism and the problems with which they have attempted to deal have not disappeared. Given the unique situation in New Zealand, with its high rate of domestic abuse, it is especially important that an effective system be put in place. It seems likely that if New Zealand were to adopt one of the partial defences seen in the aforementioned jurisdictions, many of the problems that occurred under the former defence would continue to occur.

B A New Approach: Sentencing Tariff For Manslaughter

In New Zealand, there is a sentencing tariff for grievous bodily harm. There is no sentencing tariff for manslaughter.

1 Grievous bodily harm

In *Taueki,* the Court stated that the modern approach to sentencing involves three stages. The first, as mentioned above, requires the setting of a starting point sentence by taking into account aggravating and mitigating factors of the offending. The second stage is to take into account aggravating and mitigating factors of the offender. The third stage is to determine the end sentence. With regards to the offence of wounding with intent to cause grievous bodily harm under s 188 of the Crimes Act 1961, the Court prescribed three sentencing bands for starting point sentences. In addition, the Court provided guidelines identifying fourteen aggravating features of the offence and two mitigating factors, which would alter the starting point sentence in the relevant bands.[203]

[203] Katherine Basire "Taking Restorative Justice Seriously" (2007) 13 Canta LR 31 at 40.

The first band is 3 to 6 years' imprisonment and applies to violence at the lower end of the spectrum. The starting point will depend on the presence of aggravating factors. If there are one or more aggravating factors, a higher starting point (up to 6 years) will be taken. The second band is 5 to 10 years and applies to offending with two or three aggravating factors. The third band is 9 to 14 years and applies to serious offending involving three or more aggravating factors and where the combination of these is particularly serious.[204] Importantly, the two mitigating factors that might lower the starting point are provocation and excessive self-defence.[205]

In the second stage of the process, the judge considers whether the circumstances of the offender require the sentence to be higher or lower than the starting point sentence. This approach significantly fetters the judge's discretion in regards to sentencing for offending under s 188.[206]

It is worth noting that the High Court of Australia rejected this three-stage approach in *Wong v R*[207] and later in *Markarian v R.*[208] The Court held that such an approach is likely to give rise to error and that it does not adequately take into account that there are many conflicting elements which impact upon sentencing an offender. The Court was concerned with the idea of attributing weight to some elements and not to others.[209] The approach has not been rejected in New Zealand.

2 A tariff for manslaughter

In *Rangi,* Collins J noted that sentences for manslaughter have ranged from conviction and discharge through to life imprisonment. His Honour noted that this range of sentences demonstrated the broad spectrum of circumstances that can give rise to a conviction for manslaughter. Each of these circumstances, however, involves an unlawful act where death is the unintended consequence.[210]

---

[204] At 41.
[205] *R v Taueki*, above n 179, at [32].
[206] Basire, above n 203, at 41.
[207] *Wong v R* [2001] HCA 64; (2001) 207 CLR 584 at [74]-[76].
[208] *Markarian v R* (2005) 215 ALR 213.
[209] At [37].
[210] *R v Rangi* [2015] NZHC 1879 at [16].

Manslaughter comes in all shapes and sizes and the degree of offending varies greatly from case to case. If a manslaughter tariff were to be adopted, a similar approach to the *Taueki* methodology might be taken. The Court of Appeal or the Supreme Court could consider a range of cases that deal with the causing of death as an indirect result of the intentional infliction of harm. The Court could thereby establish three or four bands to be used in establishing the starting point of the sentence. As in *Taueki,* there could be various aggravating and mitigating factors that might be taken into account in reaching an end sentence.

Aggravating factors might include the vulnerability of the victim, the duration of the offending and the brutality of the defendant's actions. Mitigating factors might include victim remorse, provocation and prolonged abuse suffered by the defendant at the hands of the victim. The list of aggravating and mitigating factors could be extensive and open-ended, so as to accommodate a wide variety of situations.

Cases involving the manslaughter of a child are viewed harshly, especially when the ill-treatment and neglect of the child has been ongoing. The vulnerability of the child and the child's dependence upon the abuser allows such cases to attract a high level of culpability. *Shailer* and *Witika & Smith,* with their sentences of 17 and 16 years' imprisonment respectively, reflect this fact. *Paea,* with a sentence of only 24 months' imprisonment, arguably does not. Even taking into account the mitigating factors in that case, it is difficult to reconcile a difference of 15 years' imprisonment between two cases that involve the intentional infliction of harm upon a vulnerable, dependent child, resulting in that child's death.

Since the repeal of the defence of provocation, many cases involving battered defendants have been dealt with lightly. Both *Wickham* and *Tagatauli* had sentences to just 12 months' home detention. In *Tagatauli*, this resulted from a starting point of 3 years and 9 months' imprisonment. Others, such as *Wihongi* and *Rihia*, have still attracted higher sentences. In *Wihongi*, the sentence following appeal was 12 years' imprisonment and this was subsequently the starting point adopted in *Rihia*. Prior to the repeal of the defence of provocation, *Reti* and *Neale* both resulted in convictions for murder. However, whereas in *Wihongi* and *Rihia* there was prolonged abuse that

had resulted in mental impairment, *Reti* and *Neale* might be distinguished as the provocative acts, although violent, appeared to be more isolated.[211]

Based on a consideration of the *Taueki* bands, possible sentencing bands for manslaughter might look something like the following:

(1) 4-8 years' imprisonment

This would apply to manslaughter at the lower end of the spectrum. The starting point would depend on the presence of aggravating factors. To come within this band an offence would have a maximum of two aggravating factors. This band would encompass some provocation cases, and perhaps some cases of battered defendants who killed.

(2) 8-12 years' imprisonment

This band would apply to offending with two or three aggravating factors. It might apply to some child abuse cases, like *Paea,* where the motives behind the offending are less sinister. It would also encompass some battered defendant cases. Cases like *Rihia* and *Wihongi* might fall within this band.

(3) 12-18 years' imprisonment

Band 3 would apply to serious offending involving three to four aggravating factors and where the combination of these is serious. If there were evidence of provocation or excessive self-defence, this might lower the starting point within the band. The most serious child abuse cases such as *Witika & Smith* and *Shailer* would fall within this category.

[211] New Zealand Law Commission, above n 55, at 172.

Conclusion

The current approach to dealing with provocation and battered defendants in New Zealand is inadequate. A sentencing tariff for manslaughter might provide greater guidance for judges, whilst still ultimately leaving provocation and other mitigating factors to be considered in the exercise of the judge's discretion. If there were a sentencing tariff for manslaughter, the system would arguably be more transparent. If the process were clear and able to be understood, these decisions might be less likely to come under criticism.

– CONCLUSION –

The repeal of the partial defence of provocation has created a gap in the law in New Zealand. The decision to opt for sentencing discretion in lieu of a new defence has proved inadequate. It is clear that New Zealand's law with regards to sympathetic homicides is in drastic need for reform. This has correctly been recognised by the New Zealand Law Commission and it is likely that change is just around the corner.

New Zealand's situation is unique. Domestic violence and, by extension, cases where battered defendants kill their abusers are especially prevalent. As such, special consideration of New Zealand's social context must be taken when determining the appropriate way forward. Partial defences that have been adopted in overseas jurisdictions have hardly proved ideal. Although some have been successful to an extent, they are still subject to significant criticism. It seems that, perhaps, in terms of dealing with provocation and intimate partner homicides, partial defences will be inherently limited in their application and will always either be too broad or too narrow.

The establishment of a sentencing tariff for grievous bodily harm has been widely approved and applied. Sentencing tariffs arguably provide for more flexibility than statutory defences, as they still depend in large part on the exercise of a judge's discretion. Each case can be dealt with on its merits. If a particular outcome seems manifestly unjust, the judge has the ability to make appropriate changes to the starting point sentence using aggravating and mitigating factors. With partial defences, if a particular case does not fit within the ambit of the defence, it is excluded regardless of whether this seems just in the circumstances. The establishment of a sentencing tariff for manslaughter might solve some of these problems.

Ultimately, some sort of reform is essential. Seven years is far too long to have gone without an adequate system in place for dealing with these sympathetic homicides, which are particularly common in New Zealand. Change is crucial and imminent. Hopefully this change, when it comes, is the right one.

– BIBLIOGRAPHY –

I Cases

A New Zealand

Ambach v R [2011] NZCA 93.

Hamidzadeh v R [2013] 1 NZLR 369, (2012) 26 CRNZ 245.

Ioata v R [2013] NZCA 235.

McNaughton v R [2013] NZCA 657, [2014] 2 NZLR 467.

R v AM [2010] NZCA 114.

R v Campbell [1997] 1 NZLR 16 (CA).

R v Carmichael HC Tauranga CRI-2007-070-2603, 6 September 2007.

R v Cooper [2014] NZCA 275.

R v Gordon (1993) 10 CRNZ 430 (CA).

R v King [2012] NZHC 3072.

R v McCarthy [1992] 2 NZLR 550 (CA) 558.

R v McGregor [1962] NZLR 1069 (CA).

Murray v R [2013] NZCA 177.

R v Neale HC Auckland CRI-2007-004-3059, 12 June 2009.

R v Oakes [1995] 2 NZLR 673 (CA).

R v Paea [2016] NZHC 822.

R v Rangi [2015] NZHC 1879.

R v Rihia [2012] NZHC 2720.

R v Reti HC Whangarei CRI-2007-027-2103, 9 December 2008 [*Reti* (HC)]; and *R v Reti* [2009] NZCA 271.

R v Rongonui [2000] 2 NZLR 385; (2000) CRNZ 310 (CA).

R v Shailer [2016] NZHC 1414.

R v Tagatauli [2016] NZHC 757.

R v Taueki [2005] 3 NZLR 372 (CA).

R v Timoti [2005] 1 NZLR 466, (2004) 21 CRNZ 90 (CA).

R v Witika & Smith [1993] 2 NZLR 424, (1992) 9 CRNZ 272.

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

Weatherston v R [2011] NZCA 276.

B Australia

Markarian v R (2005) 215 ALR 213.
R v Middencorp [2010] VSC 202.
Wong v R [2001] HCA 64; (2001) 207 CLR 584.

C UK

Asmelash v R [2013] EWCA Crim 157.
B v R [2013] EWCA Crim 3.
Bedder v Director of Public Prosecutions [1954] 2 All ER 801, [1954] 1 WLR 1119 (HL).
Clinton v R [2012] EWCA Crim 2.
Dawes & Ors v R [2013] EWCA Crim 322.
Gurpinar v R [2015] EWCA Crim 178.
Mehmedov v R [2014] EWCA Crim 1523.
R v Ahluwalia (1993) 96 Cr App R 133.
R v Jewell [2014] EWCA Crim 414.
R v Thornley [2011] EWCA Crim 153.
R v Welsh (1869) 11 Cox CC 336.
SO v The Crown [2013] EWCA Crim 1725.
Workman v R [2014] EWCA Crim 575.

II Legislation

A New Zealand

Crimes Act 1908
Crimes Act 1961
Sentencing Act 2002

B Australia

Crimes Act 1900 (ACT)
Crimes Act 1900 (NSW)
Crimes Act 1958 (Vic)
Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic)
Criminal Code 1983 (NT)
Criminal Code Act 1899 (Qld)
Criminal Code Act Compilation Act 1913 (WA)
Criminal Law Consolidation Act 1935 (SA)

C Canada

Criminal Code (R.S.C., 1985, c. C-46)

D UK

Homicide Act 1957
Coroners and Justice Act 2009

E US

US Model Penal Code

III Books

Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell NZ, Wellington, 1971).

A Ashworth and J Horder *Principles of Criminal Law* (7th ed, OUP, Oxford, 2013).

George P Fletcher *Rethinking Criminal Law* (Brown, Boston, 1978).

Andrew Hemming *Criminal Law Guidebook: Queensland and Western Australia* (Oxford University Press, 2015).

Jonathan Herring "The Serious Wrong of Domestic Abuse and the Loss of Control Defence" in Alan Reed and Michael Bohlander (ed) *Loss of Control and Diminished Responsibility Domestic, Comparative and International Perspectives* (Ashgate Publishing Ltd, Farnham, 2013).

David J Lanham and others *Criminal Laws in Australia* (Federation Press, Annandale, 2006).

Gerald Orchard and J Bruce Robertson *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004).

D Ormerod and K Laird *Smith and Hogan's Criminal Law* (14th ed, Oxford University Press, London, 2015).

IV Loose-leaf Texts

Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers).

V Journal Articles

Katherine Basire "Taking Restorative Justice Seriously" (2007) 13 Canta LR 31.

W J Brookbanks "Self-Help and Criminal Law" (1999) NZ L Rev 109.

Mandy Burton "Sentencing Domestic Homicide Upon Provocation: Still 'Getting Away with Murder'" (2003) 11 Feminist Legal Studies 279.

A Cornford "Mitigating Murder" (2016) 10 Crim L & Phil. 31.

Graeme Coss "Provocative reforms: A comparative critique" (2006) 30 Crim LJ 138.

Kevin Dawkins “Criminal Law and Procedure” (1994) NZ Recent Law Review 48.

Heather Douglas “A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women” (2012) 45 Australian and New Zealand Journal of Criminology 367.

Kate Fitz-Gibbon and Asher Flynn “Bargaining with Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-Law Reform” (2011) 35 Melb U L Rev 905.

Andrew Hemming “Provocation: A Totally Flawed Defence that has No Place in Australian Criminal Law Irrespective of Sentencing Regime” (2010) 14 UWSLR 1.

Brenda Midson “Coercive Control and Criminal Responsibility: Victims who kill their abusers” (2016) Crim Law Forum 1.

Elizabeth Sheehy, Julie Stubbs and Julia Tolmie “Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?” (2012) 45 Australia and New Zealand Journal of Criminology 383.

Elizabeth Sheehy, Julie Stubbs and Julia Tolmie “Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand” (2012) 34 Syd LR 467.

Gertrude Summers and Nina Feldman “Blaming the Victim Versus Blaming the Perpetrator: An Attributional Analysis of Spouse Abuse” (1984) 2 Journal of Social and Clinical Psychology 339.

Julia Tolmie “Is the Partial Defence an Endangered Defence – Recent Proposals to Abolish Provocation” (2005) NZ L Rev 25.

Madeleine Ulbrick, Asher Flynn and Danielle Tyson "The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders" (2016) 40(1) Melbourne University Law Review (Advance).

Barry Wright "Self-Governing Codifications of English Criminal Law and Empire: the Queensland and Canadian Examples" (2007) 26 U Queensland LJ 39.

VI Parliamentary and Government Materials

A New Zealand

Ministry of Justice *Discussion Document: Strengthening New Zealand's Legislative Response to Family Violence* (2015).

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

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

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

New Zealand Law Commission *Understanding Family Violence* (NZLC R139, 2016).

B Australia

Criminal Law Review, DOJ (Vic), 'Defensive Homicide Consultation Paper'.

VII Dissertations

Isabella Clarke "A Kahui Exception? Examining the Right to Silence in Criminal Investigations" (LLB (Hons) Dissertation, University of Otago, 2007).

VIII Internet Resources

LH Leigh "Clarifying the Loss of Control Defence" (5 July 2013) Criminal Law & Justice Weekly <http://www.criminallawandjustice.co.uk>.

IX Newspaper Articles

Anna Leask "Kahui tragedy: 'When he took his final breath, he smiled'" *The New Zealand Herald* (online ed, Auckland, 20 March 2016).

– APPENDIX 1 –

NEW ZEALAND CRIMINAL PROVISIONS

CRIMES ACT 1908

Section 184. Provocation

(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.

(3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.

(4) No one shall be held to give provocation to another by doing that which he had a legal right to do, 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.

Section 185. Illegal arrest may be evidence of provocation

An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal; but if the illegality was known to the offender it may be evidence of provocation.

CRIMES ACT 1961

Section 48. Self-defence and defence of another

Every one 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.

Section 160. Culpable homicide

(1) Homicide may be either culpable or not culpable.

(2) Homicide is culpable when it consists in the killing of any person–

- (a) by an unlawful act; or
- (b) by an omission without lawful excuse to perform or observe any legal duty; or
- (c) by both combined; or
- (d) by causing that person by threats or fear of violence, or by deception, to do an act which causes his or her death; or
- (e) by wilfully frightening a child under the age of 16 years or a sick person.

(3) Except as provided in section 178, culpable homicide is either murder or manslaughter.

(4) Homicide that is not culpable is not an offence.

Section 167. Murder defined

Culpable homicide is murder in each of the following cases:

- (a) if the offender means to cause the death of the person killed:

(b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
(c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, although he or she does not mean to hurt the person killed:
(d) if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting anyone.

Section 168. Further definition of murder

(1) Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:
(a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2), or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:
(b) if he or she administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:
(c) if he or she by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath.

(2) The offences referred to in subsection (1) are those specified in the following provisions of this Act, namely:
(a) Section 73 (Treason) or section 78 (Espionage):
(b) Section 79 (Sabotage):
(c) Section 92 (Piracy):
(d) Section 93 (Piratical acts):
(e) Section 119 to 122 (escape or rescue from prison or lawful custody or detention):
(f) Section 128 (sexual violation):
(g) Section 167 (Murder):
(h) Section 208 (Abduction):
(i) Section 209 (Kidnapping):
(j) Section 231 (Burglary):
(k) Section 234 (Robbery):
(l) Section 267 (Arson).

Section 169. Provocation (repealed)

(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything done or said may be provocation if–
(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

Section 171. Manslaughter

Except as provided in section 178, culpable homicide not amounting to murder is manslaughter.

Section 178. Infanticide

(1) Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder or manslaughter, and is liable to imprisonment for a term not exceeding 3 years.

(2) Where upon the trial of a woman for the murder or manslaughter of any child of hers under the age of 10 years there is evidence that would support a verdict of infanticide, the jury may return such a verdict instead of a verdict of murder or manslaughter, and the defendant shall be liable accordingly. Subsection (2) of section 339 shall be read subject to the provisions of this subsection, but nothing in this subsection shall affect the power of the jury under that section to return a verdict of manslaughter.

(3) Where upon the trial of a woman for infanticide, or for the murder or manslaughter of any child of hers under the age of 10 years, the jury are of opinion that at the time of the alleged offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she was insane, the jury shall return a special verdict of acquittal on account of insanity caused by childbirth.

(4) If the jury returns a special verdict under subsection (3), the Judge must order that the woman be examined by 2 medical practitioners and the following provisions apply:

(a) pending the receipt by the Judge of certificates from the medical practitioners, the woman must be detained in a place that the Judge thinks appropriate, and that place must be one of the following:

(i) a hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992:

(ii) a facility within the meaning of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003:

(iii) a prison:

(b) if each of the medical practitioners certifies that the woman is no longer insane and that she is in no need of care and treatment in a hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a facility within the meaning of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, the Judge must order that the woman be discharged from custody immediately:

(c) unless each of the medical practitioners certifies in accordance with paragraph (b), sections 23 to 29 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 apply, so far as they are applicable, as if the references in those sections to the court were references to the Judge.

(5) If, under subsection (4)(c), the Judge makes an order that the woman be detained in a hospital as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, section 33 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 applies.

(6) *[Repealed]*

(7) Nothing in this section shall affect the power of the jury, upon the trial of any woman for infanticide or for murder or manslaughter, to return a verdict, otherwise than under this section, of acquittal on account of insanity; and where any such verdict is returned the provisions of the Criminal Procedure (Mentally Impaired Persons) Act 2003 shall apply accordingly.

(8) The fact that by virtue of this section any woman has not been or is not liable to be convicted of murder or manslaughter, whether or not she has been or is liable to be convicted of infanticide, shall not affect the question whether the homicide amounted to murder or manslaughter in the case of any other party to it.

Section 180. Suicide Pact

(1) Every one who in pursuance of a suicide pact kills any other person is guilty of manslaughter and not of murder, and is liable accordingly.

(2) Where 2 or more persons enter into a suicide pact, and in pursuance of it 1 or more of them kills himself or herself, any survivor is guilty of being a party to a death under a suicide pact contrary to this subsection and is liable to imprisonment for a term not exceeding 5 years; but he or she shall not be convicted of an offence against section 179.

(3) For the purposes of this section the term **suicide pact** means a common agreement between 2 or more persons having for its object the death of all of them, whether or not each is to take his or her own life; but nothing done by a person who enters into a suicide pact shall be treated as done by him or her in pursuance of the pact unless it is done while he or she has the settled intention of dying in pursuance of the pact.

(4) It shall be for the person charged to prove that by virtue of subsection (1) he or she is not liable to be convicted of murder, or that by virtue of subsection (2) he or she is not liable to be convicted of an offence against section 179.

(5) The fact that by virtue of this section any person who in pursuance of a suicide pact has killed another person 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 a third person who is a party to the homicide and is not a party to the suicide pact.

CRIMINAL CODE ACT 1893

Section 165. Provocation

(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.

(3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.

(4) No one shall be held to give provocation to another by doing that which he had a legal right to do, 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.

(5) An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal; but if the illegality was known to the offender it may be evidence of provocation.

– APPENDIX 2 –

COMPARATIVE JURISDICTIONS: LEGISLATION

I AUSTRALIA

CRIMES ACT 1900 (ACT)

Section 13. Trial for murder – provocation

(1) If, on a trial for murder–
  (a) it appears that the act or omission causing death occurred under provocation; and
  (b) apart from this subsection and the provocation, the jury would have found the accused guilty of murder;
  the jury shall acquit the accused of murder and find him or her guilty of manslaughter.

(2) For subsection (1), an act or omission causing death shall be taken to have occurred under provocation if–
  (a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
  (b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control –
    (i) as to have formed an intent to kill the deceased; or
    (ii) as to be recklessly indifferent to the probability of causing the deceased's death;
  whether that conduct of the deceased occurred immediately before the act or omission causing death or ay any previous time.

(3) However, conduct of the deceased consisting of a non-violent sexual advance (or advances) towards the accused–
  (a) is taken not to be sufficient, by itself, to be conduct to which subsection (2) (b) applies; but
  (b) may be taken into account together with other conduct of the deceased in deciding whether there has been an act or omission to which subsection (2) applies.

(4) For the purpose of determining whether an act or omission causing death occurred under provocation, there is no rule of law that provocation is negatived if–
  (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission; or
  (b) the act or omission causing death did not occur suddenly; or
  (c) the act or omission causing death occurred with any intent to take life or inflict grievous bodily harm.

(5) If, on a trial for murder, there is evidence that the act or omission causing death occurred under provocation, the onus of proving beyond reasonable doubt that the act or omission did not occur under provocation lies on the prosecution.

(6) This section does not exclude or limit any defence to a charge of murder.

CRIMES ACT 1900 (NSW)

Section 23. Trial for murder – partial defence of extreme provocation

(1) If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter.

(2) An act is done in response to extreme provocation if and only if:
   (a) the act of the accused that causes death was in response to conduct of the deceased towards or affecting the accused, and
   (b) the conduct of the deceased was a serious indictable offence, and
   (c) the conduct of the deceased caused the accused to lose self-control, and
   (d) the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

(3) Conduct of the deceased does not constitute extreme provocation if:
   (a) the conduct was only a non-violent sexual advance to the accused, or
   (b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.

(4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.

(5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.

(6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negatived merely because the act causing death was done with intent to kill or inflict grievous bodily harm.

(7) If, on the trial of a person for murder, there is any evidence that the act causing death was in response to extreme provocation, the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation.

(8) This section does not exclude or limit any defence to a charge of murder.

(9) The substitution of this section by the Crimes Amendment (Provocation) Act 2014 does not apply to the trial of a person for murder that was allegedly committed before the commencement of that Act.

(10) In this section:
act includes an omission to act

Section 421. Self-defence – excessive force that inflicts death

(1) This section applies if:
   (a) the person uses force that involves the infliction of death; and
   (b) the conduct is not a reasonable response in the circumstances as he or she perceives them,

but the person believes the conduct is necessary:
   (c) to defend himself or herself or another person, or
   (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person

The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

CRIMES ACT 1958 (VIC)

Section 9AD. Defensive homicide (repealed)
A person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder, is guilty of an indictable offence (defensive homicide) and liable to level 3 imprisonment (20 years maximum) if he or she did not have reasonable grounds for the belief referred to in that section.

CRIMINAL CODE 1983 (NT)

Section 158. Trial for murder – partial defence of provocation

(1) A person (the ***defendant***) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.

(2) The defence of provocation applies if:
   (a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
   (b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

(3) Grossly insulting words or gestures towards or affecting the defendant can be conduct of a kind that induces the defendant's loss of self-control.

(4) A defence of provocation may arise regardless of whether the conduct of the deceased occurred immediately before the conduct causing death or at an earlier time.

(5) However, conduct of the deceased consisting of a non-violent sexual advance or advances towards the defendant:
   (a) is not, by itself, a sufficient basis for a defence of provocation; but
   (b) may be taken into account together with other conduct of the deceased in deciding whether the defence has been established.

(6) For deciding whether the conduct causing death occurred under provocation, there is no rule of law that provocation is negatived if:
   (a) there was not a reasonable proportion between the conduct causing death and the conduct of the deceased that induced the conduct causing death; or
   (b) the conduct causing death did not occur suddenly; or
   (c) the conduct causing death occurred with an intent to take life or cause serious harm.

(7) The defendant bears an evidential burden in relation to the defence of provocation.

Note for subsection (7)

Under section 43BR(2), the prosecution bears a legal burden of disproving a matter in relation to which the defendant has discharged an evidential burden of proof. The legal burden of proof on the prosecution must be discharged beyond reasonable doubt – see section 43BS(1).

(8) A defendant who would, apart from this section, be liable to be convicted of murder must be convicted of manslaughter instead.

CRIMINAL CODE ACT 1899 (QLD)

Section 171. Self-defence against unprovoked assault

(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Section 304. Killing on provocation

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character

(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if–

(a) a domestic relationship exists between 2 persons; and

(b) one person unlawfully kills the other person (the ***deceased***); and

(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –

(i) to end the relationship; or

(ii) to change the nature of the relationship; or

(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(4) For subsection (3)(a), despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.

(8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.

Section 304B. Killing for preservation in an abusive domestic relationship

(1) A person who unlawfully kills another (the ***deceased***) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if–

(a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
(b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
(c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

(2) An ***abusive domestic relationship*** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.

(3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.

(4) Subsection (1) may apply even if the act or omission causing the death (the ***response***) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.

(5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.

(6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.

(7) In this section–
domestic violence see the *Domestic and Family Violence Protection Act 2012*, section 8.

CRIMINAL CODE ACT COMPILATION ACT 1913 (WA)

Section 248. Self-defence

(1) In this section–
harmful act means an act that is an element of an offence under this Part other than Chapter XXXV.

(2) A harmful act done by a person is lawful if the act is done in self-defence under subsection (4).

(3) If–
(a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
(b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be,
the person is guilty of manslaughter and not murder.

(4) A person's harmful act is done in self-defence if–
(a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
(b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
(c) there are reasonable grounds for those beliefs.

(5) A person's harmful act is not done in self-defence if it is done to defend the person or another person from a harmful act that is lawful.

(6) For the purposes of subsection (5), a harmful act is not lawful merely because the person doing it is not criminally responsible for it.

CRIMINAL LAW CONSOLIDATION ACT 1935 (SA)

Section 15. Self-defence

(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–
   (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.

(3) For the purposes of this section, a person acts for a defensive purpose if the person acts–
   (a) in self defence or in defence of another; or
   (b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

(4) However, if a person–
   (a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or
   (b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party,

   the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.

(5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

II CANADA

CRIMINAL CODE (R.S.C., 1985, C. C-46)

Section 232. Murder reduced to manslaughter

(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

(3) For the purposes of this section, the questions

(a) whether the conduct of the victim amounted to provocation under subsection (2), and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

III UK

CORONERS AND JUSTICE ACT 2009 (UK)

Section 54. Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if–

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55. Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which–

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger–

(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to "D" and "V" are to be construed in accordance with section 54.

HOMICIDE ACT 1957 (UK)

Section 3. Provocation

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

IV US

US MODEL PENAL CODE

The Code's manslaughter mitigation applies where:

Section 1.12(2).

...murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

– APPENDIX 3 –

NEW ZEALAND SENTENCING PROVISIONS

Section 7. Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are–
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or
- (e) to denounce the conduct in which the offender was involved; or
- (f) to deter the offender or other persons from committing the same or a similar offence; or
- (g) to protect the community from the offender; or
- (h) to assist in the offender's rehabilitation and reintegration; or
- (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

Section 8. Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court–

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

Section 9. Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:

(b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:

(c) that the offence was committed while the offender was on bail or still subject to a sentence:

(d) the extent of any loss, damage, or harm resulting from the offence:

(e) particular cruelty in the commission of the offence:

(f) that the offender was abusing a position of trust or authority in relation to the victim:

(fa) that the victim was a constable, or a prison officer, acting in the course of his or her duty:

(fb) that the victim was an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency:

(g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic:

(ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):

(hb) the nature and extent of any connection between the offending and the offender's

(i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or

(ii) involvement in any other form of organised criminal association:

(i) premeditation on the part of the offender and, if so, the level of premeditation involved:

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time:

(k) any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:

(i) caused a delay in the disposition of the proceedings:

(ii) had an adverse effect on a victim or witness.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) whether and when the offender pleaded guilty:

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

(f) any remorse shown by the offender, or anything as described in section 10:

(fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:

(fb) any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement:

(g) any evidence of the offender's previous good character:

(h) that the offender spent time on bail with an EM condition as defined in section 3 of the Bail Act 2000.

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(3A) In taking into account that the offender spent time on bail with an EM condition under subsection (2)(h), the court must consider–

(a) the period of time that the offender spent on bail with an EM condition; and

(b) the relative restrictiveness of the EM condition, particularly the frequency and duration of the offender's authorised absences from the electronic monitoring address; and

(c) the offender's compliance with the bail conditions during the period of bail with an EM condition; and

(d) any other relevant matter.

(4) Nothing in subsection (1) or subsection (2)–

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

(4A) In subsection (1)(fb), **emergency health or fire services provider** means a person who has a legal duty (under any enactment, employment contract, other binding agreement or arrangement, or other source) to, at the scene of an emergency, provide services that are either or both

(a) ambulance services, first aid, or medical or paramedical care:

(b) services provided by or on behalf of a fire brigade (as defined in section 2(1) of the Fire Service Act 1975) to save life or property.

(5) In this section, **procedural requirement** means a requirement imposed by or under–

(a) the Criminal Procedure Act 2011; or

(b) any rules of court or regulations made under that Act; or

(c) the Criminal Disclosure Act 2008 or any regulations made under that Act.

Section 86. Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment

(1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.

(2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
   (a) holding the offender accountable for the harm done to the victim and the community by the offending:
   (b) denouncing the conduct in which the offender was involved:
   (c) deterring the offender or other persons from committing the same or a similar offence:
   (d) protecting the community from the offender.

(3) *[Repealed]*

(4) A minimum period of imprisonment imposed under this section must not exceed the lesser of–
   (a) two-thirds of the full term of the sentence; or
   (b) 10 years.
   (c)

(5) For the purposes of Part 6 of the Criminal Procedure Act 2011, an order under this section is a sentence.

Section 86A. Interpretation

In this section and in sections 86B to 86I, unless the context otherwise requires,–

record of final warning, in relation to an offender, means a record of a warning that the offender has under section 86C(3) or 86E(8)

record of first warning, in relation to an offender, means a record of a warning that the offender has under section 86B(3)

serious violent offence means an offence against any of the following provisions of the Crimes Act 1961:

(1) section 128B (sexual violation):

(2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):

(3) section 129A(1) (sexual connection with consent induced by threat):

(4) section 131(1) (sexual connection with dependent family member under 18 years):

(5) section 131(2) (attempted sexual connection with dependent family member under 18 years):

(6) section 132(1) (sexual connection with child):

(7) section 132(2) (attempted sexual connection with child):

(8) section 132(3) (indecent act on child):

(9) section 134(1) (sexual connection with young person):

(10) section 134(2) (attempted sexual connection with young person):

(11) section 134(3) (indecent act on young person):

(12) section 135 (indecent assault):

(13) section 138(1) (exploitative sexual connection with person with significant impairment):
(14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):
(15) section 142A (compelling indecent act with animal):
(16) section 144A (sexual conduct with children and young people outside New Zealand):
(17) section 172 (murder):
(18) section 173 (attempted murder):
(19) section 174 (counselling or attempting to procure murder):
(20) section 175 (conspiracy to murder):
(21) section 177 (manslaughter):
(22) section 188(1) (wounding with intent to cause grievous bodily harm):
(23) section 188(2) (wounding with intent to injure):
(24) section 189(1) (injuring with intent to cause grievous bodily harm):
(25) section 191(1) (aggravated wounding):
(26) section 191(2) (aggravated injury):
(27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):
(28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):
(29) section 198A(1) (using firearm against law enforcement officers, etc):
(30) section 198A(2) (using firearm with intent to resist arrest or detention):
(31) section 198B (commission of crime with firearm):
(32) section 200(1) (poisoning with intent to cause grievous bodily harm):
(33) section 201 (infecting with disease):
(34) section 208 (abduction for purposes of marriage or sexual connection):
(35) section 209 (kidnapping):
(36) section 232(1) (aggravated burglary):
(37) section 234 (robbery):
(38) section 235 (aggravated robbery):
(39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):
(40) section 236(2) (assault with intent to rob)

stage-1 offence means an offence that–

(a) is a serious violent offence; and
(b) was committed by an offender at a time when the offender –
  (i) did not have a record of first warning under section 86B; and
  (ii) was 18 years of age or over

stage-2 offence means an offence that–

(a) is a serious violent offence; and
(b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

stage-3 offence means an offence that–

(a) is a serious violent offence; and
(b) was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences).

Section 86B. Stage-1 offence: offender given first warning

(1) When a court, on any occasion, convicts an offender of 1 or more stage-1 offences, the court must at the same time–

(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-1 offence for which the offender is being convicted); and

(b) record, in relation to each stage-1 offence, that the offender has been warned in accordance with paragraph (a).

(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

(3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-1 offence (for which a record is entered), a record of first warning.

(4) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

Section 86C. Stage-2 offence other than murder: offender given final warning and must serve full term of imprisonment

(1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must at the same time–

(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and

(b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).

(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

(3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-2 offence for which a record is entered, a record of a final warning.

(4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,–

(a) in the case of a long-term sentence (within the meaning of the Parole Act 2002, serve the sentence without parole; and

(b) in the case of a short-term sentence (within the meaning of the Parole Act 2002, not be released before the expiry of the sentence.

(5) If the sentence imposed on the offender for 1 or more stage-2 offences is a short-term sentence (within the meaning of the Parole Act 2002) and any conditions are imposed on the offender under section 93, then, despite anything in that section, those conditions take effect on the sentence expiry date (within the meaning of the Parole Act 2002).

(6) If, but for the application of this section, the court would have ordered, under section 86, that the offender serve a minimum period of imprisonment, the court must state, with reasons, the period that it would have imposed.

(7) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

Section 86D. Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment

(1) Despite any other enactment,–

(a) a proceeding against a defendant charged with a stage-3 offence must be transferred to the High Court when the proceeding is adjourned for trial or trial callover under section 57 of the Criminal Procedure Act 2011 or, as the case may be, in accordance with section 36 of that Act, and the proceeding from that point, including the trial, must be in the High Court; and

(b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.

(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

(3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

(4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum period of imprisonment of not less than 20 years unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.

(5) If the court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the court must give written reasons for not doing so.

(6) If the court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.

(7) Despite subsection (2), this section does not preclude the court from imposing, under section 87, a sentence of preventive detention on the offender, and if the court imposes such a sentence on the offender, –

(a) subsections (2) to (5) do not apply; and

(b) the minimum period of imprisonment that the court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the court would have imposed under subsection (2), unless the court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be manifestly unjust.

(8) If, in reliance on subsection (7)(b), the court imposes a minimum period of imprisonment that is less than the term of imprisonment that the court would have imposed under subsection (2), the court must give written reasons for doing so.

Section 86E. When murder is a stage-2 or stage-3 offence

(1) This section applies if–

(a) an offender is convicted of murder; and

(b) that murder is a stage-2 offence or a stage-3 offence.

(2) If this section applies, the court must –
  (a) sentence the offender to imprisonment for life for that murder; and
  (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.

(3) If the court does not make an order under subsection (2)(b), the court must give written reasons for not doing so.

(4) If the court does not make an order under subsection (2)(b), the court must, –
  (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
  (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.

(5) If, in the case of a stage-3 offence, the court imposes under subsection (4)(a) a minimum period of imprisonment of less than 20 years, the court must give written reasons for doing so.

(6) If, in the case of a stage-2 offence, the court makes an order under subsection (4)(b) and the offender does not, at the time of sentencing, have a record of final warning, the court must –
  (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning; and
  (b) record that the offender has been warned in accordance with paragraph (a).

(7) It is not necessary for a Judge to use a particular form of words in giving the warning.

(8) On the entry of a record under subsection (6)(b), the offender has a record of final warning.

(9) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (6)(a).

Section 102. Presumption in favour of life imprisonment for murder

(1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

(2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.

(3) This section is subject to section 86E(2).

Section 103. Imposition of minimum period of imprisonment or imprisonment without parole if life imprisonment imposed for murder

(1) If a court sentences an offender convicted of murder to imprisonment for life it must, –
  (a) if section 86E(1) does not apply to the conviction, –
    (i) order that the offender serve a minimum period of imprisonment under that sentence; or
    (ii) if subsection (2A) applies, make an order under that subsection; or
  (b) in any case where section 86E(1) applies to the conviction, take the action prescribed by that section.

(2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
  (a) holding the offender accountable for the harm done to the victim and the community by the offending:
  (b) denouncing the conduct in which the offender was involved:
  (c) deterring the offender or other persons from committing the same or a similar offence:
  (d) protecting the community from the offender.

(2A) If the court that sentences an offender convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment would be sufficient to satisfy 1 or more of the purposes stated in subsection (2), the court may order that the offender serve the sentence without parole.

(2B) The court may not make an order under subsection (2A) unless the offender was 18 years of age or over at the time that the offender committed the murder.

(3) *[Repealed]*

(4) *[Repealed]*

(5) *[Repealed]*

(6) *[Repealed]*

(7) Subsection (2) is subject to section 104.

Section 104. Imposition of minimum period of imprisonment of 17 years or more

(1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
  (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
  (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
  (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
  (d) if the murder was committed in the course of another serious offence; or
  (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
  (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
  (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or
  (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or
  (i) in any other exceptional circumstances.

(2) This section does not apply to an offender in respect of whom an order under section 86E(2)(b) or (4)(a) or 103(2A) is made.