



THE PARTIAL DEFENCE OF PROVOCATION





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

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CONTENTS

Letter of transmittal.....	5
Foreword	6
Terms of reference	8
SUMMARY	9
CHAPTER 1	
Introduction.....	14
What are partial defences?	14
Previous Law Commission work	14
Government response.....	15
The scope of this report.....	16
Report outline and structure.....	16
CHAPTER 2	
A troubled legal history: appellate, common and case law	18
Provocation at common law	19
New Zealand	20
United Kingdom.....	29
Conclusion.....	40
CHAPTER 3	
Provocation's fundamental flaws	42
Four conceptual flaws.....	42
The counter-productive practical effect of the defence	46
A question of values	50
CHAPTER 4	
Reasons to retain a provocation partial defence.....	51
Recognition of reduced culpability	51
The majority of comparable jurisdictions have a defence of provocation.....	59
Conclusion.....	67
CHAPTER 5	
Other options for recognising reduced culpability	69
Option 1: a redrafted partial defence of provocation.....	69
Option 2: a smorgasbord of partial defences	71
Option 3: a generic partial defence	72
Option 4: degrees of murder.....	73
Option 5: culpable homicide.....	75
Conclusion.....	77

CHAPTER 6

Provocation as a sentencing issue	78
Addressing provocation on sentence: four concerns	78
Options for ensuring adequate account can be taken of mitigating factors in murder cases	83
A sentencing guideline	84

APPENDIX A

Current operation of the defence of provocation	86
Introduction	86
Statistical method	87
Summary of findings	87
Frequencies	89
Who relies on the defence of provocation?	92
Defences relied on and the outcome of the case	94
Gender analysis	95
Reliance on characteristics	99
Relationship between reliance on characteristics and successful use of provocation	100
Appeals on the basis of misdirection or failure to leave provocation to the jury	101
Facts of the four successful provocation cases	102

APPENDIX B

Crimes (Abolition of Defence of Provocation) Amendment Bill	106
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30 September 2007

The Hon Mark Burton
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R98 – THE PARTIAL DEFENCE OF PROVOCATION

I am pleased to submit to you Law Commission Report 98, *The Partial Defence of Provocation*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in cursive script, reading "Geoffrey Palmer". The signature is written in dark ink and is positioned above a short horizontal dashed line.

Geoffrey Palmer
President

FOREWORD

A number of years ago, the Law Commission undertook a review of some of New Zealand's criminal defences, primarily focusing on their applicability to battered defendants. In *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001), we recommended repeal of the partial defence of provocation. We also recommended abolition of the mandatory life sentence, in favour of a sentencing discretion in murder cases. We concluded that partial defences generally, and provocation in particular, are not well suited to the circumstances of battered defendants.

The government abolished the mandatory life sentence for murder in the Sentencing Act 2002. Section 102 of that Act provides for discretionary sentencing in murder cases, subject to a presumption of life imprisonment. However, questions were raised by some government agencies about whether the implications of repealing section 169 of the Crimes Act 1961 had been fully considered. In particular, there was concern that mentally ill or impaired offenders who might otherwise have been able to rely on provocation could be prejudiced; there was also some residual doubt about the impact on battered defendants (typically, battered women). We were asked in 2004 to further consider these issues.

In the ensuing several years, we have undertaken a great deal of further research and consultation. The legal profession has been widely consulted on a number of occasions, as have all affected government agencies, and experts and interest groups outside of government (including mental health professionals and various women's groups).

There is a widespread view that the present operation of section 169 is unsatisfactory. Twelve out of the 16 Crown Solicitors supported repeal. The defence bar (which is adamantly opposed to repeal, on the basis that partial defences perform a useful and necessary function in the criminal justice system) nonetheless wanted the partial defence framework to be reformed, to either include more partial defences, or replace provocation with a partial defence that is broader in scope. Senior members of the judiciary have repeatedly expressed dissatisfaction with the defence in appellate judgments.

Amongst mental health professionals, there was virtually universal recognition that provocation benefits very few defendants who are mentally ill or impaired. The same was true for women's groups considering the defence from the perspective of women generally and battered women in particular. These groups were also concerned about the potential for the defence to have an undesirable collateral effect: as defendants, from time to time, a battered woman or a mentally impaired defendant will benefit from the existence of the defence; however, if the same battered woman or mentally impaired defendant instead becomes the victim of an intentional killing, the defence can operate to implicitly devalue the nature of that crime.

In other contexts, too, the negative social effects of the defence were noted. An example of this, which has occurred all too frequently in recent years, is its use to partially excuse intentional killing in response to a homosexual advance. When we reviewed a sample of homicide cases over a five-year period, we found that fifty percent of the cases in which provocation was successful were so-called “homosexual advance” or “homosexual panic” cases.

The prevailing view thus appears to be that something must be done about section 169.

Amongst those we consulted, there were broadly two views about the appropriate remedy. Those who considered that it is important to involve juries in the assessment of relative culpability, and similarly important to signal reduced culpability by means of a manslaughter verdict, favoured reform of the partial defence framework. However, we considered all of the available options, and found each one to be flawed. While there are some arguable reasons to retain a partial defence framework, overall we consider these unconvincing, and in any event insufficient to outweigh the considerable problems with each reform option.

We thus remain of the alternative view that the partial defence of provocation should simply be repealed. We recommend that provocation should instead be dealt with as a sentencing issue. We acknowledge the importance and relevance of sentencing guidelines in this regard. In particular, a guideline will be desirable addressing departure from the presumption in section 102 of the Sentencing Act 2002 of life imprisonment for murder.

The Commissioner responsible for this reference was Dr Warren Young. The principal researcher and writer was Claire Browning, with the exception of Appendix A, which is primarily attributable to Elisabeth McDonald, Peter Williams, and David Walsh. We are grateful for their assistance.

A handwritten signature in blue ink that reads "Geoffrey Palmer". The signature is written in a cursive, flowing style. Below the signature is a short, horizontal dashed line.

Geoffrey Palmer
President

TERMS OF REFERENCE

In relation to partial defences, the Commission has been asked to further consider issues arising from its recommendations in *Some Criminal Defences with Particular Reference to Battered Defendants*, including:

- Will the repeal of partial defences unduly disadvantage persons with mental illness or disability, battered defendants, and any other minority groups who may be particularly reliant on such defences?
- Undertake gender analysis of the current operation of partial defences, and in light of this, consider the gender implications of the recommendation for partial defence repeal.
- Is there a risk of unduly harsh sentences under section 102 of the Sentencing Act as currently drafted (and should the section therefore be amended) if partial defences are repealed?
- Is the stigma of a murder conviction appropriate for persons who have acted by reason of adverse circumstances for which society may feel some sympathy?
- Should there be a separate defence for battered defendants, in addition to or instead of current defences?



Summary

Partial defences are only available in homicide cases. They apply in circumstances that, but for the defence, would constitute murder. They result in a lesser conviction, usually for manslaughter. Historically, the rationale for this was to avoid the mandatory sentence for murder (formerly capital punishment, and subsequently life imprisonment) in cases with mitigating circumstances. However, in New Zealand, under the Sentencing Act 2002, a sentence of life imprisonment for murder is no longer mandatory.

New Zealand's partial defences include provocation. In relevant part, section 169 of the Crimes Act 1961 defines provocation as follows:

169 Provocation

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

(2) Anything done or said may be provocation if—

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

This report focuses on the “sufficiency” test in section 169(2)(a), which is the most troublesome aspect of the provocation defence.

In broad terms, over the years two approaches have been taken to the interpretation of section 169(2)(a), and the equivalent legislation in the United Kingdom: see further chapter 2. The first approach is that the relevance of the offender's characteristics is limited to their effect on the gravity of the provocation; the self-control exercised in response must be the self-control that would have been demonstrated by an ordinary person in the face of provocation of equivalent gravity. The second approach is that the offender's characteristics are regarded as relevant in all circumstances, including when they have reduced his or her power of self-control; the objective question for the jury under this approach is “how much ought society to expect of this accused”? There has been considerable vacillation in the courts in both New Zealand and the United Kingdom as to which approach is preferred.

The leading authority in New Zealand is *R v Rongonui* [2000] 2 NZLR 385; (2000) 17 CRNZ 310 (CA), in which the majority took the first approach. Their Honours held that jurors are first to assess the gravity of the provocation (actual or perceived) to the particular defendant, taking into account all of his or her characteristics, on an abstract scale from 1 to 10. Having determined the gravity, they must then decide whether a person with ordinary self-control would have lost that self-control in the face of provocation of such gravity. The minority preferred the second approach, holding that the underlying consideration is whether the accused “ought” to have restrained himself or herself. If the effect of a particular characteristic is that the accused cannot exercise ordinary self-control, the statute does not require enforcement of that standard. The majority indicated some sympathy for the minority view, but for the wording of the statute; they also repeatedly expressed dissatisfaction with the present law.

In England, the equivalent legislation has been considered by the House of Lords or the Privy Council on five occasions between 1978 and 2005, and numerous times by the English Court of Appeal. In *R v Smith (Morgan)* [2001] 1 AC 146; [2000] 4 All ER 289 (HL), the House of Lords divided 3:2 in favour of the second approach (i.e. the approach that had been preferred by the *Rongonui* minority). However, only a few years later, the Privy Council in *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC) divided 6:3 in the opposite direction, preferring the first approach (the approach of the *Rongonui* majority). Like the majority judges in *Rongonui*, Lord Nicholls writing for the majority in *Holley* expressed views to the effect that the law is unsatisfactory and beyond rescue by the courts. The present position of the English Court of Appeal is that *Holley* – somewhat unconventionally, given its status as a Privy Council decision pertaining to Jersey – should be taken as the leading authority for the purposes of English law.

At present, therefore, the English and New Zealand appellate courts are aligned in their approach to provocation, as is the High Court of Australia. However, historically, provocation has caused considerable and continual difficulty in the courts. The extraordinary number and frequency of appellate decisions, and the lack of consensus apparent in them, illustrates the fraught nature of the defence. History demonstrates that the law is susceptible to change as appellate benches change, and ongoing pressure for change can be expected in New Zealand, because there is considerable dissatisfaction with the present state of the law. One problem is that New Zealand lacks the “companion” defence of diminished responsibility that has done much to persuade English academics and judges that self-control can justly be objectively assessed. In our view, the volatile nature of the case law clearly indicates a need for either repeal or reform. Not only is it volatile; its practical application is also difficult. As a matter of legal theory, the approach articulated by Tipping J for the majority in *Rongonui* is impeccably expressed. Nonetheless, we consider that it is debatable whether, in practice, juries are able to apply it.

In our view, appellate courts and juries have struggled (and continue to struggle) to come to grips with the provocation defence for one very simple reason: the defence is irretrievably flawed. Some of the flaws are such that the defence does not in fact fulfil its policy purposes. These are outlined in chapter 3. First, it purports to be a partial excuse, but arguably does not give effect to the spirit of excuse philosophy (recognition of human frailty), because defendants who through no fault of their own are unable to demonstrate an ordinary facility for

self-control are excluded from the scope of the defence. Secondly, it envisages a “bifurcation” between a defendant’s perceptions of heightened provocation gravity, which may be affected by particular characteristics, and their capacity for ordinary self-control, which must be wholly objectively assessed. Thirdly, it assumes that there is in fact such a phenomenon as a loss of self-control. Fourthly, if the phenomenon of loss of self-control exists, it further assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this. And finally, the tensions that can be observed in the legal development of the provocation defence can arguably be seen as a response to liberal motives – that is, a desire to meaningfully recognise increasing social diversity. However, in its practical application, we would suggest that the provocation defence backfires in this regard, because of the stereotypical effect of requiring defendants to define their characteristics, and the defence’s bias in favour of the interests of heterosexual men.

There is one further and final issue, that to our minds is much more fundamental than the legal, conceptual and practical difficulties already canvassed. Section 169 excuses a homicidal loss of self control, in the face of a provocation of such gravity that it would have prompted a person with ordinary self-control to do likewise. The defence is thus open-ended about the precise emotions that might be driving the defendant; in other words, on its face, provocation is not necessarily confined to an angry loss of self-control, as opposed to one prompted by fear or sympathy. However, anger is the context in which it is commonly understood to operate, and is most frequently used. We would thus argue that the defence puts a premium on anger – and not merely anger, but homicidally violent anger. This, to our minds, is or should be a central issue in considering whether reform is required: out of the range of possible responses to adversity, why is this the sole response that we choose to partially excuse? Ultimately, issues such as the sexist and heterosexist bias of the provocation defence, that are accorded considerable weight in the literature, strike us as relatively immaterial, when weighed against the larger question of how we, as a society, wish to choose to respond to violence.

Set against all of the problems identified with the partial defence of provocation, and notwithstanding the abolition of the mandatory life sentence in New Zealand, there are said to be some sound reasons to retain it: see further chapter 4. The same reasons surface repeatedly, throughout the literature and other forums from which we have sought feedback. They are, first, that it would be fundamentally wrong in principle for the criminal law to fail to tangibly recognise a degree of culpability short of murder, and the provocation defence is a desirable mechanism for achieving this. Secondly, a majority of jurisdictions with which New Zealand typically compares itself still offer a provocation defence. And thirdly, practical problems are thought to be likely to arise when attempting to address provocation at the sentencing stage.

It is certainly true that the majority of our fellow jurisdictions still retain a defence of provocation, but the majority of them also still have a mandatory life sentence for murder. While the abolition of provocation does not follow automatically from that change (the partial defence has been retained in the Australian Capital Territory and New South Wales, notwithstanding the abolition of the mandatory sentence in both of those states), the weight of

opinion in Commonwealth jurisdictions that, like New Zealand, have discretionary sentencing for murder is quite different. Arguments relating to a majority of jurisdictions retaining a partial defence of provocation are misconceived: the appropriate comparator is jurisdictions that have abolished the mandatory sentence for murder.

We have significant reservations about the argument that a partial defence of provocation is the best mechanism by which to recognise reduced culpability in murder cases. Many of the assertions made in support of this argument in fact tend to implicitly support reform of the partial defence framework to broaden its scope. The argument also turns upon three highly debatable assumptions that a murder conviction carries a unique stigma, relative to a lesser conviction such as manslaughter; that the label “manslaughter”, when attached to a provoked killer, does in fact label that person accurately and fairly, in the light of society’s general understanding of the manslaughter concept; and that the provocation defence is accurately capturing the groups of defendants to whom society would wish to show sympathy.

In particular, our current terms of reference were founded on concerns about the risk of prejudice to mentally ill or impaired persons arising from provocation’s repeal. We have not found any basis for such concerns. The theory, now widely accepted in almost all jurisdictions, is that provocation is a partial defence for those who are in a broad sense mentally normal; diminished responsibility (which does not exist in New Zealand) would be the appropriate defence for the mentally ill or impaired. The practical effect of this is to limit the extent to which section 169 benefits mentally ill or impaired persons. This conclusion is borne out by reviews of case law. Furthermore, it may be that reliance upon the provocation defence is in fact disadvantaging mentally ill or impaired defendants, because of the disjunction between legal and psychiatric considerations. Provocation requires a binary approach – the defendant is either convicted of murder or of manslaughter – and if they are convicted of murder, the judge is likely to be constrained in his or her ability to take account of the alleged provocation on sentence. By contrast, the sentencing forum permits a more rounded consideration of the issues, unhampered by the legal definition of provocation, including the extent to which mitigation may be appropriate by reason of mental impairment.

The English Law Commission has recently considered these issues in two reports: *Partial Defences to Murder* (No 290, 2004) and *Murder, Manslaughter and Infanticide* (No 304, 2006). It concluded that partial defences should be retained as long as the mandatory sentence of life imprisonment for murder is also retained. Reconsideration of the mandatory sentence had been excluded from the Commission’s terms of reference. It was thus considering the issues in a quite different context from New Zealand’s, in which the mandatory life sentence was abolished in 2002. However, in every other respect, their thinking bears considerable similarity to our own. In particular, the Commission concluded that any argument for the retention of partial defences that is based on fair labelling (i.e. avoiding the label “murderer” for less culpable killers) is of secondary importance compared to the sentence mitigation principle; and that under its new proposed structure, those who succeed with a partial defence should be convicted of second degree murder rather than manslaughter.

Given the level of support that we identified for partial defences as a mechanism for recognising reduced culpability, we considered the merits of the various ways in which this might be achieved. The options are: a redrafted partial defence of provocation; a smorgasbord of partial defences; a generic partial defence; degrees of murder; and culpable homicide. Chapter 5 of the report sets out the pros and cons of each option. Ultimately, we do not consider any of them viable, and consequently do not recommend any of them; our preferred option is instead for judges to deal with provocation issues on sentence, aided by a sentencing guideline.

We recommend that the partial defence of provocation should be abolished in New Zealand by repealing section 169 of the Crimes Act 1961; the defendants who would otherwise have relied upon that partial defence should be convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise.

There are some issues around sentencing that will need to be considered and addressed if section 169 is repealed and provocation removed to the sentencing arena: see further chapter 6. Sentencing guidelines may assist in this regard. We recommend that the Sentencing Establishment Unit of the Law Commission (which is undertaking preliminary guideline drafting work in advance of the establishment of the new Sentencing Council) should draft a guideline addressing departure from section 102 of the Sentencing Act 2002 as it ought to operate if section 169 of the Crimes Act 1961 was repealed. The guidance should cover not only the relevance of provocation under section 102, but also the range of other mitigating circumstances that might justify rebuttal of the presumption. Priority should be given to this work, with a view to ensuring that a draft guideline is available in time to inform the views of those considering our recommendation for repeal.

RECOMMENDATIONS

- R1 The partial defence of provocation should be abolished in New Zealand by repealing section 169 of the Crimes Act 1961; the defendants who would otherwise have relied upon that partial defence should be convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise.
- R2 The Sentencing Establishment Unit should draft a guideline addressing departure from section 102 of the Sentencing Act 2002 as it ought to operate if section 169 of the Crimes Act 1961 was repealed. The guidance should cover not only the relevance of provocation under section 102, but also the range of other mitigating circumstances that might justify rebuttal of the presumption. Priority should be given to this work, with a view to ensuring that a draft guideline is available in time to inform the views of those considering our recommendation for repeal.

Chapter 1

Introduction

WHAT ARE PARTIAL DEFENCES?

1. Partial defences are only available in homicide cases. They apply in circumstances that, but for the defence, would constitute murder. They result in a lesser conviction, usually for manslaughter. Historically, the rationale for this was to avoid the mandatory sentence for murder (formerly capital punishment, and subsequently life imprisonment) in cases with mitigating circumstances.
2. New Zealand has the following partial defences: provocation,¹ infanticide,² and killing pursuant to a suicide pact.³
3. Additional partial defences commonly found in other jurisdictions include diminished responsibility (which applies when, by reason of a mental impairment short of insanity, the offender was not fully capable of controlling or comprehending his or her actions); and excessive self defence (which applies when the offender acted in circumstances that warranted the use of some force, but the killing that actually occurred was excessive).

PREVIOUS LAW COMMISSION WORK

4. Some years ago, the Law Commission undertook a review of some of New Zealand's criminal defences, primarily focusing on their applicability to the circumstances of battered defendants. The terms of reference for that project were to:⁴
 - (1) examine how the existing New Zealand law applies to those who commit criminal acts in circumstances where they are victims of domestic violence, in particular, the defences of self defence, provocation, duress and necessity;
 - (2) consider developments and proposals in other jurisdictions, in particular, the defences of self preservation, diminished responsibility and judicial discretion in sentencing for murder;
 - (3) make proposals for reform, if appropriate.

1 Crimes Act 1961, s 169.

2 Crimes Act 1961, s 178.

3 Crimes Act 1961, s 180.

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

5. The Commission, in its resulting report, recommended that:⁵
 - a. the partial defence of provocation should be abolished;
 - b. neither diminished responsibility, nor any other partial defences, should be introduced in New Zealand;
 - c. instead, the mandatory life sentence for murder should be replaced by a sentencing discretion;
 - d. self defence (as provided for in section 48 of the Crimes Act 1961) should be amended slightly, to ensure its applicability to the circumstances of battered defendants; and
 - e. the duress defences should be reformed.

GOVERNMENT RESPONSE

6. The Sentencing Act 2002 abolished the mandatory life sentence for murder, in favour of a discretionary sentence with a presumption of life imprisonment.⁶
7. In 2003, the Ministry of Justice drafted a Cabinet paper which recommended:⁷
 - a. the repeal of provocation, as recommended by the Commission;
 - b. the repeal of infanticide (because infanticide as drafted in section 178 is riddled with anomalies, and is one form of diminished responsibility which the Commission had not recommended for New Zealand); and
 - c. a new necessity defence (encompassing all of the duress defences).
8. In the course of consulting on that Cabinet paper, questions were raised by some government agencies about the implications of partial defence repeal for minorities, particularly the mentally ill or impaired. There was concern that the repeal of both provocation and infanticide might have the effect of unfairly prejudicing mentally ill or impaired offenders who would otherwise have been able to rely on such defences. It was said that this prejudice might arise in two ways: a murder conviction, rather than a conviction for manslaughter or infanticide; and the potential for longer sentences, given the Sentencing Act presumption of life imprisonment for murder.
9. As discussed in chapter 4, such concerns are widely held, and are in fact of general application to anyone who would otherwise have relied on partial defences (not just mentally ill or impaired offenders).

⁵ New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, Wellington, 2001). We note that, at that time, the Commission was wholly differently constituted; wherever they are discussed in this report, R73 recommendations are therefore attributed to the third person.

⁶ Sentencing Act 2002, s 102.

⁷ Cabinet paper “Criminal Defences Reform: Necessity and Partial Defences (Provocation and Infanticide)” (18 November 2003) POL (03) 367.

10. We were therefore asked to further consider these issues. Our terms of reference are reproduced on page 8.

THE SCOPE OF THIS REPORT

11. This report addresses only provocation.
12. Diminished responsibility is not within the scope of the terms of reference, and we remain of the view, previously articulated by the Commission, that it should not be introduced in New Zealand. However, it is briefly discussed, in the context of its relationship to provocation.
13. In the event that our recommendation to repeal provocation is not accepted, other reform options are analysed in chapter 5. One such reform option is the retention of section 169, bolstered by the introduction of other partial defences, including diminished responsibility.
14. In a number of discussions that we had with the legal fraternity, diminished responsibility was suggested as a preferable alternative to provocation. We are not at all clear how this would assist defendants in New Zealand: it would confer a partial defence on some defendants who are presently unable to avail themselves of provocation, but it would remove it from those defendants who presently do. The two partial defences are complementary, and cover quite different ground (or ought to, if they were operating as intended).
15. However, it may be that “diminished responsibility” is regarded by the defence bar as a euphemism for a partial defence of broader scope, which is another reform option considered in chapter 5.
16. Although we also received terms of reference relating to the partial defence of infanticide, we are proposing to separately address these issues in a forthcoming report that will also consider the insanity defence.
17. Finally, the 2003 work conducted by the Ministry of Justice on partial defences proceeded on the stated basis that all partial defences should be repealed. However, the Ministry omitted to consider killing pursuant to a suicide pact.⁸ If we were subsequently to recommend the repeal of infanticide, we would need to also consider what should be done with section 180 (i.e. whether all of New Zealand’s partial defences should be repealed).

REPORT OUTLINE AND STRUCTURE

18. The partial defence of provocation is an ancient defence to a charge of murder, which has been recognised in the criminal law for at least three centuries.⁹ The historical rationale for it was to mitigate the death sentence, and then subsequently the mandatory life sentence.
19. On this basis, there is arguably no longer a need for provocation to exist in New Zealand. The Sentencing Act 2002 introduced a presumption of life

⁸ Julia Tolmie “Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation” [2005] NZ Law Review 25.

⁹ *R v Mawgridge* (1706) Kel 119.

imprisonment, which may be departed from where it would cause manifest injustice. But, on the other hand, it might be argued that the rationale for the provocation defence is not so much absent in New Zealand in modern times, as changed; the defence may remain relevant and necessary for other reasons.

20. While there are some arguable reasons to retain either a partial defence of provocation, or partial defences in general, overall we consider these insufficient to outweigh the considerable problems that bedevil both the status quo and every other possible reform option. This report therefore concludes, first, that the partial defence of provocation in section 169 should be repealed; and secondly, that it should be replaced by a sentencing guideline, rather than a revised partial defences framework.
21. The report is structured as follows:
 - a. the problems with section 169 (chapters 2 and 3);
 - b. reasons identified by stakeholders to either retain section 169, or broaden the partial defence framework in New Zealand (chapter 4);
 - c. an analysis of partial defence reform options (chapter 5);
 - d. our recommendation for a sentencing guideline (chapter 6).

Chapter 2

A troubled legal history: appellate, common and case law

22. Provocation is widely recognised as a troublesome and difficult area of the criminal law. Dissatisfaction with it has been extensively and repeatedly expressed, in all manner of forums. It is evident in judicial dicta at the highest levels.¹⁰ Submissions to similar effect were received by the Law Commission in consultation on *Some Criminal Defences with Particular Reference to Battered Defendants*: the District Court judges' jury trial committee said provocation was "an all but impenetrable and incomprehensible mess" and the High Court judges described it as "a blot on the criminal law". There is a vast and complicated literature, addressing and critiquing every possible aspect of the defence, and a similarly vast and complicated body of case law. We have been able to address only a very small portion of that material in this report. Finally, New Zealand law reformers have been consistently recommending abolition for over three decades.¹¹ The time, in our view, has come to act on such recommendations.
23. The problems with the defence can broadly be categorised as follows:
 - a. legal difficulty, which is addressed in this chapter;
 - b. its fundamental theoretical and practical flaws, described in chapter 3.

10 For examples, see dicta from the *Rongonui* majority set out below at para 45; see also Lord Nicholls writing for the majority in *Holley* discussed at para 68. More recently, see *R v Turaki* (23 November 2006) CA47/06, para 20: "The defence of provocation continues to present daunting challenges to juries and judges. It has indeed been suggested that the logic of s 169 is difficult to support by reference to studies of human psychology: Alex Reilly "Loss of Self-Control and Provocation" (1997) 21 Crim LJ 320. But it remains the law and the appellant was entitled to a correct direction as to its application." See also [2007] NZ Law Rev 136, for an expression of sympathy for trial judges who must explain the "abstruse requirements" of s 169 to juries.

11 New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976); Crimes Bill 1989; Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991); a differently constituted New Zealand Law Commission in NZLC R73; the Ministry of Justice.

24. The common law origins of the provocation defence have been well documented in the literature.¹² It originated as a retaliatory justification, in the face of an objectively recognised outrage to the defendant's honour, such as adultery or physical insult. In *R v Mawgridge*,¹³ four specific instances were indicated in which murder would be reduced to manslaughter: a gross insult; seeing a friend attacked; seeing an Englishman unlawfully deprived of liberty; and catching someone in the act of adultery with the defendant's wife. There was no generally applicable defence; that came later with the case of *R v Welsh* (provocation sufficient to kindle "violence of passion naturally arising... in the breast of a reasonable man").¹⁴
25. Somewhat more recently, but prior to the passage of the present provocation legislation in New Zealand and the United Kingdom, provocation was assessed without any reference to the individual characteristics of the defendant. In *Bedder v Director of Public Prosecutions*,¹⁵ the appellant was convicted of the murder of a prostitute, who had taunted him about his impotence. The trial judge had directed the jury that, for the defence of provocation to succeed, it had to find that the prostitute's taunting would have provoked an ordinary or reasonable man to murderous rage, and that, in assessing that question, they could pay no heed to the fact that the appellant was impotent. The jury rejected the defence of provocation, presumably on the basis that no ordinary potent man would have reacted as the appellant did – notwithstanding the fact that, first, the ordinary potent man would never have been in that situation at all, and secondly, the appellant might understandably have been peculiarly sensitive to taunting of that kind. The House of Lords upheld the direction and the conviction:¹⁶

The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man... But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence... For that proposition I know of no authority: nor can I see any reason in it. It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another. Moreover, the proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation, is or may be itself conditioned by some

12 For a succinct review, see Helen Power "Provocation and Culture" [2006] Crim LR 871, 876–884, and the sources cited therein.

13 Above n 9.

14 (1869) 11 Cox CC 336.

15 [1954] 1 WLR 1119 (HL).

16 *Bedder v DPP*, above n 15, 1122–1123.

physical defect. It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account... this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the “reasonable” or the “average” or the “normal” man is invoked.

26. The harshness of this approach provoked considerable criticism and, ultimately, legislative intervention in both New Zealand and the United Kingdom. The thrust of the criticism was that, while some sort of objective test had much to commend it, there had to be a balance between a policy which set a community standard and said that intentional killing is wrong, and a policy which allowed some compassion to be shown to the motives of the individual accused.¹⁷

NEW ZEALAND 27. Section 169 of the Crimes Act 1961 was New Zealand’s legislative response to the problems perceived in *Bedder*. It defines provocation as follows:

169 Provocation

- (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
 - (2) Anything done or said may be provocation if—**
 - (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control;** and
 - (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.
 - (3) Whether there is any evidence of provocation is a question of law.
 - (4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.
 - (5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.
 - (6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.
 - (7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.
28. The discussion that follows focuses on the “sufficiency” test in section 169(2)(a), and the equivalent United Kingdom “reasonable man” test. This is the most troublesome aspect of the provocation defence.

¹⁷ Matthew Goode “The Abolition of Provocation” in S M Yeo (ed) *Partial Excuses to Murder* (Sydney, The Federation Press, 1990) 43.

29. The wording and operation of provocation in the United Kingdom differ in some respects from New Zealand, in ways that have caused problems and are the subject of discussion in case law and literature, but which we have not needed to address because they are not part of the law here.
30. Recent appellate decisions in both the Court of Appeal and the Supreme Court have addressed several other aspects of provocation in New Zealand, resulting in retrials:¹⁸
 - a. the degree of victim association with provocation by a third party;
 - b. the effect of provocation directed at a third party, such as an assault on a friend of the perpetrator;
 - c. whether the defence is available for murders under section 167(d) Crimes Act 1961;
 - d. the scope of accident or mistake in section 169(6) Crimes Act 1961; and
 - e. the extent to which proportionality is part of provocation law in New Zealand.
31. We have preferred not to explore these aspects of the defence here, in the interests of relative simplicity and length. While it might be argued that the court resource associated with such cases is disproportionate to the benefits of retaining the defence, it might equally be argued that if provocation was abolished, the resource implications for appellate courts would be transferred (at least initially) to sentencing appeals. We therefore note the existence of the cases, but do not consider that they add a great deal either way to the debate about the preliminary question of whether the defence should be retained or abolished. The issues that they raise would of course need to be considered if the defence was to be retained and reformed.
32. It is fairly generally agreed that, with the passage of section 169 in New Zealand, Parliament intended the wholly objective common law (*Bedder*) test to be modified to some extent, but considered that a degree of objectivity was nonetheless necessary so that the provocation defence would not become a licence for bad behaviour.
33. In broad terms, over the years two approaches have been taken to achieving this outcome in practice. The first is that the relevance of the individual characteristics of the accused is limited to their effect on the gravity of the provocation; the self-control exercised in response still needs to be that which would have been demonstrated by an ordinary person in the face of provocation of equivalent gravity. The alternative is that the characteristic is regarded as relevant because it generally reduces the accused's power of self-control; the objective question for the jury under this approach is "how much ought society to expect of this accused"?

¹⁸ *R v Turaki* [2005] 3 NZLR 329; (2005) 21 CRNZ 875 (CA); *R v Timoti* [2005] 1 NZLR 466; (2004) 21 CRNZ 90 (CA); *R v Timoti* [2006] 1 NZLR 323; (2005) 21 CRNZ 804 (SC).

34. In *R v McGregor*,¹⁹ in the courts' first attempt at interpreting what was then a brand new section 169, North J writing on behalf of the Court of Appeal suggested the following approach:²⁰
- a. If the characteristics of the offender were not relevant to self-control, section 169 would not achieve its policy objective of giving some relief from the purely objective *Bedder* approach. Therefore, the "offender must be presumed to possess in general the power of self-control of the ordinary man, **save insofar as his power of self-control is weakened because of some particular characteristic possessed by him**".
 - b. However, not every trait or disposition of the offender should be permitted to modify the concept of the ordinary man, because if so, the ordinary man would be extinguished. The characteristic was therefore required to be of sufficient significance to make the offender a different person from the ordinary run of mankind, and also needed to have a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character. A tendency to be unduly suspicious or to lose one's temper readily would not suffice, nor would self-induced states such as drunkenness.
 - c. The provocation needed to be directed at the characteristic:

there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked... Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity... provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control.
 - d. "Characteristics" could apply to mental as well as physical qualities. However, where a mental characteristic was in issue, a general assertion that the offender was mentally deficient or weak-minded would not suffice. This kind of approach would move too far in the direction of a defence of diminished responsibility, which the legislature had not authorised in New Zealand. There needed to be something more, such as provocative words or acts directed to a particular phobia.
35. All of this was prefaced with the observation that:²¹

Notwithstanding the observations of their Lordships in [*Bedder*] to the effect that it was well-nigh impossible to invest a reasonable man with the peculiar characteristics of the accused without making nonsense of the test, it is apparent, even from a cursory examination of the new section, that those who were entrusted with the drafting and approving of the provisions of the Crimes Act 1961 have attempted that task. Therefore it is plainly the duty of this Court to endeavour to see that their efforts are not rendered unavailing notwithstanding the manifold difficulties that arise in defining what is meant by the somewhat vague words "the characteristics of the offender".

19 [1962] NZLR 1069 (CA). The appeal was decided on a different basis (that there was no evidence sufficient to found provocation), therefore North J's comments were obiter dicta.

20 *R v McGregor*, above n 19, 1080–1082.

21 *R v McGregor*, above n 19, 1077.

36. Most of the *McGregor* propositions were subsequently discredited, in a process that began with *R v McCarthy*:²²

In our view it has to be respectfully said, in the light of judicial experience of the operation of s 169, that the added and obiter observations in *McGregor* go somewhat too far and add needless complexity to the application of the section. We do not think that they have been found workable or followed closely in practice. A racial characteristic of the accused, his or her age or sex, mental deficiency, or a tendency to excessive emotionalism as a result of brain injury are, for the purposes of s 169(2)(a), examples of characteristics of the offender to be attributed to the hypothetical person. In a case where any of them apply, the ordinary power of self-control falls to be assessed on the assumption that the person has the same characteristics. It can be a difficult question, like others which are left to the common sense of juries, but we cannot avoid thinking that the difficulty is unjustifiably aggravated by the suggestion that provocation must be “directed at” a particular characteristic.

...the hypothetical person is to be endowed with the accused’s brain damage and any personality consequences that it may have except as to the power of self-control... Only the effect of alcohol, being transitory and not a characteristic, is to be ignored for the purpose of para (a), although it falls to be taken into account under para (b) in deciding whether the accused in fact lost self-control. **In short the questions are whether the alleged provocation in fact caused the accused to lose self-control to the extent of committing the homicide, and whether a person with the accused’s characteristics other than any lack of the ordinary power of self-control could have reacted in the same way.**

37. The approach of the Court in *McCarthy* was confirmed in *R v Campbell*.²³ In *Campbell* the Court of Appeal noted the difficulties that the required distinction between the gravity of the provocation modified by characteristics, and ordinary self-control, can cause in practice. The appellant, a young man aged 22, had allegedly been homosexually abused as a child. When the somewhat older deceased put his hand on the appellant’s thigh and smiled, it was contended for the appellant that this caused a flashback to the previous abuse; he then lost control and violently struck the deceased multiple blows with an axe. If the jury accepted the evidence of the abuse and the flashback, they could take this into account in assessing the defendant’s sensitivity or susceptibility to the provocation. But self-control had to be assessed by reference to an ordinary person, even though the appellant only lost self-control by reason of the flashback: as the Court of Appeal noted, the ordinary person who had not experienced such a flashback would not have lost self-control by reason of this kind of advance. *Campbell*, it seems to us, offers a particularly good illustration of the problems with the “bifurcated” approach to provocation – that is, the distinction between gravity and self-control. Whether the defence succeeds or not arguably rests heavily on semantics: characteristics, such as the experience of a flashback, if filtered through the lens of gravity may have a bearing on self-control, but to regard the flashback as directly causing the loss of self-control is unacceptable, even in cases in which the sequence of the defendant’s thinking is not at all clear.

22 [1992] 2 NZLR 550 (CA), 558. However, in the meantime, *McGregor* had been relied on in the United Kingdom, as discussed further below.

23 [1997] 1 NZLR 16 (CA).

38. *R v Rongonui*,²⁴ New Zealand's leading case on provocation, is another such case, in which the *Campbell* gravity/self-control distinction was confirmed by a 3:2 majority of the Court of Appeal after lengthy consideration of the issues. Janine Rongonui met the diagnostic criteria for multiple mental disorders, was brain damaged as a result of long term physical and chemical abuse, and was thought to have a mental age of about 15. In the hours preceding the homicide, she had received a letter from the (then) Children and Young Persons Service (CYPS) indicating that her children were at risk and might be taken from her, and had encountered her partner sharing a bed with a friend. When her neighbour refused to care for the children while Rongonui went to CYPS, Rongonui entered the house, obtained a knife from the kitchen, stabbed the neighbour over 150 times, stole her wallet, and subsequently used the cash card to withdraw money from automatic teller machines. There was some evidence that torture may have occurred to obtain the victim's PIN.
39. The trial judge had commented that the *Campbell* approach of distinguishing gravity from self-control "leaves a virtually impossible task of making an understandable direction to the jury in a case like the present where the two are inextricably joined in the mental processes of an accused". On appeal, the Crown submitted that, although the judge had been bound to apply *Campbell*, the approach of that case was in fact incorrect, and there should be a return to *McGregor*, which struck the correct balance between competing interests, by allowing some characteristics to be taken into account within quite strict constraints. This was in response to a submission by counsel for the appellant that the jury should have been directed in accordance with the *McGregor* formulation, requiring a defendant to have exercised "in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him".²⁵
40. Tipping J (with Richardson P and Blanchard J concurring) held that:
- [225] ...The accused is saying to the jury that even if this provocation was insufficient to deprive a person with ordinary powers of self-control of their self-control, it was sufficient to deprive me of my power of self-control because of my characteristic. If what is asserted is a characteristic lowering the accused's power of self-control generally, the accused is effectively saying to the jury, I have less self-control than an ordinary person and my reaction to any provocation must be assessed accordingly.
- [226] To ascribe that consequence of the asserted characteristic to the hypothetical person directly contradicts the statutory requirement that the hypothetical person be taken as having the power of self-control of an ordinary person. The only possible way under the statute in which this ordinary power of self-control can be modified is if the provocation has some relationship to the characteristic which allows the

24 [2000] 2 NZLR 385; (2000) 17 CRNZ 310 (CA).

25 The argument that was run by the parties in *Rongonui* and rejected by both the majority and minority judges was suggested to us in consultation as an option for reform. That is, that *McGregor* struck the right balance between humanity (self-control as modified by the person's characteristics) and an objective standard (by strictly prescribing what characteristics may be considered, along with other barriers to the operation of the defence such as sudden loss of control in the heat of the moment rather than "slow burn"). It is our opinion, as evidently that of the *Rongonui* court, that this offers the worst of both worlds, and was abandoned with good reason. The distinction between mental and physical characteristics, the "directed at" requirement, and the need to show instant rather than cumulative provocation are all completely arbitrary.

accused to say: This provocation was graver for me with this characteristic than it would have been for a person without the characteristic, not because I have generally lowered self-control, but because of the nature of the provocation for me with my characteristic. Therefore, says the accused, with my characteristic and the resulting gravity of the provocation, even ascribing to me as you must the power of self-control of an ordinary person, the provocation I received was sufficient to deprive me of my self-control. While as was said in *McCarthy*, the concept of the provocation having to be directed at the characteristic may be thought unhelpful, the statute inevitably requires there to be a sufficient relationship between the characteristic and the provocation. A characteristic which produces only a general lowering of the power of self-control is not enough, unless there is in addition a more specific connection between the provocation and the characteristic.

...

[235] In a case involving an asserted characteristic, the directions of necessity have to be much more complicated but may usefully be prefaced by the point that if the jury considers that the provocation, without any reference to the accused's characteristic, was sufficient to deprive a person of ordinary self-control, of the power of self-control, the defence will succeed without any reference to the asserted characteristic. If the Crown establishes that the provocation was not sufficient to do this, the jury will have to tackle the question of characteristics... the jury must consider whether the provocation was of sufficient gravity to deprive [a hypothetical person having the power of self-control of an ordinary person but otherwise having the accused's characteristic] of the power of self-control. It is desirable to add that this means the provocation must have been of sufficient gravity to deprive of their self-control a person with the accused's characteristic but who is expected to display the power of self-control of an ordinary person. To assist the jury further, it is helpful to say that **this requires the jury to assess the gravity of the provocation from the point of view of a person with the accused's characteristic. After assessing the level of gravity of the provocation in that way, the sufficiency of the provocation to deprive the hypothetical person of self-control must be viewed from the standpoint of a person with the power of self-control of an ordinary person. The question becomes whether such a person ought to have been able to resist provocation of that level of gravity. A metaphorical description of what this involves would be to say that provocation, which for an ordinary person is at level 5 of gravity, might be at level 7 for the accused because of the characteristic. The accused must show the self-control of an ordinary person but against provocation at level 7, not level 5.** The sufficiency of the provocation to cause loss of self-control must be assessed on that basis.

41. Elias CJ (with Thomas J concurring) dissented, and proposed the following approach:

[120] I am of the view that s 169(2)(a), properly construed, invests the ordinary man with the characteristics of the accused. Those characteristics may be taken into account in assessing whether the words and conduct of the victim were "sufficient" to cause the accused to lose control. Such characteristics must extend beyond the ill-temper, irascibility, impulsiveness, violence, or intoxication an ordinary man may experience and which he is expected to keep under control. That is the self-control of the ordinary man. But if the characteristics are such as to deprive the accused of the power of this ordinary self-control, they are made relevant to the question of

sufficiency of the provocation under s 169(2)(a). Immaturity through youth or mental impairment, cognitive impairment through brain damage or senility, and heightened sensitivity through a recognised syndrome induced by abuse are all examples of characteristics which may be considered.

[121] This interpretation I consider accords both with the structure of the objective test contained in the clause and the policy of the defence of provocation. It is also the conclusion reached in *McGregor*. It is not clear to me that *McCarthy* departed from this interpretation (although, rightly in my view, it corrected the impression conveyed by *McGregor* that the provocative conduct had to be “directed” at the characteristics)...

...

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

[126] The statutory modification of the ordinary man test does not abolish it altogether. **The question of “sufficiency” means that the underlying consideration is whether the accused “ought” to have restrained himself... if the characteristic meant that the accused could not exercise ordinary self-control, in my view the statute does not hold him to that standard.** I agree with the *McGregor* conclusion that the provocation will be “sufficient” to cause loss of self-control if the accused exercised the self-control expected of an ordinary person “save insofar as his power of self-control is weakened because of some particular characteristic possessed by him”.

...

[128]... **the policy behind the “ordinary man” test is not served by holding to it those who cannot exercise the control to be expected of the ordinary man and denying to those who are the most frail the palliative developed by the law, through experience, for human frailty... The objective test operates as a brake upon the availability of the defence of provocation not to promote equality, but to ensure that human life is better protected by holding people to the control they ought to maintain. That policy is not achieved by imposition of a standard impossible of attainment in the circumstances of the provocation given because of the particular characteristics of the accused. Equality before the law is not achieved by holding those mentally damaged to the same level of culpability as those not.**

...

[131]... In my view *McCarthy* was correct to reject the restriction suggested by [North J in *McGregor*]. A characteristic is any attribute which, in the circumstances of the provocation, depresses the accused’s power of self-control below that of an ordinary person. A state of intoxication, whether induced through alcohol or drugs, is not a characteristic. Nor is ill temper or impulsivity within the wide range experienced by normal people. Brain damage induced by substance abuse is. The provocation need

not be “directed” at the characteristic, but to be relevant the characteristic must have affected the accused’s power of self-control to the provocation. Whether the provocation was “sufficient” to cause such loss of control is a jury question to be assessed against the standard of an ordinary man, able to control his temper or impulses, unless that control in relation to the provocation is displaced by the accused’s own characteristics.

42. Thomas J considered the majority approach to be unworkable in practice:

[172]... Having assessed the impact of a provocation on the offender because of his or her characteristic, the jury are required to arrive at an assessment of the impact of the provocation on the ordinary person without regard to the characteristic but with regard to the gravity of the provocation to a person with that characteristic. This exercise can only be completed by determining a level at which the provocation would be sufficient to cause the ordinary person to lose self-control at that level of gravity. Yet, when that determination is made it must necessarily be made in a vacuum or in the abstract... In order to work, the paragraph requires a constant level, say, level 7, at which the ordinary person would lose the power of self-control whatever the circumstances. Whether any trial judge would risk the silent ridicule of a jury by working the metaphor through to its logical conclusion is open to doubt.

...

[205]... The gravity/sufficiency paradigm... has caused considerable dissatisfaction among trial judges. Having regard to the incomprehensible nature and potential for injustice of the gravity/sufficiency paradigm, it would be surprising if it were otherwise... Trial judges are all too aware of the difficulty in trying to explain the gravity/sufficiency concept to the jury. Most have seen the glazed look in the jurors’ eyes as, immediately after instructing them that it is open to them to have regard to the accused’s alleged characteristic in assessing the gravity of the provocation, they are then advised that they must revert to the test of the ordinary person and disregard that characteristic when determining the sufficiency of the accused’s loss of self-control.

43. He also considered that the majority judgment (as expressed by Tipping J) would have the undesirable effect of reinstating the *McGregor* requirement for provocation to be directed at the characteristic (such as provocative words alluding to a physical deformity), which was subsequently overruled in *McCarthy*. We do not read Tipping J’s judgment as requiring anything more than a connection between the characteristic and the provocation in the sense that the latter was graver by reason of the former. However, we agree that there is potential, if the concluding lines of para 226 were quoted out of context, for a different conclusion to be drawn, which would be problematic. We note that English courts have had the same experience, where a lack of clarity of expression in this very difficult area at worst allegedly spawns a line of inconsistent case law, and at best generates confusion and further litigation.²⁶
44. There may be some division of opinion about the extent of the practical problem with section 169. Sir Robin Cooke expressed the view that the difficulties are largely an urban myth,²⁷ and Thomas J’s views on the matter may be contrasted with those of Richardson P:²⁸

26 See further paras 54–62.

27 “The Crimes Bill 1989: A Judge’s Response” [1989] NZLJ 235.

28 *R v Rongonui*, above n 24, para 156.

In *McCarthy*, the court, in deciding to revisit and depart from *McGregor*, noted five reported decisions of the court between 1976 and 1991 showing that the observations of the *McGregor* court... had caused continual difficulty... the judges sitting in *McCarthy*, did not think that the *McGregor* observations had been found workable or had been followed closely in practice. By contrast, so far as my researches go and recollection extends, no similar concerns had been expressed in this court in relation to *McCarthy* until the challenge in the present case; and both the Senior Puisne Judge and the Executive Judge at Auckland have confirmed that that is their experience and understanding at the trial level.

45. However, tellingly, the other two members of the *Rongonui* majority indicated some sympathy for Elias CJ's approach if the wording of the statute had permitted it, and at the very least dissatisfaction with the present law:

I would very much like to feel free to approach the question of provocation as the Chief Justice has done...²⁹

... it strikes me as entirely unfair to disregard such a mental condition in determining the culpability of a sufferer who has lost self-control as a consequence of something said or done by the deceased.³⁰

The present law is plainly unsatisfactory. There must be doubt whether a jury can realistically be expected to understand the instruction which the statute requires of the judge.³¹

What can and should be said is that the present statutory provisions are in need of early attention by Parliament. The policy behind any amended provision is of course for Parliament. Whatever approach is adopted its expression must be easier of understanding and application than the present section.³²

The mental gymnastics involved in this exercise simply serve to underline the desirability of achieving conceptual simplification of the law in this area. A humane way of approaching that task and one which is consistent with the essentially subjective approach which the criminal law takes to mental states, would be to allow as a characteristic any mental state which generally reduces the accused's power of self-control, provided that state was neither self-induced such as intoxication, nor was simply a personality trait like short temper.³³

46. The Court of Appeal was subsequently asked to reconsider its stance,³⁴ in the light of the House of Lords majority decision in *Smith (Morgan)*.³⁵ Perhaps with some prescience, the Court declined.³⁶

29 *R v Rongonui*, above n 24, para 211, per Blanchard J.

30 *R v Rongonui*, above n 24, para 213, per Blanchard J.

31 *R v Rongonui*, above n 24, para 216, per Blanchard J.

32 *R v Rongonui*, above n 24, para 227, per Tipping J.

33 *R v Rongonui*, above n 24, para 236, per Tipping J.

34 *R v Makoare* [2001] 1 NZLR 318 (CA).

35 [2001] 1 AC 146; [2000] 4 All ER 289 (HL).

36 See further paras 66–70: *Smith (Morgan)* has since been disapproved in *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC); and in *R v James; R v Karimi* [2006] QB 588 (CA) the English Court of Appeal held that *Holley* should be regarded as binding upon the English courts, thus effectively overruling *Smith (Morgan)*.

47. Section 3 of the Homicide Act 1957 was the United Kingdom equivalent of section 169 – that is, the legislative response to *Bedder*. It provides:³⁸

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.

48. What the legislature intended by its reference to the “reasonable man”, and the way in which the jury should be directed to approach this phrase, has been considered by the House of Lords or the Privy Council on five occasions between 1978 and 2005, and numerous times by the English Court of Appeal, culminating in the House of Lords decision in *Smith (Morgan)* with a 3:2 split,³⁹ and only a few years later the Privy Council decision in *Attorney-General for Jersey v Holley*, with a 6:3 split in the opposite direction.⁴⁰ Faced with this divergence of opinion and authority, the present position of the English Court of Appeal is that *Holley*, somewhat unconventionally, should be taken as the leading authority for the purposes of English law.⁴¹

R v Camplin [1978] AC 705; [1978] 2 All ER 168 (HL)

49. *R v Camplin* was the first case in which the House of Lords was called upon to consider section 3 of the Homicide Act 1957, and the first case in which the gravity/self-control distinction was propounded that is now a settled part of both New Zealand and English law.⁴² The defendant, who was 15 years old, had hit the deceased on the head with a chapatti pan; this occurred after he had been sexually violated by the deceased, who then laughed at his reactions. The question on appeal was whether the trial judge had erred in directing the jury in terms of the “reasonable man”, as opposed to a reasonable boy of the defendant’s age. Lord Diplock held that the addition by the legislature of verbal provocation to the scope of the defence (“take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man”) required the jury to be able to take into consideration factors that may affect the gravity of taunts or insults to the particular person: the new requirement would be rendered meaningless if jurors tried to assess the gravity of a particular taunt in a vacuum. In relation to self-control, he held that age may be taken into account in determining the degree of self-control to be expected of an ordinary person: the law should not require “old heads upon young

37 We are indebted to the Law Commission for England and Wales’ *Partial Defences to Murder* (Consultation Paper No 173, 2003) and *Partial Defences to Murder* (Report No 290, 2004): the collation of information about English law and other Commonwealth jurisdictions’ legislation and leading cases saved us a significant amount of research time.

38 Murder is a common law offence in England; it is also by virtue of the common law that the murder charge reduces to a manslaughter conviction where the section 3 requirements are satisfied.

39 Above n 35.

40 Above n 36.

41 “Unconventionally” because *Holley* was a Privy Council decision relating to Jersey, and as such would not normally bind the English courts: see further paras 69–70.

42 [1978] AC 705; [1978] 2 All ER 168 (HL).

shoulders”.⁴³ He proposed the following jury direction:⁴⁴

... the reasonable man... is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him...

50. In 1976, Andrew Ashworth had published an article to similar effect, explaining why characteristics need to be taken into account when considering the issue of provocation, and suggesting a way forward that in his view struck the appropriate balance between compassion for individual frailty, and objectivity in the interests of the wider community. This was that characteristics should be used to assess the gravity of the provocation, but not self-control; defendants needed to demonstrate objectively reasonable self-control:⁴⁵

... in general a provocation can only be described as “grave” in relation to persons of a particular class. Thus the sight of two persons indulging in sexual intercourse cannot properly be described as a grave provocation – for it would hardly provoke the unrelated intruder to anything more than embarrassment – without adding that it would be grave for someone who is married, engaged or related to one of the participants. Similarly, to say that throwing a pigskin shoe is a grave provocation would be incorrect as a general proposition: but it would be grave to a Moslem... To be meaningful, the “gravity” of provocation must be expressed in relation to persons in a particular situation or group. For this reason it is essential and inevitable that the accused’s personal characteristics should be considered by the court. The proper distinction, it is submitted, is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused’s level of self-control should not.

51. As to the workability of the distinction in practice, Ashworth noted the potential – in cases such as *Bedder* and, more recently, *Rongonui* – for factors explaining the gravity of the provocation to also have affected the accused’s level of self-control. For example, in *Bedder*, there was evidence of emotional instability arising from the impotence.⁴⁶
52. As to whether the distinction might produce unfairness, Ashworth thought that in the English legislative context, with an available defence of diminished responsibility, it did not:⁴⁷

The doctrine of provocation is thus reproached with a cruel inconsistency: it sets out to provide a concession to human weakness and yet it applies the same standard to persons of unequal capacities, with the result that what operates as a concession to “normal” individuals comes to others as the opposite of a concession... But what

43 *R v Camplin*, above n 42, 717. Compare *Stingel v R* (1990) 171 CLR 312 (HCA): “the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness”.

44 *R v Camplin*, above n 42, 718. His Lordship wrote for the majority; however, the two Law Lords who wrote separately were essentially in agreement.

45 AJ Ashworth “The Doctrine of Provocation” [1976] *Camb LJ* 292, 300. See also Sir Francis Adams *Adams on Criminal Law and Practice in New Zealand* (1st ed, 1964), 268–270; (2nd ed, 1971), paras 1264–1269.

46 Ashworth, above n 45, 301.

47 Ashworth, above n 45, 311–312.

exactly is offensive to the popular moral sense – failure to provide such abnormal individuals with a defence to murder, or the failure to regard their offences as manslaughter upon provocation? Mitigation of the offences of those individuals may indeed be desirable, as may their subjection to treatment rather than punishment, but the defence of provocation is hardly an appropriate vehicle... The defence of provocation is for those who are in a broad sense mentally normal. Those suffering from some form of mental abnormality should be brought within the defence of diminished responsibility.

53. It would appear that Lord Diplock in *Camplin*, writing two years after Ashworth's article and taking exactly the same approach, was probably influenced by the article, although he did not cite it.

Court of Appeal cases

54. Subsequent to *Camplin*, a line of Court of Appeal authority emerged that came to be interpreted as authority for a different approach to section 3, whereby the relevance of the defendant's characteristics was no longer confined to the gravity of the provocation, and might instead have a bearing on the defendant's power of self-control. In hindsight, it is doubtful whether departure from *Camplin* to this extent is what the Court of Appeal intended; however, inadvertently or otherwise, the cases prompted more than a decade of considerable debate and uncertainty for courts of first instance as to the proper approach.
55. In both *R v Ahluwalia*⁴⁸ and *R v Dryden*⁴⁹ the English Court of Appeal held that the characteristics in issue in these cases (Mrs Ahluwalia was a battered wife, and Mr Dryden was mentally subnormal) were capable of modifying the reasonable person test, and should have been left to the jury for its consideration,⁵⁰ without being specific about which limb of the two-limb *Camplin* test (gravity as opposed to self-control) the characteristics should apply to. The sequence of

48 [1992] 4 All ER 889 (CA). Medical and court records confirmed that the appellant had suffered violence and abuse from the deceased from the outset of their arranged marriage. The deceased was having an affair with a work colleague. He indicated to the appellant that their relationship was over; she wanted to hold it together for the sake of duty and their children. He threatened to burn her face with a hot iron if she would not leave him alone, and demanded money from her on the threat of a beating next morning. After the appellant had gone to bed, she recalled purchases previously made by her of caustic soda and petrol: "She had bought some caustic soda a few days earlier with a view to using it upon the deceased. She had also bought a can of petrol and put it in the lean-to outside the house. Her mind turned to these substances and some time after 2.30 am she got up, went downstairs, poured about two pints of the petrol into a bucket (to make it easier to throw), lit a candle on the gas cooker and carried these things upstairs. She also took an oven glove for self-protection and a stick. She went to the deceased's bedroom, threw in some petrol, lit the stick from the candle and threw it into the room." The deceased sustained serious burns, and died 6 days later. Before he died he deposed that the appellant had thrown something else over him in the bathroom when he was trying to douse the flames; there was some basis on the evidence to think that this may have been the caustic soda.

49 [1995] 4 All ER 987 (CA). The appellant had been engaged in a long-running planning dispute with his local authority. A demolition order was finally issued by the authority for buildings illegally constructed by the appellant on his property. When the council workers arrived (accompanied by their solicitor, police officers, and a number of media), the appellant emerged from his house with a gun and began shooting. He killed the council planning officer, and injured some other people. According to medical evidence, and that of the appellant's friends, he was intellectually in the bottom 25 per cent of the population; solitary and eccentric; inclined to obsessive behaviour (such as keeping meticulous records of the weather and his garden produce); and had been in a "poor state" both physically and mentally for some time, exacerbated by the death of his mother and the dispute with the council.

50 More precisely, in *Ahluwalia*, it would have been proper to leave evidence of the syndrome to the jury if there had been evidence of it at the time of the trial.

reasoning in *Ahluwalia* and *Dryden* is similar to that of the slightly fuller reasoning in the subsequent case of *R v Humphreys*.⁵¹

- a. The Court quoted a passage from *Camplin* to the effect that “the gravity of verbal provocation may well depend on the particular characteristics or circumstances of the person to whom a taunt or insult is addressed”, without discussing or disapproving it. On the contrary, the Court commented that the passage “is of particular importance in the present case”.
- b. It quoted section 169(2) of the Crimes Act 1961, as a legislative embodiment of the distinction drawn in *Camplin*, followed by a reference to *McGregor*, as the first New Zealand interpretation of the proper reading of this section, including the passage from North J that “The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him”.⁵²
- c. It then quoted *R v Morhall*,⁵³ which, like both *Ahluwalia* and *Dryden*, was a Court of Appeal judgment that had been delivered by Lord Taylor CJ. The reasoning of his Lordship in *Morhall* had made clear that characteristics that are taken into account are in respect of gravity, with no indication that in reaching this view he was departing from his previous authority. Accordingly, *Morhall* arguably could and should be legitimately read as an explication of *Ahluwalia* and *Dryden*.⁵⁴

In our judgment, it must be a matter for the judge as to whether any suggested characteristic is capable of being considered by the jury consistent with the concept of a reasonable man and capable of affecting the gravity of the provocation to the defendant. If he decides the characteristic is so capable, he should leave it to the jury to decide whether it is in fact consistent with the reasonable man and whether, if so, it might have affected the gravity of the provocation to a reasonable man invested with it so as to cause him to lose his self-control and do as this defendant did.

In our judgment, however, a self-induced addiction to glue-sniffing brought on by voluntary and persistent abuse of solvents is wholly inconsistent with the concept of a reasonable man.

- d. Finally the Court, without discussing or disapproving *Morhall*, concluded (again omitting to specify which limb of the reasonable person test was engaged):

51 [1995] 4 All ER 1008 (CA). The appellant came from a broken home, and in adolescence had turned to drugs, alcohol, and prostitution. At the time of her offending she was 17 years old, and living with the victim, a 33 year old man named Mr Armitage. He had picked her up off the street, was living on her prostitution earnings, and treated her violently. The appellant had a tendency to mutilate herself when stressed or seeking attention, primarily by cutting her wrists and forearms. On the night of the murder, Mr Armitage had been drinking with friends; he suggested a “gang bang” to the appellant; she cut her wrists; he later came to sit by her with no trousers on (from which she inferred a possibility of rape) and commented that she hadn’t made a very good job of the wrist-slashing; whereupon she stabbed him in the heart with the knife she had been using on herself.

52 *McGregor*, in the interim, had been discredited in *McCarthy*, but none of the judgments cites *McCarthy*. *Ahluwalia*, which is the earliest, was issued on 31 July 1992; *McCarthy* was issued on 27 February 1992 (although it would not have been immediately reported).

53 [1993] 4 All ER 888 (CA).

54 *R v Morhall*, above n 53, 894. The focus of the case was on a different issue: whether characteristics that are repugnant to reasonableness can be considered: see further the discussion of the House of Lords’ judgment at paras 57–58.

We therefore consider that the judge should have left for the jury's deliberation these two relevant characteristics as eligible for attribution to the reasonable woman, it being for them to decide what, if any, weight should be given to them in all the circumstances.

56. It is possible to interpret this series of cases in two ways, which is what has subsequently occurred. First, there is nothing in them explicitly disapproving the *Camplin* approach, and therefore they should be read as consistent with it (particularly in light of the fact that *Camplin* was binding on them). However, this line of cases has subsequently been relied upon as authority for a quite different approach, without acknowledging the possibility that they represent no more than a lack of clarity in expression. That is, that there is no gravity/self-control distinction: it is up to the jury to decide how to integrate individual characteristics with the statutory reasonable person threshold, and that may include characteristics that modify (reduce) self-control.

R v Morhall [1996] 1 AC 90 (HL)

57. The Court of Appeal decision in *Morhall*,⁵⁵ discussed above, was subsequently taken on appeal to the House of Lords. The appellant was a glue sniffer, whose friends and girlfriend were concerned about and openly critical of his habit. Ultimately, while high on glue, he fatally stabbed one of the friends for continuing to nag him on the subject. The Court of Appeal had held that this was not a characteristic with which the reasonable man could properly be invested:⁵⁶

Otherwise, some remarkable results would follow. Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury; logic would demand similar indulgence towards an alcoholic, or [a drug addict or] a paedophile... Yet none of these addictions or propensities could sensibly be regarded as consistent with the reasonable man... Whilst *DPP v Camplin* decided that the "reasonable man" should be invested with the defendant's characteristics, they surely cannot include characteristics repugnant to the concept of the reasonable man.... In effect, [the appellant's] argument would stultify the test. It would result in the so-called reasonable man being a reincarnation of the appellant with his peculiar characteristics whether capable of being possessed by a reasonable man or not and whether acquired by nature or by his own abuse.

58. The House of Lords reversed the decision, holding that "the mere fact that a characteristic of the defendant is discreditable does not exclude it from consideration". An important distinction needed to be drawn between the addiction to glue-sniffing as a characteristic, and intoxication with glue at the time of the killing; like other kinds of intoxication, and "exceptional pugnacity" (i.e. displaying a lack of ordinary self-control), the latter would be excluded as a matter of policy.⁵⁷ However, chiefly of relevance to the present discussion was the fact that, obiter dicta, the House of Lords maintained the *Camplin* distinction between characteristics (including discreditable characteristics) going to gravity, and ordinary self-control unaffected by any characteristic other than age and sex.

55 [1996] 1 AC 90 (HL).

56 [1993] 4 All ER 888, 893–894.

57 *R v Morhall*, above n 55, 98–100.

Luc Thiet Thuan v R [1997] AC 131; [1996] 2 All ER 1033 (PC)

59. In *Luc Thiet Thuan*,⁵⁸ considering section 4 of the Hong Kong Homicide Ordinance which was identical to section 3 of the Homicide Act 1957 (UK), a majority of the Privy Council disapproved the line of post-*Camplin* Court of Appeal authority that allowed the jury to take into account factors that had the effect of reducing ordinary self-control:

... there is no basis upon which mental infirmity on the part of the defendant which has the effect of reducing his powers of self-control below that of the ordinary person can as such be attributed to the ordinary person for the purposes of the objective test in provocation.

... an indication of the problems involved in so taking mental infirmity into account is provided by *R v Raven* [1982] Crim LR 51, which was concerned with the trial for murder of a man whose physical age was 22 years, but whose mental age was only 9 years. The Recorder of London directed the jury that, in considering the objective test in provocation, they should attribute to the reasonable man the retarded development and mental age of the defendant. It is scarcely surprising that Professor Birch, in her commentary on the report, should have expressed the opinion that “putting oneself in the position of a reasonable 22-year-old with a mental age of nine is a tremendously difficult feat” (see [1982] Crim LR 51 at 52). Even greater problems would arise if the appellant’s argument was to be accepted in the present case, in which event the jury should have been directed to attribute to the reasonable man, ie a man having the ordinary man’s power of self-control, the appellant’s brain damage, with the consequent impairment of that power.

60. The mental infirmity was relevant to the gravity of the provocation, but not to self-control.⁵⁹

R v Campbell [1997] 1 Cr App R 199 (CA)

61. In *R v Campbell*,⁶⁰ the English Court of Appeal declined to follow *Luc Thiet Thuan*, and instead applied what it regarded as a binding line of domestic appellate authority – that is, the cases discussed above.⁶¹

58 [1997] AC 131; [1996] 2 All ER 1033 (PC).

59 The provocation alleged in *Luc Thiet Thuan* was that the appellant visited his former girlfriend to collect a debt from her. They argued, whereupon he tied her up. She then said (according to the appellant’s evidence in chief) “that her boyfriend could make her very happy while in bed. Then she said that that was better than me. And she said that I was so quick that I was just like a newspaper selling boy... she said that I had no right to control her, and she said that at that moment I had no relationship with her at all... at this moment after she had said all those words then I felt that everything had gone. All these years I was simply deceiving myself... I had wasted so much time on her and it was only at this moment that I realised that she had only played me. At that moment everything just popped up to me inside and I did not want to hear her any more; so I told her to shut up. Then I picked up that knife... I just went mad and used the knife to stab her”. The mental impairment relied upon by the appellant is described in the judgment at 1037: both Crown and defence experts agreed that there was evidence of impaired brain function, but the Crown expert noted that the appellant had not exhibited aggressive tendencies while in prison on remand.

60 [1997] 1 Cr App R 199 (CA).

61 *R v Campbell*, above n 60, 207. This was obiter dicta; the appeal was decided on the alternative diminished responsibility ground (on the basis of the appellant’s epilepsy). He had offered a female hitchhiker a lift, then punched her in the throat when she rejected his sexual advances by hitting him in the eyes. The punch caused her to bleed profusely from the mouth, whereupon he drove around for a while in “plain blind panic”, stopping from time to time to try to strangle her, and eventually succeeding.

If we were entitled to choose between the competing views expressed in the Privy Council decision, we should face a difficult task. The legislation in Hong Kong and this country is to the same effect. There is compelling force in the construction which the majority have put on a section which makes reference to the reasonable man and gives no express warrant for elaborating or qualifying that concept. We are, however, conscious that the body of Court of Appeal authority which is in doubt represents a judicial response, born of everyday experience in criminal trials up and down the country, to what fairness seems to require. If the concept of the reasonable man expressed in section 3 were accepted without any qualification, successful pleas of provocation would be rare indeed, since it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation... We do not, however, conceive that it is open to us to choose between these competing views. The previous decisions of this Court are binding upon us. The decision of the Privy Council is not. It appears to us that unless and until the previous decisions of this Court are authoritatively overruled, our duty and that of trial judges bound by the decisions of this Court is to apply the principles which those cases lay down.

62. To the extent that any overruling was required, *Morhall* should have achieved this (albeit obiter dicta). However, as should be clear from the analysis above, the line of Court of Appeal cases in fact does not explicitly stand for anything contrary to the *Camplin* approach affirmed in both *Morhall* (by the House of Lords) and *Luc Thiet Thuan* (by the Privy Council). There were arguably no “competing views” or “body of Court of Appeal authority” between which it was necessary to choose.

R v Smith (Morgan) [2001] 1 AC 146; [2000] 4 All ER 289 (HL)

63. In *Smith (Morgan)*,⁶² the House of Lords was asked to resolve the conflicting authorities discussed above – specifically, the direct conflict between the Court of Appeal’s approach in *Campbell*, and the Privy Council’s approach in *Luc Thiet Thuan*. The appellant and the deceased were alcoholics, who spent their evening drinking and arguing. In particular, the appellant accused the deceased of stealing his carpentry tools, and selling them to buy drink. When the deceased repeatedly denied this (“he just kept lying and lying”), the appellant became enraged and stabbed him. According to expert evidence (which was disputed), he was clinically depressed at the time, which may have reduced his threshold for erupting with violence. The trial judge had directed the jury in terms of *Luc Thiet Thuan*, that if the depression affected the gravity of the provocation then it could be taken into account, but its disinhibiting effect on self-control was irrelevant. This was overturned on appeal (the Court of Appeal considering itself bound by *Campbell*), with a question certified to the House of Lords because of the conflict with *Luc Thiet Thuan*. The question was whether any characteristics other than age and sex could be relevant to both the gravity of the provocation, and the standard of self-control.
64. The essence of the majority decision (per Lords Hoffman, Clyde, and Slynn) reflected the approach preferred by the minority in *Rongonui* in New Zealand (Elias CJ and Thomas J). According to that approach, the key question for the jury is whether the loss of self-control was sufficiently excusable to reduce the

62. *R v Smith (Morgan)*, above n 35.

gravity of the offence from murder to manslaughter, taking into account all of the defendant's characteristics and deciding what degree of control over their emotions everyone is entitled to expect their fellow citizens to exercise. Their Lordships' reasoning was as follows:

- a. Section 3 of the Homicide Act 1957 conferred sole discretion on the jury to determine what is an acceptable degree of provocation. If the accused was in fact provoked, the judge no longer had the power to withdraw the defence from the jury on the basis that there were insufficient grounds for it in law: it was for the jury to decide if the provocation was objectively sufficient to allow the accused the benefit of the defence. It would be trespassing on the function of the jury to tell them to ignore some characteristics, or use them only for certain purposes.
- b. However, this did not justify exceptional pugnacity, or self-induced disinhibition (for example, by intoxication), or, apparently, other kinds of antisocial behaviour such as stalking:⁶³

A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his anti-social propensity as even a partial excuse for killing. [His Lordship described the Australian case of *Stingel v R* (1990) 171 CLR 312, where the accused became obsessed with his former girlfriend and, on finding her engaged in sexual activity in a vehicle with another man, fetched a knife and stabbed the man.] Male possessiveness and jealousy should not today be an acceptable reason for loss of self control leading to homicide, whether inflicted upon the woman herself or her new lover. In Australia the judge was able to give effect to this policy by withdrawing the issue from the jury. But s 3 prevents an English judge from doing so. So, it is suggested, a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element is the best way to ensure that people like *Stingel* cannot rely upon the defence.

- c. Regarding *Camplin*, Lord Diplock's inclusion of age and sex as characteristics relevant to the objective standard of self-control was not intended to be comprehensive; those were the characteristics relevant on the facts of that case. *Camplin* could be relied upon as authority for the fact that the standard of self-control can be mitigated by the accused's characteristics.
- d. The distinction widely supported in the Commonwealth, between characteristics relevant to gravity, and objective self-control, requires the jury to dissect the whole person into parts and second-guess whether it was the gravity of the provocation that caused the loss of self-control, or reduced self-control. Faced with a disordered person, the two aspects become "inextricably muddled" (referring to *Rongonui* as an example).
- e. The blind application of an objective standard of conduct may cause injustice where a particular individual is incapable of attaining the objective standard of behaviour for reasons that fall short of diminished responsibility. The general principle is that the same standard of behaviour is expected of everyone, but the jury should be told that this is a principle rather than a

63 *R v Smith (Morgan)*, above n 35, per Lord Hoffman at 169; 308–309.

rigid rule. It may sometimes have to yield to the more important principle of doing justice in the particular case. People who are incapable of meeting a wholly objective standard should only be expected to do what is reasonable for them:⁶⁴

... the standard of reasonableness in this context should refer to a person exercising the ordinary power of self control over his passions which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced. Society should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which reduce the extent to which he is incapable of controlling himself.

65. The minority (per Lords Hobhouse and Millett) held that characteristics should be relevant only to the fact that self-control was lost, and the gravity of the provocation. They should not be admissible in respect of the objective standard of self-control that all defendants are expected to exercise. Their dissenting view was thus the one preferred in New Zealand by the *Rongonui* majority. Their Lordships reasoned that:
- a. The “reasonable man” test serves an important societal function: to set a uniform standard of self-control that determines the scope of the defence. It is not acceptable to leave the question of whose criminal responsibility should be mitigated entirely in the hands of the jury; that will inevitably lead to idiosyncratic and inconsistent decisions, based on the subjective judgment of the individual jurors that happen to be deciding the case.
 - b. To judge an accused by what society expects of a person with the accused’s reduced powers of self-control is a meaningless standard. If ordinary powers of self-control are irrelevant, there is no external benchmark left against which the jury can assess whether the defendant ought to have done better. Nobody knows whether a person who has failed to control themselves could in fact have controlled themselves.
 - c. The diminished responsibility defence in section 2 of the Homicide Act 1957 (UK) expressly provides for such matters as brain damage and depressive illness. The perceived injustice that the majority is concerned to avoid (holding to an objective standard persons who are incapable of achieving it) is addressed by section 2:⁶⁵

Section 2 is of course capable of applying in any situation and those situations include a killing by a defendant who has killed after losing his self-control. A defendant in this situation can contend that his conduct was not abnormal and require the prosecution to satisfy the jury that his loss of self-control was not the result of provocation or his response to it was not that of a reasonable man. Or, he can contend and seek to satisfy the jury on the balance of probabilities that he had an abnormality of the mind which in the circumstances substantially reduced his mental responsibility for what he did. A defendant can of course place both

64 *R v Smith (Morgan)*, above n 35, per Lord Clyde at 179; 318.

65 *R v Smith (Morgan)*, above n 35, per Lord Hobhouse at 191; 329–330.

contentions before the jury, as the respondent did in this case. The jury can then return a verdict of manslaughter on one or the other basis. But it is always open to the jury to conclude (as no doubt the jury did in this case) that the defendant's response was objectively disproportionate and that his abnormality of mind did not suffice to impair his mental responsibility for what he had done.

- d. The alternative construction of section 3 would have the effect that a defendant who does not want to rely on section 2, or who fails to satisfy the jury of his mental impairment on the balance of probabilities, is then able "to escape the burden of proof and introduce vaguer concepts not contemplated by either section".⁶⁶
- e. Appellate authorities over the years have been misconstrued, and selectively quoted. There is in fact no authority for the proposition relied upon by the respondent (and preferred by the majority).

Attorney-General for Jersey v Holley [2005] UKPC 23 (PC)

66. *Attorney-General for Jersey v Holley* is the most recent appellate decision at this level.⁶⁷ *Holley* was an appeal from the Court of Appeal of Jersey. Jersey provocation law is the same as English law.⁶⁸
67. The Privy Council (divided 6:3) held that whether the defendant in fact lost self-control, and the gravity of the provocation to the defendant are subjective tests – that is, the jury must take the defendant as they find him. However, contrary to the *Smith (Morgan)* majority, the standard of self-control by which his conduct is to be evaluated, for the purpose of deciding whether the defence of provocation is available, is the objective standard of an ordinary person having and exercising the powers of self-control of a person of the defendant's age and sex:⁶⁹
 12. ... The objective standard of self-control is the standard set by the common law and, since 1957, by the statutory reference to a "reasonable man". It is of general application. Inherent in the use of this prescribed standard as a uniform standard applicable to all defendants is the possibility that an individual defendant may be temperamentally unable to achieve this standard.
 13. Taking into account the age and sex of a defendant, as mentioned in *Camplin*, is not an exception to this uniform approach. The powers of self-control possessed by **ordinary** people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not.
 14. That Lord Diplock intended to draw this distinction in *Camplin* is plain from the terms of his suggested direction to a jury [which is in the following terms]. The statutory reasonable man has the power of self-control to be expected of an ordinary person of like sex and age. In other respects, that is, in respects other than power of self-control, the reasonable man shares such of the defendant's

66 *R v Smith (Morgan)*, above n 35, per Lord Hobhouse at 190; 329.

67 *Attorney-General for Jersey v Holley*, above n 36.

68 Homicide (Jersey) Law 1986, art 4.

69 *Attorney-General for Jersey v Holley*, above n 36, paras 12–16, 22.

characteristics as the jury think would affect the gravity of the provocation to the defendant. This direction, approved by the other members of the House, was clearly intended to be a model direction, of general application in cases of provocation.

...

15. Before proceeding further it is important to pause and note that when adopting the “reasonable man” standard in section 3 of the Homicide Act 1957 Parliament recognised that, standing alone, this provision might work harshly on defendants suffering from mental abnormality. Accordingly, cheek by jowl with section 3 Parliament introduced into English law the partial defence of diminished responsibility. In short, under section 2 a person is not to be convicted of murder if he shows he was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury, as “substantially impaired” his mental responsibility for his acts and omissions in killing or being a party to the killing...

16. This provision, which is reproduced in article 3 of the Jersey law, is apt to embrace some cases where it is inappropriate to apply to the defendant the standard of self-control of an ordinary person. Section 3, with its objective standard, is to be read with this in mind. The statutory provision regarding diminished responsibility in section 2 represents the legislature’s view on how cases of mental abnormality are to be accommodated in the law of homicide... Section 2 should not be distorted to accommodate the types of case for which section 3 was specifically enacted.

...

22. [The *Smith (Morgan)*] majority view, if their Lordships may respectfully say so, is one model which could be adopted in framing a law relating to provocation. But their Lordships consider there is one compelling, overriding reason why this view cannot be regarded as an accurate statement of English law. It is this. The law of homicide is a highly sensitive and highly controversial area of the criminal law. In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be. In these circumstances it is not open to judges now to change (“develop”) the common law and thereby depart from the law as declared by Parliament. However much the contrary is asserted, the majority view does represent a departure from the law as declared in section 3 of the Homicide Act 1957. It involves a significant relaxation of the uniform, objective standard adopted by Parliament. Under the statute the sufficiency of the provocation (“whether the provocation was enough to make a reasonable man do as [the defendant] did”) is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant’s response met the “ordinary person” standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable.

68. Like the majority judges in *Rongonui*,⁷⁰ Lord Nicholls writing for the majority in *Holley* expressed views to the effect that the law is unsatisfactory and beyond rescue by the courts: “In expressing their conclusion above their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is

70 See para 45 above.

not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts". His Lordship called for the review of homicide law to be expedited.⁷¹

R v James; R v Karimi [2006] QB 588 (CA)

69. According to the usual rules of precedent, a decision of the Privy Council is not binding on the English courts. However, in *R v James; R v Karimi*,⁷² a five-member Court of Appeal considered whether the Privy Council in *Holley* should be regarded as having effectively overruled the House of Lords in *Smith (Morgan)*.
70. The Court referred to dicta from Lord Nicholls, writing for the majority in *Holley*. His Lordship had noted that "This appeal, being heard by an enlarged Board of nine members, is concerned to resolve this conflict and clarify definitively the present state of English law... on this important subject".⁷³ Accordingly, in *R v James; R v Karimi*, the Court of Appeal held that *Holley*, not *Smith (Morgan)*, should be followed by the English courts.⁷⁴

CONCLUSION

71. Historically, provocation has caused considerable and continual difficulty in the courts. The extraordinary number and frequency of appellate decisions, and the lack of consensus apparent in them, illustrates the fraught nature of the defence. There is, at present, something of a hiatus, with a consensus being reached across jurisdictions as to the best approach to the defence: see further chapter 4. However, history demonstrates that the law is susceptible to change as appellate benches change. There is also considerable dissatisfaction with the present state of the law, particularly in New Zealand, which lacks the "companion" defence of diminished responsibility that has done much to persuade English academics and judges that self-control can justly be objectively assessed. In our view, the volatile nature of the case law clearly indicates a need for either repeal or reform.
72. Not only is it volatile; its practical application is also difficult. As articulated by Tipping J for the majority in *Rongonui*, the appropriate approach to provocation is as follows: jurors are first to assess the gravity of the provocation (actual or perceived) to the particular defendant, taking into account all of his or her characteristics, on an abstract scale from 1 to 10; having determined the gravity, they must then decide whether a person with ordinary self-control would have lost that self-control in the face of provocation of such gravity.

71 *Attorney-General for Jersey v Holley*, above n 36, paras 26–27.

72 *Attorney-General for Jersey v Holley*, above n 36.

73 *Attorney-General for Jersey v Holley*, above n 36, para 1.

74 See also Laurence Toczek "Provocation – Muddle Resolved?" (22 July 2005) 155 NLJ 1136: "However, given that six current members of the House of Lords have clearly shown a preference for the *Luc Thiet Thuan* approach over *Smith*, it would take a brave Crown Court judge to direct a jury in the terms suggested by Lord Hoffman in *Smith*". To similar effect, see Andrew Ashworth [2005] Crim LR 966, 971: "It is likely that anyone attempting to argue that *Morgan Smith* is still good law in England and Wales would receive short shrift".

73. As a matter of legal theory, His Honour's description is impeccably expressed. Nonetheless, we consider that it is debatable whether, in practice, it can be applied. That is, can a jury realistically be expected to assess, first, how grave any given provocation is to a particular person; and then secondly, at which particular measure of gravity (5 or 7 or 10) the ordinary person would lose self-control?
74. We suggest that jurors would find such an exercise difficult to conduct for themselves in the abstract, let alone a stranger, who by definition is probably not the average stranger. They are likely to find it particularly difficult, and indeed unfair, in the case of a defendant such as Janine Rongonui, in relation to whom both reasoning and self-control are disordered.
75. Faced with what is an impossible task, jurors can do one of two things. First, they might give the defendant the benefit of the doubt, as indeed they must always do in criminal cases, and therefore the benefit of a manslaughter conviction. It seems to us that this leads less to the conclusion that there are social merits in having a provocation defence, than to the conclusion that juries are taking the legally appropriate approach to uncertainty. In some cases, particularly the "hard cases" such as *Rongonui*, a manslaughter verdict will be indicative of a failure on the part of the prosecution to discharge its burden, rather than an affirmation of the defendant's conduct. It thus does not follow that juries – as the proxy for society generally – are concluding that it is sound social policy to convict these people of manslaughter rather than murder. Instead, they are simply addressing, in a legally correct way, an insoluble problem that the law itself has created.
76. Alternatively, they can take a more workmanlike approach, probably along the lines of the *Smith (Morgan)* majority, which amounts to asking "do we think this person should have done better?" or "how much sympathy do we feel?". This is, of course, contrary to the law.
77. In our view, appellate courts and juries have struggled (and continue to struggle) to come to grips with the provocation defence for one very simple reason: the defence is irretrievably flawed. The reasons why we believe this to be the case are explored in the following chapter.

Chapter 3

Provocation's fundamental flaws

78. Both conceptually and in practice, we consider the partial defence of provocation to be irretrievably flawed. Some of the flaws are such that the defence does not in fact fulfil its policy purposes.

FOUR CONCEPTUAL FLAWS

79. The several ways in which we believe provocation to be conceptually flawed are discussed below. By “conceptually flawed”, we mean that the defence is founded on some explicit and implicit assumptions, each of which can be exposed to challenge. They are:
- a. it purports to be a partial excuse, but arguably does not give effect to the spirit of excuse philosophy (recognition of human frailty), because defendants who through no fault of their own are unable to demonstrate an ordinary facility for self-control are excluded from the scope of the defence;
 - b. it envisages a “bifurcation” between a defendant’s perceptions of heightened provocation gravity, which may be affected by particular characteristics, and their capacity for ordinary self-control, which must be wholly objectively assessed;
 - c. it assumes that there is in fact such a phenomenon as a loss of self-control; and
 - d. if the phenomenon of loss of self-control exists, it further assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this.
80. Much academic effort has been directed over the years to debating whether provocation is a partial justification or a partial excuse. The weight of opinion seems to be that it is a partial excuse. It is an acknowledgement of human frailty: specifically, the alleged susceptibility of ordinary people to lose their tempers and react violently – indeed homicidally – from time to time. However, it is a partial excuse with justificatory aspects such as the wrongful conduct of the provoker (i.e. the victim asked for it); and provocation that is more than trivial (i.e. any ordinary person would have done the same). These are the factors that assist in

determining whether we are willing to excuse, and the extenuating circumstances that, formerly, made a remission of the mandatory murder penalty appropriate.⁷⁵

81. The justificatory aspects of the defence identified above (that the victim asked for it, and that any ordinary person would have done the same) imply that the provocation offered, and the response to it, should be objectively assessed. However, this is not the case in New Zealand. In New Zealand, whether provocation was of sufficient gravity to cause the ordinary person to lose self-control is assessed by reference to the defendant's characteristics because, it is thought, one cannot sensibly or fairly assess what is provocative in a vacuum: different things will provoke different people. However, the effect of this is that the victim did not necessarily "ask for it" in any objective sense, if the defendant in question has perceptions that differ from the norms of the majority, or simply makes a mistake. Furthermore, if killing by reason of provocation is justified only in part (because of the excessive response and competing social interest in preserving life), logically one might expect a lesser response such as assault to be fully justified and result in an acquittal. However, defendants who are provoked to commit an assault are convicted of the full offence, and provocation is dealt with solely as a sentencing matter.
82. Viewed through the different lens of provocation as a partial excuse, importation of the defendant's characteristics is entirely defensible. But, in New Zealand, characteristics may legitimately affect only the gravity of the provocation, not the defendant's ability to exercise an ordinary level of self-control. We thus excuse the defendant who reacts as the ordinary person (allegedly) would in the sense of demonstrating ordinary self-control, but not the defendant who is incapable of attaining objective standards of self-control. The extent to which this approach is at odds with excuse philosophy is open to debate, but it is certainly counter-intuitive, and has been one contributing factor to the ongoing differences of opinion and divergence of approach at appellate level. The partial defence is thus arguably not fulfilling the primary need put forward by its proponents for retention – the recognition of human frailty.
83. The validity of the assumption that there is a "bifurcation" between the gravity of a particular provocation and the self-control demonstrated in response, so that a defendant may therefore possess characteristics that heighten their perceptions of a provocation's gravity and yet be able to demonstrate ordinary self-control, has also been questioned:⁷⁶

75 For example, Joshua Dressler "Provocation: Partial Justification or Partial Excuse?" (1988) 51 MLR 467; Joshua Dressler "Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject" (2002) 86(2) Minnesota LR 959, 966–975; Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General *Discussion Paper: Chapter 5 Fatal Offences Against the Person* (June 1998) 69; Ashworth, above n 45; Goode, above n 17, 39–40. See also Jeremy Horder *Excusing Crime* (Oxford, Oxford University Press, 2004); S M Yeo (ed) *Partial Excuses to Murder* (Sydney, The Federation Press, 1990). For the view that provocation is a partial justification, see Finbarr McAuley "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 MLR 133; Finbarr McAuley "Provocation: Partial Justification, Not Partial Excuse" in S M Yeo (ed), above, 19.

76 Power, above n 12, 879–880; see also the views of the *Smith (Morgan)* majority discussed above at para 64.

It has been suggested that lawyers, insufficiently acquainted with anthropological and sociological insights, fail to understand that not only do cultural imperatives shape how an alleged provocation is received (that is, perception of provocativeness), they also shape the response to it (that is, the resultant conduct – the loss of self-control and the killing). The bifurcation... reasserted in the Privy Council's decision in *Holley*... "as much as asserts that culture affects minds but not actions"... if the law acknowledges the relevance of culture to the gravity issue, it cannot avoid its relevance to self-control...

84. If this was correct, the choice would be between declaring characteristics to be relevant to everything, as in *Smith (Morgan)*, or nothing, as in *Bedder*. There would be no place for the middle ground presently attempted by provocation as expressed both by the statute and the Court of Appeal in *Rongonui*.
85. For both of these reasons, it is far from a foregone conclusion that a requirement of objective self-control will continue to be a defensible position in the future. Both age and sex have long been widely recognised as legitimate modifiers of self-control. In relation to age, the rationale as stated by the House of Lords in *Camplin* was that old heads are not to be expected upon young shoulders; and similarly, in *Stingel*, the High Court of Australia observed that the process of development from childhood to maturity is common to us all and, as such, age is an objectively relevant characteristic. However, this does not apply to sex, which is of course not a universal experience: only roughly half of the population knows what it is to be either male or female. It is thus here that the slippery slope begins: if sex is a legitimate modifier of self-control, why not sexuality, or race, or religion, and so on?⁷⁷ It is not difficult to discover the origin of the long-running English debate in the courts on this issue, culminating in *Smith (Morgan)* which declared all characteristics to be relevant to both gravity and self-control, nor can the logic that led to the debate be criticised.⁷⁸
86. However, if all characteristics were to be regarded as relevant to both gravity and self-control, the balance that the legislature was attempting to strike when it drafted section 169, and which must be struck if the law is to attempt to uphold any sort of societal standard, would be destroyed. The law cannot simultaneously take on board all of a defendant's characteristics and maintain a normative assessment. It is a necessary implication of importing the characteristics of the particular defendant to the hypothetical ordinary defendant that the normative standard will ultimately be entirely subsumed, so that "in its efforts to **understand** the defendant, the law ceases to **judge**".⁷⁹
87. If the ordinary person was invested with all of the characteristics of the accused, before deciding whether he or she ought to have exercised self-control, then the ordinary person would become the accused. Furthermore, it would follow from the fact that he or she actually lost self-control (the factual pre-requisite to the

77 See Stanley Yeo "Power of Self-Control in Provocation and Automatism" (1992) 14 Syd Law Rev 3, who for a brief period proposed that ethnicity might have a bearing on self-control. This was subsequently retracted. However, in the meantime, that approach was taken up by McHugh J dissenting in *Masciantonio v The Queen* (1985) 185 CLR 58, 73. See further New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997), paras 2.65–69.

78 See further ch 2. It may be this that led the Privy Council in *Holley* to refer to age "and, more doubtfully, sex".

79 Power, above n 12, 882.

evaluative question), that no more self-control could have been, and thus ought to have been, exercised by such a person. To infer otherwise would be to suggest that a person has control over the point at which they lose self-control. But if this is true, then it considerably undermines the rationale for the existence of a provocation defence at all, however it is drafted. If a person has control over the point at which they lose self-control, then it logically follows that the loss of self-control could have been avoided, and as such is arguably inexcusable.

88. There is considerable literature addressing the psychological and philosophical debates regarding drivers of loss of self-control – that is, whether self-control, including the loss of it, is moderated by reason, or is a wholly biophysical and thus uncontrollable response.⁸⁰ It is not at all clear that there is in fact such a phenomenon as a loss of self-control.
89. Even if the phenomenon does exist, we would argue that it is not an experience to which the ordinary person tends to be susceptible, and certainly not an experience that will prompt the ordinary person to indulge in homicidal violence. To our minds, this assumption is the defence’s most telling flaw – whichever way it is drafted. We would argue that, in truth, only the most extraordinary person responds in this way. To take one example, of a very ordinary circumstance in which provocation has historically been considered entirely legitimate:⁸¹

In Australia each year, there are on average 77 intimate partner homicides. Between 75–80% involve men killing women (ie about 60). As studies reveal, a large percentage of intimate partner homicides are the result of jealousy and possessiveness, often at the time of the breakdown of the relationship: wife, de facto, or girlfriend announces she is leaving.

Based on the above, let’s make a guesstimate and say that about 50 men kill each year in circumstances of jealousy, at separation and so on. They feel rejected, humiliated, have been subjected perhaps to taunts, hurtful and disparaging remarks.

The Australian Bureau of Statistics tells us that there are between 50,000–55,000 divorces recorded in Australia each year. It is not beyond imagination to assume that some hurtful comments might be exchanged in 99.9% of those divorces – realistically, in **all** of them. Statistics do not exist for the numbers of de facto breakdowns, but the experts put the figure at higher than for marital divorce. Let’s assume that a total of 120,000 marital or de facto relationships break down each year. And again, we can presume that at some stage in 99.9% of those break downs (well, in **all** of them), hurtful comments are made. Beyond the 120,000 already mentioned, I will not even begin to guesstimate the numbers of intimate relationships between girlfriend and

80 For a review, see Alex Reilly “Loss of Self-Control in Provocation” (1997) 21 Crim LJ 320, who concludes that the provocation defence places too much emphasis on a narrative of lost self-control; if the defence is intended primarily as a vehicle for a sympathy verdict, then defendants should simply be permitted to tell their stories.

81 Graeme Coss “Provocation’s Victorian Nadir: The Obscenity of *Ramage*” (2005) 29 Crim LJ 133, 134, echoing Glanville Williams *Textbook of Criminal Law* (London, Stevens & Sons, 1978): “Killing upon provocation is very unusual. This is particularly true of killing in jealousy which is one of the best established instances of provocation. In 1976 adultery was alleged in 39,231 petitions for divorce (in England and Wales) and doubtless there were many spouses who discovered this conduct without taking divorce proceedings. We lack the figures for voluntary killings for adultery, but in comparison with the instances of adultery they must be insignificant. To say that the ordinary man or woman kills for adultery is a grotesque untruth.”

boyfriend (to say nothing of same-sex couples) that are terminated each year in Australia. Hurtful comments galore. But let's leave them out of the equation.

If 50 men in Australia each year kill their intimate partners at separation, out of jealousy and so on, that equates to 0.04 % of people in intimate partner relationships which break down each year. A conservative guesstimate – the true percentage is likely to be **lower**.

That being the case, it is an abomination that a judge, defence counsel, or members of a jury can seriously contend that an ordinary person faced with such provocation (hurtful comments in a relationship or at separation) might lose control and kill. Nonsense. **Only the most extraordinary** person could kill in such circumstances.

90. This is, of course, a further reason why there has been ongoing pressure to modify the ordinary person test by importing the defendant's characteristics in relation to provocation gravity: if this were not done, the defence would be redundant. In short, the defence is based upon a fallacy. We have, to some limited extent, been able to demonstrate this in our own review of provocation case law, the results of which are reproduced in Appendix A to this report. There is some evidence that defendants are more likely to succeed with the provocation defence when they point to a personal characteristic that exacerbated the gravity of a particular provocation to them.

THE COUNTER-
PRODUCTIVE
PRACTICAL
EFFECT OF
THE DEFENCE

91. Provocation stems from an era when it was culturally acceptable to exercise physical violence in defence of one's honour – an era of "pistols at dawn". It was also an era in which the law tended to perpetuate white, male, heterosexual, middle class, Christian values. However, these values have been increasingly exposed to challenge, and the provocation defence has changed as our culture has changed.⁸² Western societies are now less homogeneous and cultural perceptions have shifted to accommodate what have been described as "pluralist" concerns. In relation to *Smith (Morgan)* it has been said that:⁸³

... although [the *Smith (Morgan)* decision] was nominally a case about the adaptability of the provocation defence in the face of certain mental illnesses and personality disorders, there lurked behind it a broader set of worries about the suitability of the provocation defence, as traditionally understood, to today's cosmopolitan social conditions. It is one thing to insist on the uniform standard of the reasonable person when it can safely be assumed that people in the same physical space share the same social and cultural space. But... How can the criminal law continue to uphold a uniform standard of character in this more cosmopolitan environment? Specifically, is there any longer a defensible role for a standardised "reasonable person", the quality of whose temper is a suitable measure for all of us? Once this cosmopolitan worry takes hold in respect of cultural difference, it readily extends itself to the many other dimensions in which people differ as well. Supposed differences of temperament as between men and women, as between the gay and the straight, as between the educated and the uneducated, etc, also become sources of disquiet. It is not long before one is worrying about the potential unfairness of ignoring any personal idiosyncrasy

⁸² Power, above n 12.

⁸³ Timothy Macklem and John Gardner "Provocation and Pluralism" (2001) 64 MLR 815, 816. See also Celia Wells "Provocation: The Case for Abolition" in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (Oxford, Oxford University Press, 2000), 85, 99: provocation "tends to function as a distorting echo of contemporary fears and concerns". See further Power, above n 12.

that may have been a factor in explaining the defendant's reactions. Against this backdrop, one can sympathise with the anxiety of the House of Lords that the Privy Council's uncompromising reaffirmation of the "reasonable person" standard was not only lacking in compassion towards those suffering from some mental illnesses and personality disorders – the narrow legal issue at stake – but was also insufficiently astute, more broadly, to the moral consequences of human diversity.

92. The tensions that can be observed in the legal development of the provocation defence can therefore arguably be seen as a response to liberal motives – that is, a desire to meaningfully recognise increasing social diversity. However, in its practical application, we would suggest that the provocation defence backfires in this regard in at least two respects:
 - a. the stereotypical effect of requiring defendants to define their characteristics; and
 - b. the defence's bias in favour of the interests of heterosexual men.

The reductive effect of defining "characteristics"

93. There are two ways in which a defendant's personal characteristics may have a bearing on the operation of the provocation defence. First, age or sex might be relied upon as modifiers of ordinary self-control. Secondly, a defendant may point to a particular characteristic (such as ethnicity or mental illness) as the basis for suggesting that the gravity of the provocation was more extreme than may be superficially apparent.
94. A defendant seeking to rely on such characteristics will need to describe their effect to both judge and jury. This is an exercise that seems doomed to degenerate into reductive stereotyping: it reduces the defendant to little more than a cartoon character, briefly describing them by reference to a few key points of difference. The effect of this has been particularly vividly described in relation to ethnicity, but is the same, regardless of which characteristic is relied upon.⁸⁴

To assume that there is one relevant ethnic experience within each group leaves out of account that members of any ethnic group, as well as having an ethnicity, also have a class status, a sexual orientation, a particular physical ability, and, of course, given the emphasis in this article, a sex. Such a listing of aspects of identity is not meant to suggest that these characteristics can be separated out in a simplistic way. Rather, it

84 Jenny Morgan "Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them" (1997) 21 MULR 237, 267–268. See also Helen Power "Pitcairn Island: Sexual Offending, Cultural Difference and Ignorance of the Law" [2007] Crim LR 609, 613; and Power, above n 12, 882 levelling criticism at the provocation defence for its simultaneous "reification and ossification of culture". See too the Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004), para 2.79: "Care should also be taken in the use of witnesses giving evidence about how a person from a particular cultural background would view certain behaviour. As pointed out by workshop participants, the concept of culture is extremely problematic, and it is unlikely that two people will view a culture, or what is acceptable, in the same way. Culture is relative. What is represented as 'culture' by an expert is likely to be simply that person's subjective views of what that culture is, and what normal behaviour may be for someone from that background". See also fn 171, which notes that "Concerns were raised by workshop participants about how cultural 'experts' are identified. A suggestion was made that court appointed cultural experts could be used in appropriate cases, who might be nominated by, for example, a committee of community members. Others questioned how useful evidence of culture was in this context, given how subjective a person's view of a particular culture is likely to be".

is to emphasise that any useful description of the culture of an ethnic group will need to encompass the experience of all of its members, not just some.

To illustrate the problems in this task, I will examine just one example, the Victorian case of *R v Dincer* [in which a conservative Muslim Turkish father reacted to his daughter's sexual emancipation by stabbing her to death]... In his ruling on whether provocation should be left to the jury, Lush J noted:

“There is evidence that such a man expects to be the undisputed head of his house and that he expects his daughters to live in fairly close confinement in the home circle and to avoid contacts with young men other than those of the family's selection. There is evidence that the loss of virginity in a daughter is a matter of shame and disgrace to their parents which may lead to their social ostracism.”

...

My concern in this case is that there is no evidence referred to which indicates how (conservative, traditional, Turkish) women might feel in these circumstances. There is one reference to “parents”, but that is the only time there is any mention of “women” and then only very indirectly. It is also the only time that Mrs Dincer is mentioned, and again, naturally, very indirectly. This is, of course, what one would expect in a criminal trial – she, after all, was not on trial – but it remains the case that her perspective is not necessarily reflected in the court's characterisation of “culture”. And Zerrin Dincer, the dead daughter... had no chance to tell her own story. What negotiations had occurred with her father or mother? What was her view of “traditional Turkish culture”? How do feminist Turkish Moslem women describe traditional Turkish Moslem culture?... there is no one “true” characterisation of a culture. It is certainly not the case that any two anthropologists will describe the same culture in the same way.

95. Furthermore, the operation of the defence in this regard is deeply ironic. As described above,⁸⁵ the evolution of the provocation defence has been attributed to liberal, pluralist concerns – a desire to take full and fair account of legitimate difference – and yet at the same time, in application, it undermines this objective, by reducing individual defendants to stereotypes.

The defence's bias in favour of the interests of heterosexual men

96. The provocation defence has been expanded to take into account subjective considerations with the best of intentions, but the inevitable effect is its exposure to claims that, ironically, undermine those same liberal values that have led to the expansion of its scope. The way in which it tends to operate against both

⁸⁵ See para 91.

women⁸⁶ and gay men,⁸⁷ and thereby serves the interests of heterosexual men, is one example in relation to which there is a substantial literature, documenting the way in which provocation has acted as a shield for men to react with murderous violence to threats to their sexual identity. The thesis is that the defence is overwhelmingly used by men, and often used in situations where they deem their masculinity to be fundamentally threatened (when their partner leaves them for another, or they are propositioned by another man); the defence also offers sympathy to a reassertion of that masculinity by violence, so that from start to finish it operates as a defence that protects and reaffirms a male way of thinking. Furthermore, an acceptance that such reactions are those of the ordinary person (as the provocation defence explicitly does, when it succeeds) implies that it is natural and excusable to feel revolted and violently outraged by the gay men and the former partners who have done no more than exercise their freedom of choice and expression.⁸⁸

97. In our own case study that is reproduced in Appendix A, we encountered no evidence of the provocation defence being used by men against their female intimates. However, there were four cases in our study in which a provocation defence was run and a manslaughter verdict was achieved, and two of these – that is, half – involved an alleged “homosexual advance”.

86 Graeme Coss “Provocation, Law Reform and the Medea Syndrome” (2004) 28 Crim LJ 133, 135: “Many critics have labelled the defence as gender-biased. And one reason in particular is that it is viewed as a defence more likely to be used by men who kill when angry. Put simply, men kill mostly other men in confrontational, social interactions. Men kill other men who have insulted them. Men kill men they claim made a homosexual advance towards them (eg *Green* (1997) 191 CLR 334; 97 A Crim R 307). They kill women mostly in ‘intimate’ scenarios. Sometimes they kill the woman’s male friend (eg *Stingel* (1990) 171 CLR 312). All because they are jealous, feel rejected, insulted and so on... Women rarely kill, but when they do it is almost always men with whom they are having, or have had, an intimate relationship. And crucially they kill out of fear, and in defence of themselves and/or their children. The case of a jealous man who kills his partner who threatens to leave him, and the case of a battered woman who kills to stay alive, cannot – indeed MUST not – be thought of as equivalent. That would be an obscenity. And yet the courts have done just that, or worse, historically shown greater leniency to the jealous male”. See also Victorian Law Reform Commission, paras 2.22–2.23; Wells, above n 83, 93. For reviews of the high incidence of provocation relied on (with mixed success) as a defence to male on female violence in the context of a failed relationship see Jenny Morgan “Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them” (1997) 21 MULR 237 (Australia); Elisabeth McDonald “Provocation, Sexuality and the Actions of ‘Thoroughly Decent Men’” (1993) 9(2) Women’s Studies Journal 126 (New Zealand); Victoria Nourse “Passion’s Progress: Modern Law Reform and the Provocation Defense” (1997) 106(2) Yale LJ 1331 (United States). See further the literature cited by Power, above n 12.

87 For relevant case law in New Zealand see *R v Edwards* (13 April 2005) CA371/04; *R v Ali* (21 July 2004) HC AKL CRI2003-292-1224 Williams J; see also Dr Alison Laurie “‘Homosexual Panic’ Defence Must Go” (18 August 2004) *New Zealand Herald* A19, which includes a review of New Zealand cases dating back to 1944, and Elisabeth McDonald “No Straight Answer: Homophobia as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases” (2006) 37 VUWLR 223. In Australia and the United States, there is a voluminous literature relating to reliance upon provocation as a “homosexual advance” or “homosexual panic” defence. For gay critiques of the provocation defence as a shield for homophobia, see literature cited by Power, above n 12. For a full description of developments in Australia, see Adrian Howe “More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)” (1997) 19 Syd LR 336, 347–348.

88 Howe, above n 87; see also Joshua Dressler “When ‘Heterosexual’ Men Kill ‘Homosexual’ Men: Reflections on Provocation Law, Sexual Advances, and the ‘Reasonable Man’ Standard” (1995) 85 Crim L and Criminology 726, 731–733, 752–753, 756–757.

A QUESTION
OF VALUES

98. There is one further and final issue, that to our minds is much more fundamental than the legal, conceptual and practical difficulties already canvassed. The preceding discussion has questioned the legitimacy of the provocation defence as it operates in section 169 because of its manifold problems. But even if none of those problems existed, we consider that there is a further question, which is ultimately a question of values.
99. Section 169 excuses a homicidal loss of self control, in the face of a provocation of such gravity that it would have prompted a person with ordinary self-control to do likewise. The defence is thus open-ended about the precise emotions that might be driving the defendant; in other words, on its face, provocation is not necessarily confined to an angry loss of self-control, as opposed to one prompted by fear or sympathy. However, anger is the context in which it is commonly understood to operate, and is most frequently used.⁸⁹ We would thus argue that the defence puts a premium on anger – and not merely anger, but homicidally violent anger. This, to our minds, is or should be a central issue in considering whether reform is required: out of the range of possible responses to adversity, why is this the sole response that we choose to excuse? Ultimately, issues such as the sexist and heterosexist bias of the provocation defence, that are accorded considerable weight in the literature, strike us as relatively immaterial, when weighed against the larger question of how we, as a society, wish to choose to respond to violence.

89 See *Rajamani v R* [2007] NZSC 68, para 16, in which the Supreme Court observed: “The statement that provocation is not available to a person who is motivated by anger is unsupportable. If taken literally it would almost abolish the partial defence. Almost everyone who is provoked is angry.”

Chapter 4

Reasons to retain a provocation partial defence

100. Set against all of the problems identified with the partial defence of provocation, and notwithstanding the abolition of the mandatory life sentence in New Zealand, there are said to be some sound reasons to retain it. The same reasons surface repeatedly, throughout the literature and other forums from which we have sought feedback.⁹⁰ They are:
- a. that it would be fundamentally wrong in principle for the criminal law to fail to tangibly recognise a degree of culpability short of murder, and the provocation defence is a desirable mechanism for achieving this;
 - b. a majority of jurisdictions with which New Zealand typically compares itself still offer a provocation defence; and
 - c. practical problems are likely to arise when attempting to address provocation at the sentencing stage.
101. We agree that there are several issues around sentencing that would need to be considered and addressed if section 169 was repealed and provocation removed to the sentencing arena: see further chapter 6. The remaining objections are addressed below, in this chapter.

RECOGNITION OF REDUCED CULPABILITY

102. The first, and arguably primary, objection to abolishing the partial defence of provocation is that there is a need for the criminal law to adequately and appropriately recognise reduced culpability in homicide cases. The partial defence of provocation is considered the best method of achieving this, for a number of reasons.
- a. It is said that the nature of a homicide conviction matters a great deal, and provocation ensures that less culpable offenders are convicted of

⁹⁰ In particular, attendees of an open forum at the Criminal Law Symposium (2004), and the Criminal Law Committee of the New Zealand Law Society. On both occasions the defence bar was heavily (although not exclusively) represented.

manslaughter, thus ensuring that they do not suffer the stigma of being labelled a murderer (the “fair labelling” argument). A reduced sentence, it is said, cannot adequately achieve the same tangible acknowledgement of mitigating circumstances; it will not suffice to counteract the enormous stigma of a murder conviction.⁹¹

- b. Dealing with provocation as a partial defence, at trial, allows 12 community members to make the value judgment about reduced culpability, by way of the jury verdict. This is thought to be preferable to delegating the responsibility to a single sentencing judge. As one particular practical instance of the importance of this, it is said that, if there is a community endorsement of the fact that there were extenuating circumstances, this will in turn provide a foundation for the judge’s decision to impose a significantly lower sentence, which otherwise the community might neither accept nor understand. Although judges evaluate provocation as a mitigating factor in all other cases, homicide has a particular stigma that justifies a different approach.⁹²
 - c. Thirdly, if the above two assertions are ignored, and provocation is repealed, it is said that it would have the potential for perverse consequences that are not in the overall interests of justice. In particular, if jurors are faced with the stark choice of acquitting or convicting of murder, in cases where they feel some sympathy for the defendant they may prefer to acquit, or find themselves unable to reach a verdict which would require another trial. Neither of these outcomes will serve the overall interests of justice: one denies the victim at least a measure of justice, while the other is resource-intensive.⁹³
103. As one submitter noted, not all of these objections can validly co-exist. In particular, if it is correct that juries will tend to acquit or hang where they feel sympathy for a defendant, rather than convict that person of murder, then the problem of irreconcilable sentences will not very often arise. We note also

91 Horder, above n 75, 144, quoting from AP Simester and ATH Smith (eds) *Harm and Culpability* (Oxford, Clarendon Press, 1996) 6. See further Andrew Ashworth “Reforming the Law of Murder” [1990] *Crim LR* 75; New South Wales Law Reform Commission *Partial Defences To Murder: Diminished Responsibility* (Report 82, 1997), 11–19; Sir Robin Cooke, above n 27, 238–239 and the English authorities cited therein; Warren Brookbanks et al “The Implications of the Sentencing Act 2002 regarding the Partial Defences of Provocation and Infanticide” (1 November 2004), para 6.01.

92 Sir Robin Cooke, above n 27, 239; cited in Charles Cato “The Case for Partial Defences and Trial by Jury in Homicide Cases” (Criminal Law Symposium, Wellington, 8 November 2002) 33, 36–37; see also Judith Ablett-Kerr “Some Current Reforms of the Criminal Law of New Zealand as They Relate to Homicide” (Criminal Law Symposium, Wellington, 8 November 2002) 24, 30–31; Brookbanks, above n 91, paras 2.13–14, 6.08. This was the overriding consideration for the New South Wales Law Reform Commission in determining that the partial defences of provocation and diminished responsibility should be retained: New South Wales Law Reform Commission, above n 77, para 2.24; see also paras 1.15, 2.33, and New South Wales Law Reform Commission, above n 91, 29–30.

93 A further option is that they find an alternative vehicle by which to convict of manslaughter, such as lack of intent. See the Law Reform Commission of Ireland *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27-2003, October 2003) para 6.40: “... if, as the Commission believes, the doctrine of provocation is rooted in the moral perception that provoked killings should not be treated as murder, that perception is likely to seek alternative expression in the event of abolition. For example, it is not inconceivable that, following abolition, the concept of intention could become the new battleground for the provoked killer seeking a manslaughter verdict. In this scenario, the matching argument would most likely be to the effect that, by reason of provocation, the killing ‘wasn’t really intentional’. To say the very least, the ‘theology’ of intention that would inevitably flow from an arrangement of this type is likely to make the current difficulties associated with the plea of provocation pale into insignificance”.

that there are precedents – albeit few and far between – for short prison or non-custodial sentences for murder, with *R v Law* being the prime example.⁹⁴ We are not aware that Mr Law’s case gave rise to undue public controversy or concern, although it did receive publicity.

104. All of the above objections to the repeal of the partial defence of provocation in fact tend to do more to justify the reform of partial defences if there is a desire to retain them. For example, the assertion that the allocation in alleged provocation cases of either a manslaughter or murder conviction is inherently a collective community value judgment that can only be performed by a jury, if true, would not in fact be confined to provocation, as opposed to any other mitigating circumstance in a homicide case. It tends to suggest that there ought to be broader provision for partial defences. Similarly, the argument about the risk of acquittal if provocation is abolished must presumably exist now, in any context in which provocation is not offered: if the risk does exist, and if we are concerned about it, then we ought to be taking steps to ensure that juries can legitimately return a manslaughter verdict in any likely sympathetic circumstances, not merely provocation: see further chapter 5.
105. All of the objections to provocation’s repeal also turn on the assertion that murder is unique, although it is in fact arguable that the stigma attached to any given homicide varies depending on the circumstances of the case as much as the name of the crime. For example, a drunk driver who crashes and kills the occupants of another car will be convicted of manslaughter, which reflects lack of criminal intent, but not the public abhorrence of this kind of crime; whereas an elderly spouse who kills his failing partner, by consent or believing that it is in her best interests, is dubbed a murderer. We consider that the argument might plausibly be made that some murders (e.g. mercy killing) may be more sympathetically regarded by society than some instances of manslaughter that are widely regarded as particularly abhorrent.⁹⁵
106. Focusing more particularly on provocation, proponents of the partial defence assume that “manslaughter”, which is the label that will be attached by way of conviction when a provocation defence is successfully run, does in fact label a provoked killer accurately and fairly in the light of society’s general understanding of the concept. Manslaughter is a category of offending that encapsulates a very wide range of cases. However, except in provocation cases, these are all unintentional killings, perhaps arising from careless or dangerous driving, medical misadventure, or a misjudged assault. We would suggest that provocation is quite different. In provocation cases, murder is intended, but prompted by a particular (arguably mitigating) motive.
107. Proponents of the partial defence also assume that provocation accurately captures the groups of people to whom society would wish to show sympathy by

94 (2002) 19 CRNZ 500. Mr Law, aged 77, pleaded guilty to murdering his wife who had been suffering from Alzheimer’s disease. He gave her sleeping pills, hit her on the head with a mallet, and smothered her with a pillow, before attempting to take his own life. He claimed that this was all in accordance with a pact. A sentence of 18 months’ imprisonment was imposed, with leave to apply for home detention.

95 We note that, in the past, the Law Commission (depending on its composition at the time) has differed in its conclusions on this issue. For example, in *Proof of Disputed Facts on Sentence* (NZLC R76, Wellington, 2001) the Commission wrote “murder is the ultimate offence of violence... and carries a unique stigma”; compare *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, Wellington, 2001) in which it was said that “the true stigma arises from the perceived circumstances of the crime, not from the label attached to the crime”.

convicting them of manslaughter instead of murder. There is no doubt that, in some provocation cases, the mitigating nature of the motive may be unalloyed, and two examples of this – battered defendants and the mentally ill or impaired – are discussed below.⁹⁶ However, this is not true of all cases. For example, when provocation is relied upon to defend the killing of a battered woman or a gay man – as it was, in two out of the four successful provocation cases in our study – society perhaps ought to take a somewhat more jaundiced view of the operation of the defence.⁹⁷ In a similar vein, it has been said that provocation justly distinguishes between defendants who kill intentionally in cold blood and defendants whose acts are unpremeditated and occur in an extreme emotional state.⁹⁸ However, this is a pejorative generalisation without reference to the facts: anyone who reviews the cases will find that not all cold blooded killers are undeserving of sympathy, and not all defendants who have relied upon provocation have acted in an unpremeditated and extreme emotional state. It does not follow that someone who kills in hot blood (e.g. a young man such as Edwards, who was provoked to kill David McNee by an alleged homosexual assault) is automatically less culpable than a cold-blooded killer (e.g. assisting the suicide of an elderly and terminally ill spouse, as in the case of Rex Law).

108. Even if society does wish to show some degree of sympathy to all of these people, it may not be equal sympathy. The generic manslaughter verdict that is conferred on provoked offenders does not assist in this regard: it fails to send any signal to society and to sentencing judges as to the culpabilities of offenders relative to one another, as opposed to relative to murderers. Provocation is thus an extremely blunt tool for labelling purposes.

Mentally ill or impaired persons

109. One constituency for whom it has been said that the provocation defence ought to be retained is mentally ill or impaired persons.⁹⁹ This assertion flies in the face of both theory and practice in New Zealand. Andrew Ashworth has argued that the defence of provocation is for those who are in a broad sense mentally normal,¹⁰⁰ and this is now the widely accepted view in almost all jurisdictions. It may be debated whether this is a justifiable approach in New Zealand, which differs from the United Kingdom by failing to offer what Ashworth regarded as the companion defence of diminished responsibility. The availability of diminished responsibility was likewise one of the factors that persuaded a minority of the House of Lords in *Smith (Morgan)*, and subsequently the Privy Council in *Holley* (which is now the leading English authority), that provocation should properly be construed as envisaged by Ashworth.

96 There are also a couple of occasions when the defence has been relied on in circumstances akin to mercy killing, but this is not widely apparent. See further paras 158–159 below, for a discussion of whether the provocation defence is acting as a surrogate for other partial defences.

97 See further Appendix A.

98 Brookbanks, above n 91, para 2.12.

99 For example, see Brookbanks et al, above n 91. See also ch 1, describing the background to this project.

100 Ashworth, above n 45.

110. However, whatever the merits of the approach in New Zealand, its practical effect is to limit the extent to which the defence can benefit mentally ill or impaired persons. If applied according to law, provocation will tend to exclude impaired persons in a large proportion of cases because of its requirement for ordinary self-control. This is because impairment can only be taken into account if it affects perceptions of the existence or gravity of provocation, not if it diminishes ordinary self-control.
111. This problem is acknowledged even by those who would prefer to see provocation retained for the benefit of persons who offend under the influence of mental illness or disability. For example, Brookbanks et al have argued that the abolition of provocation could have a wide ranging detrimental effect by labelling a range of mentally disordered or disabled provoked killers as murderers, and that recent New Zealand cases indicate that the accused's mental state was often directly in issue where the provocation defence was pleaded.¹⁰¹ However, the same authors note that:¹⁰²

In particular the current unwillingness of the New Zealand courts to allow evidence of mental abnormality to affect the question of an accused's loss of self control, as opposed to his or her susceptibility to the provocation, may raise serious questions about the usefulness of the defence to persons with illnesses and disabilities. It seems to us that it is precisely the impaired person's ability to control their actions which is so often in issue in cases of homicide, yet under current New Zealand law such factors are irrelevant...

112. Fifty reported and unreported cases from the New Zealand High Court and Court of Appeal over a five-year period in which the defence of provocation was in issue were reviewed by Brookbanks et al. The authors concluded that "in at least eight of those cases the mental state of the defendant was directly in issue".
113. Our own review of the eight cases indicates that the position may have been slightly overstated by the authors. The critical point is not whether provocation, in conjunction with the defendant's mental illness or impairment, was in issue at some stage of the legal proceedings; it is whether these defendants are succeeding with the defence at trial, and thus would be disadvantaged by its repeal. In four of the cases, a manslaughter conviction was achieved, probably by reason of provocation.¹⁰³ In two of the cases, the defendants were convicted of murder, and thus received no benefit from the provocation defence.¹⁰⁴ In one case, the defendant was convicted of murder at his first trial; a retrial was granted on appeal in 2005, but he was convicted of murder again.¹⁰⁵ In the remaining case, the evidence was considered sufficient to justify leaving the provocation defence to the jury, and the verdict was manslaughter, but the sentencing judge commented that in all likelihood this was due to a finding of lack of intent, which had also been run.¹⁰⁶ Overall, therefore, of the fifty cases reviewed, there are only

101 Brookbanks, above n 91, paras 6.01–04.

102 Brookbanks, above n 91, para 1.11.

103 *R v Rongonui* (9 May 2001) CA321/00; *R v Simpson* (12 October 2001) HC AKL T010609 Potter J; *R v Suluape* (2002) 19 CRNZ 492 (CA); *R v Erstich* (2002) 19 CRNZ 419 (CA).

104 *R v Fergusson* (5 December 2002) HC ROT T022759 Rodney Hansen J; see further *R v Fergusson* (5 February 2003) HC ROT T022759 Rodney Hansen J; *R v Mayes* [2004] 1 NZLR 71 (CA).

105 *R v Timoti* (30 March 2000) CA3/00; see further *Timoti v R* [2006] 1 NZLR 323; (2005) 21 CRNZ 804 (SC).

106 *R v Nia Nia* (2 October 2002) HC GIS T021803 Salmon J; see further *R v Nia Nia* (18 October 2002) HC GIS T021803 Salmon J.

four in which it can legitimately be said that provocation is a defence being utilised by the mentally ill or impaired.

114. Appendix A describes work of our own of a similar kind. All homicide files for trials conducted between 2001 and 2005 by Auckland and Wellington Crown prosecutors were reviewed, yielding a total of 81 cases. Fifteen defendants ran a defence of provocation; four were successful, of whom only one identified mental impairment as a relevant characteristic. Furthermore, this case (*Simpson*) involved circumstances akin to mercy killing, and it is thus unclear what drove the jury's verdict. A further two defendants identified some form of mental impairment as a characteristic but were convicted of murder. The nature of the mental impairments relied upon in these cases are outlined in Appendix A.
115. There are also doubts as to whether provocation – or any other partial defence – offers the best legal vehicle for addressing the needs of mentally ill or impaired persons. Brookbanks et al contend that the availability of the partial defence may allow for a fuller examination of factors such as mental illness or disability that otherwise might not receive adequate consideration.¹⁰⁷ Responding to a similar view that had been expressed by the New South Wales Law Reform Commission,¹⁰⁸ the Law Commission for England and Wales noted that it had received eminent submissions to the contrary:¹⁰⁹

We have taken account of the considerations that the NSWLRC found persuasive. However, we believe that there are more compelling arguments supporting the opposite conclusion. **In its response to our consultation paper on Partial Defences to Murder, the Royal College of Psychiatrists stated:**

“There is essentially a profound mismatch between the thinking of law and psychiatry (and psychology) and particularly where the law is considering verdict. It is here that the law adopts a ‘binary’ approach, rather than a more graded approach as occurs in its consideration of sentencing... Once psychiatry is placed solely within sentencing hearings, rather than hearings directed towards jury decisions about verdict, the effect of the mismatch between legal and medical thinking is all but abolished... ”

We agree with this analysis...

... If the NSWLRC was correct in saying that the defence properly reflects different degrees of culpability then it should also apply to other offences. The reason it is a partial defence to only murder is because it was introduced, not to reflect different degrees of culpability, but in order to enable the courts to avoid imposing the mandatory sentence for murder in cases where there was powerful mitigation.

116. In other words, the effect of using provocation as the vehicle to address mental illness or impairment is that, if those arguments are rejected by a jury, as can be observed in some of the cases reviewed by both Brookbanks et al and ourselves, this constrains the sentencing judge from taking full account of the issues in that forum. The law thus treats as black and white issues that are more appropriately

107 Brookbanks, above n 91, para 2.15.

108 New South Wales Law Reform Commission, above n 91.

109 Law Commission *A New Homicide Act for England and Wales? A Consultation Paper* (2005, No 177), paras 6.26–28.

graded along a continuum, which would be able to occur if provocation was dealt with solely on sentence (as opposed to trial). In this respect, therefore, reliance upon the provocation defence in fact may disadvantage mentally ill or impaired defendants.

117. In consultation on our draft report with mental health professionals,¹¹⁰ we encountered widespread recognition that, consistent with our analysis above, the partial defence of provocation is not significantly benefiting the mentally ill or impaired, and indeed may be disadvantaging them in some respects. In particular, the Office for Disability Issues indicated some ambivalence towards the defence, because although on rare occasions it may appropriately recognise the circumstances of a defendant with mental illness or disability, there are several instances in which it has implicitly operated to devalue the taking of a disabled victim's life.

Battered defendants

118. In relation to battered defendants, the terms of reference asked us to consider whether the repeal of partial defences would unduly disadvantage battered defendants, and whether there should be a special defence for battered defendants, in addition to or instead of current defences.
119. The Law Commission considered this matter previously, and relatively recently, in *Some Criminal Defences with Particular Reference to Battered Defendants*.¹¹¹ To the extent that battered defendants experience access to justice problems, the Commission did not regard partial defences as the answer: provocation, diminished responsibility, and excessive self defence, as traditionally drafted, are not apt for the circumstances of such defendants. This was consistent with the balance of opinion amongst submitters (whose submissions were contingent upon the introduction of a sentencing discretion, which has since occurred):
- a. Submissions were marginally in favour of the abolition of provocation.¹¹²
 - b. Submissions were evenly balanced on whether New Zealand should introduce diminished responsibility, but of those who favoured its introduction: "Submissions on the preferred form of the defence were mixed. All versions of the defence were criticised".¹¹³
 - c. A small majority were of the view that excessive self defence should not be introduced.¹¹⁴
 - d. A majority were opposed to a special defence for battered defendants.¹¹⁵
120. The Commission recommended that the defence of self defence in section 48 of the Crimes Act 1961 should be slightly amended, to better cater for the circumstances of battered defendants. However, in its subsequent consideration

110 Including the Ministry of Health, the Office for Disability Issues, the Mental Health Commission, and several practising forensic psychiatrists.

111 Above n 5.

112 Above n 5, ch 5.

113 Above n 5, ch 6, para 36.

114 Above n 5, ch 3.

115 Above n 5, ch 4.

of this issue, the Ministry of Justice concluded that amendment to section 48 of the Crimes Act 1961 was not required to meet the needs of battered defendants, and might be undesirable in light of the fact that the section is generally regarded as working well. The Ministry reviewed recent case law, which tended to suggest that problems previously encountered were being ironed out in the courts; it thus concluded that the real problem previously was one of social awareness, rather than of law. The Ministry found that overwhelmingly stakeholders were comfortable with letting matters take their course.

121. For the majority of battered defendants, self defence will tactically offer a preferable alternative to provocation, because it results in an acquittal. We adhere to the Law Commission's previous view that provocation is not benefiting battered defendants sufficiently to warrant its retention, and our review of case law confirms this. In Auckland and Wellington homicide trials conducted between 2001 and 2005, one defendant with an extensive history as a victim of various forms of domestic violence killed her spouse, relied upon provocation, and was convicted of manslaughter. However, the circumstances in which the killing occurred were far from paradigmatic; indeed, they are equally capable of being regarded as an example of a quite different paradigm, that is roundly critiqued when relied upon by a male accused in relation to the murder of a female intimate – that is, sexual jealousy. While provocation may in the past have offered one option for some battered defendants in New Zealand, it has also arguably been something of a mixed blessing. Although we were not able to confirm it in our own review of recent New Zealand homicide cases, there is a compelling case in the literature to suggest that provocation is a defence typically working against, rather than for, battered defendants – by the same violent and controlling and jealous spouses that have been the subject of much of the feminist critique of this defence.¹¹⁶ These views were confirmed by women's groups that we consulted on this draft report.¹¹⁷
122. We have considered the approach taken by the Victoria Law Reform Commission, and subsequently implemented by the government in the Crimes (Homicide) Act 2005. The Crimes (Homicide) Act 2005 abolished the partial defence of provocation, but enacted a new crime of "defensive homicide" with a maximum finite sentence of 20 years (which was the previously applicable maximum for manslaughter by reason of provocation).¹¹⁸ The new crime is, essentially, a partial defence of excessive self defence. It operates when the accused committed an act that would otherwise constitute murder, believing that conduct to be necessary to defend himself or herself or another person from the infliction of death or really serious injury, but without reasonable grounds for that belief. Its scope is not confined to family violence, but the intention as indicated during

116 See, for example, Graeme Coss "Provocative Reforms: A Comparative Critique" (2006) 30 Crim LJ 138, 143 and the literature cited therein; see also paras 96–97 above.

117 Including Auckland Women Lawyers' Association, Wellington Women Lawyers' Association, the Women's Consultative Group of the NZLS, and the National Collective of Independent Women's Refuges. The Ministry of Women's Affairs was also consulted, and considered that a robust case had been made out for provocation's repeal, although it remained concerned about the adequacy of self defence as a vehicle for addressing battered women's issues.

118 A further purpose of the Crimes (Homicide) Act 2005 is said to be "to amend the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 to provide further for the defence of mental impairment". This amendment appears to be unrelated to the repeal of the provocation defence. It implements a procedure for agreed verdicts where mental impairment is not in dispute, analogous to the New Zealand procedure in the Criminal Procedure (Mentally Impaired Persons) Act 2003.

the passage of the legislation was to assist defendants who have been the victims of such violence, and this is evident from the further provision in section 9AH of the Act. That section provides that, in circumstances where family violence is alleged, a person may believe, and may have reasonable grounds for believing, that defensive conduct is necessary even if he or she is responding to a harm that is not immediate, or the response involves the use of disproportionately excessive force. The relevance of certain evidence that, broadly, pertains to the dynamics of a relationship in which battering has occurred, is also confirmed in section 9AH.

123. Overall, therefore, provocation was not abolished in Victoria without reference to the needs of battered defendants. However, we consider that the initiatives implemented in Victoria are not necessary in New Zealand, because of the subtle but important difference in the way in which self defence is provided for in this country. Section 48 of the Crimes Act 1961 provides that a person “is justified in using, in the defence of himself or another, such force as, **in the circumstances as he believes them to be**, it is reasonable to use”. This is a mixed objective-subjective test and, as such, broader than the Victorian formulation which requires objectively reasonable belief (subject to section 9AH).
124. It has been said that it is “too early to be complacent” about the use of self defence by battered defendants in New Zealand, notwithstanding some supportive judicial approaches.¹¹⁹ However, in the light of the further work undertaken by the Ministry of Justice on this matter in the development of the government response to *Some Criminal Defences with Particular Reference to Battered Defendants*, we are content at this stage to concur with the Ministry’s conclusions. If provocation is repealed, we do not consider that any further legislative intervention will be required to address the needs of battered defendants.

THE MAJORITY OF COMPARABLE JURISDICTIONS HAVE A DEFENCE OF PROVOCATION

125. There is a concern that in deciding to repeal provocation, New Zealand would be at odds with the majority of our fellow jurisdictions, which offer a defence of provocation.
126. An overview of the jurisdictions follows. It shows that, while it is certainly true that the majority of jurisdictions still retain a defence of provocation, it is also true that the majority of them also still have a mandatory life sentence for murder. The abolition of provocation does not follow automatically from a change to discretionary murder sentencing (the partial defence has been retained in the Australian Capital Territory and New South Wales, notwithstanding the abolition of the mandatory sentence in both of those states). However, the weight of opinion in Commonwealth jurisdictions that, like New Zealand, have discretionary sentencing for murder is quite different. Arguments relating to a majority of jurisdictions retaining a partial defence of provocation are misconceived: the appropriate comparator is jurisdictions that have abolished the mandatory sentence for murder.
127. Furthermore, despite the diverse statutory formulations of the provocation defence in different jurisdictions, in case law a remarkable consensus can be observed in favour of the present New Zealand approach. This raises questions

119 Tolmie, above n 8. Examples of the latter include *R v Zhou* (8 October 1993) HC AKL T7/93 Anderson J; *R v Stephens* (12 April 2002) HC WHA T011676 O’Regan J. However, Tolmie also cites less favourable judicial dicta in cases such as *R v Oakes* [1995] 2 NZLR 673 (CA); *Attorney-General v Hewitt* [2000] 2 NZLR 110; *R v Maurirere* [2001] NZAR 431 (CA); *Police v Kawiti* [2000] 1 NZLR 117.

about the feasibility of proposals to address the current problems with the defence by redrafting rather than repealing it: see further chapter 5.

England and Wales: Law Commission reform proposal

128. The United Kingdom has a defence of provocation: the legislation and case law pertaining to it is reviewed in chapter 2.
129. The Law Commission for England and Wales has recommended the retention of provocation. In relevant part, their recommendation is as follows:¹²⁰

(1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to:

- (a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or
- (b) fear of serious violence towards the defendant or another; or
- (c) a combination of (a) and (b); and

a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.

(2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

130. Overall, we are not convinced that the Law Commission's formulation offers any advance on New Zealand's present position. The circumstances of the defendant – in other words, the defendant's characteristics – are all relevant, except insofar as they bear on the defendant's capacity for self-control. As regards self-control, what is required is ordinary tolerance and self-restraint. In other words, this draft (which predated *Holley*) is directed to overruling the *Smith (Morgan)* majority and establishing a position in English law that in essence is equivalent to the present New Zealand position.¹²¹
131. It is also a somewhat innovative approach, which is, and was intended to be, an amalgamation of provocation and excessive self defence. The Commission's terms of reference required it to have particular regard to the issue of domestic violence; it considered that the partial defence of excessive self defence was worthy of recognition; it noted that both provocation and excessive self defence are responses to a wrong done to the defendant; and it received submissions from the Royal College of Psychiatrists to the effect that anger and fear may often be indistinguishable.¹²² However, the proposed approach arguably runs somewhat contrary to the objective of fair labelling which is one of the key rationales put

120 Law Commission, above n 37, 70–71. It is repeatedly emphasised throughout the report that this is not intended to be the final form of words; this would be a matter for the drafters.

121 Law Commission, above n 37, para 3.110.

122 Law Commission, above n 37, paras 3.98–101.

forward for the retention of partial defences; the report also notes feedback from academics and senior judiciary that the amalgamation joins partial defences that are conceptually quite different (although the extent to which this is the case in practice will depend upon the particular formulations adopted).¹²³ Furthermore, the reference to provocation that “caused the defendant to have a justifiable sense of being seriously wronged” has prompted criticism that in the domestic violence context, this proposed draft will do no more to assist battered women than the present law, because many jealous and violent husbands will be able to point to a sufficient sense of grievance.¹²⁴

132. Since it issued its partial defence recommendations, a review of the law of murder has also been completed by the Law Commission for England and Wales.¹²⁵ The terms of reference for the review excluded the possibility of removing the mandatory sentence for murder and the Commission has concluded that “While the mandatory sentence of life imprisonment for murder remains, the partial defences should remain”.¹²⁶ However, the Commission has proposed a revised structure for homicide offences whereby a successful partial defence plea will reduce a first degree murder charge to a second degree murder conviction (as opposed to manslaughter); and in the event of a second degree murder conviction, life imprisonment will be discretionary. In several respects, therefore, their thinking bears considerable similarity to our own:¹²⁷

The primary importance of partial defences should be seen as lying in the impact they have on sentence rather than on verdict. This is what could be called the “sentence mitigation” principle. Matters of verdict and of sentence are effectively fused in murder cases. Partial defences affect the verdict of murder, and only that verdict, because a verdict of murder is the only one that carries in its wake a mandatory sentence of such gravity (life imprisonment). Therefore, in our view, the argument for partial defences that is based on fair labelling – avoiding the label “murderer” – is of secondary importance compared to the sentence mitigation principle.

...

Our view is that when the offender has killed with the fault element for first degree murder but pleads a “partial defence” successfully, he or she still ought to be convicted of an offence of “murder” (second degree murder). It is not imperative that there should be partial defences to second degree murder, just because it is an offence of “murder”, because second degree murder would attract a discretionary life maximum sentence.

The idea of “partial defence” is in reality something of a misnomer. Historically, the way that the law has created space for discretion in sentencing in murder cases has been by permitting the mitigating circumstances to reduce murder to manslaughter (the latter crime, unlike the former, having a discretionary element to the sentence). The creation of such space could equally have been achieved by making proof of the exceptional mitigating circumstances relevant to whether the sentence for murder was still mandatory, without affecting the **verdict** of murder. However, the

123 Law Commission, above n 37, paras 3.93–94.

124 Coss, above n 116.

125 Law Commission, *Murder, Manslaughter and Infanticide* (2006, Report No 304).

126 Law Commission, above n 125, para 2.130.

127 Law Commission, above n 125, paras 2.147–150.

consideration of such an option for reform of the law was beyond our remit, as it would have involved a departure from the mandatory life sentence principle in top-tier homicide cases.

Australia

133. Three of the four states with discretionary murder sentencing have recently reconsidered the provocation issue: Tasmania, Victoria, and New South Wales.¹²⁸

Tasmania

134. Tasmania does not have a mandatory murder sentence.¹²⁹ The partial defence of provocation was abolished in Tasmania in May 2003.¹³⁰ The courts can consider provocation as a mitigating factor on sentence. For a discussion of the only Tasmanian case that has since been heard on the issue, see further chapter 6.

Victoria

135. There is no mandatory sentence for murder in Victoria.¹³¹ In 2004, the Victorian Law Reform Commission recommended the abolition of provocation.¹³² The VLRC was particularly concerned with the “continued reliance on provocation by violent men who kill their intimate partners”. More generally, the Commission considered that mitigating factors relating to intentional killings could be better taken into account at sentencing, and noted that another compelling reason for recommending the abolition of the defence was that:¹³³

... the moral basis of provocation is inconsistent with contemporary community values and views on what is excusable behaviour. One of the recognised roles of the criminal law is to set appropriate standards of behaviour and to punish those who breach them. The continued existence of provocation... suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or seriously injure a person. This is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person.

128 See also Attorney-General’s Department *Review of Commonwealth Criminal Law: Interim Report Principles of Criminal Responsibility and Other Matters* (July 1990) paras 13.56–57; Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General *Discussion Paper: Chapter 5 Fatal Offences Against the Person* (June 1998) 69–107. As to the first, see also para 1.5 which states: “This Report... expresses the final views of the Committee on the matters with which it deals and is an Interim Report only in the sense that it does not deal with all matters which have been referred to the Committee”. As to the MCCOC discussion paper, a final report has not been published. For a summary of the origins and purpose of MCCOC (to take forward the work done by the Gibbs Committee on behalf of the Attorney-General’s Department) see the preface to Criminal Law Officers’ Committee of the Standing Committee of Attorneys-General *Final Report: General Principles of Criminal Responsibility* (December 1992).

129 Criminal Code (Tas), s 158.

130 Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas).

131 Crimes Act 1958, s 3 (Vic).

132 Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004). However, the Commission recommended the introduction of a partial defence of excessive self defence: it therefore is not opposed to partial defences per se. It also recommended the reformulation of self defence, using language similar to that employed in New Zealand: “the conduct is a reasonable response in the circumstances as he or she perceives them”.

133 Victoria Law Reform Commission, above n 132, at paras 2.17, 2.95.

136. The Victorian government agreed:¹³⁴

Attorney-General Rob Hulls said... the proposed reforms to go before Parliament today tackled entrenched bias against women and were the most significant since the death penalty was abolished 30 years ago.

Mr Hulls said people who killed in circumstances where they lost self-control – such as killing a spouse who had been unfaithful – would no longer be able to use the defence of provocation.

This defence was no longer acceptable, he said. “Gone are the days when prehistoric assumptions about honour and violence – about male and female behaviour – should be allowed to hold traction in our legal system,” Mr Hulls said.

“This Government will not support a mechanism that, implicitly, blames the victim for a crime – one that has been relied upon by men who kill partners or ex-partners out of jealousy or anger; by men who kill other men who they believed were making sexual advances towards them; and even by men who kill their own daughters because they believe they have dishonoured them.

“People who kill having lost self-control in this manner will now, if found guilty, be convicted of murder rather than manslaughter, the question of provocation simply taken into account, if relevant, alongside a range of other factors in the sentencing process.”

137. The Crimes (Homicide) Act 2005 (Vic) came into force on 23 November 2005.

New South Wales

138. There is no mandatory sentence for murder in New South Wales: under Schedule 1 to the Crimes (Life Sentences) Amendment Act 1989 (NSW) life imprisonment is only the maximum penalty.

139. Under section 23 of the Crimes Act 1900 (NSW):

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

- (a) the act or omission is the result of a loss of self-control on the part of the accused that was 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 as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

140. The New South Wales Law Reform Commission recommended a subjective test moderated only by community standards of blameworthiness – essentially the

¹³⁴ “End Draws Near for Defence of Provocation” *The Melbourne Age* (5 October 2005) <http://www.theage.com.au/news/national/end-nears-for-defence-of-provocation/2005/10/04/1128191716823.html> (last accessed 10 October 2005).

approach proposed by the *Smith (Morgan)* majority but subsequently abandoned in England.¹³⁵

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

141. This recommendation was issued almost 10 years ago, and has not been implemented by the government. More recently, it has been said that further consideration of retention or abolition of partial defences should be deferred, pending publication of the Victoria Law Reform Commission's final report on this issue.¹³⁶

The remaining Australian states

142. The remaining Australian states all have a partial defence of provocation (varying formulations).¹³⁷ However, with the exception of the Australian Capital Territory, they also all still have a mandatory murder sentence.¹³⁸

a. Section 13 of the Crimes Act 1900 (ACT) is substantially similar to section 23 of the Crimes Act 1900 (NSW).

b. The provocation defence in Queensland is as follows:

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.

c. The Western Australian defence is virtually identical to that in Queensland.¹³⁹

d. The Northern Territory statute provides:

(2) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided –

(a) he had not incited the provocation;

(b) he was deprived by the provocation of the power of self-control;

135 New South Wales Law Reform Commission, above n 77, 77.

136 Hon Mervyn Finlay QC "Review of the Law of Manslaughter in New South Wales" (Criminal Law Review Division, New South Wales Attorney-General's Department, April 2003). The report of the Victoria Law Reform Commission has since been published: above n 132. It recommended the abolition of provocation, a recommendation that was immediately adopted and implemented in Victoria.

137 Criminal Code 1899 (Qld), s 304; Criminal Code 1914 (WA), s 281; Crimes Act 1900 (ACT), s 13; Criminal Code (NT), s 34(2); and South Australia at common law.

138 Crimes Act (ACT), ss 12(2), 442.

139 The Law Reform Commission of Western Australia is presently conducting a review of the law of homicide. Responses have been sought from submitters as to whether both provocation and infanticide should be abolished: see *Review of the Law of Homicide: An Issues Paper* www.lrc.justice.wa.gov.au (last accessed 20 July 2007).

- (c) he acted on the sudden and before there was time for his passion to cool; and
 - (d) an ordinary person similarly circumstanced would have acted in the same or a similar way.
- e. South Australia has a defence of provocation at common law.¹⁴⁰
143. Notwithstanding the various statutory formulations, the High Court of Australia has confirmed that the Australian approach to provocation is essentially the same as the New Zealand approach and, now, the approach of England and Wales. That is, in weighing the gravity of an alleged provocation, any relevant characteristic of the accused may be taken into account. However, in assessing the standard of self-control required by the law, only age may be considered.¹⁴¹

Other Commonwealth countries

Canada

144. In Canada, section 232 of the Criminal Code provides that:
- (1) Culpable homicide that would otherwise 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) A wrongful act or insult 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 his passion to cool.
145. In *R v Thibert*, the Supreme Court of Canada held that a similar approach to New Zealand's should be taken, in terms of importing an element of subjectivity to the assessment of the impact of the wrongful act or insult.¹⁴²

In Canada, the courts have also sought to attain a proper balance in the interpretation of the provocation section. It has been properly recognized that the objective element of the test exists to ensure that the criminal law encourages reasonable and responsible behaviour. A consideration of the defence of provocation must always bear this principle in mind. On the other hand, if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered... In summary then, the wrongful act or insult

140 King CJ in *The Queen v R* (1981) 28 SASR 321, 321–322: “It is necessary to recall certain basic principles of the law of homicide. The killing of one person by another with intention to kill or do serious bodily harm is murder. Such a killing may, however, be reduced to manslaughter if the killing results from a sudden and temporary loss of self-control on the part of the killer which is brought about by acts or words of the deceased amounting in law to provocation. To amount in law to provocation the acts or words must satisfy the following tests: (1) they must be done or said by the deceased to or in the presence of the killer; (2) they must have caused in the killer a sudden and temporary loss of self-control rendering the killer so subject to passion as to make him for the moment not master of his mind; (3) they must be of such a character as might cause an ordinary person to lose his self-control to such an extent as to act as the killer has acted.”

141 *R v Stingel* (1990) 171 CLR 312 (HCA); *Masciantonio v The Queen* (1995) 183 CLR 58 (HCA).

142 [1996] 1 SCR 37 (SCC), paras 14–19.

must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.

146. The Law Reform Commission of Canada in 1984 recommended, for reasons similar to our own, that provocation should be abolished as a partial defence and instead be dealt with by abolishing the fixed penalty for second degree murder.¹⁴³ That recommendation was not implemented. The Department of Justice has since noted that the “simplest course might be to abolish the defence outright” but in the alternative, for discussion purposes, proposed half a dozen reform options¹⁴⁴

Ireland

147. Since 1978 in Ireland, the test for provocation has been “whether there is any evidence of provocation which, having regard to the accused’s temperament, character and circumstances, might have caused him to lose control of himself”.¹⁴⁵ It is an entirely subjective test.¹⁴⁶ After reviewing the resulting problems at common law, the Law Reform Commission of Ireland has proposed retaining provocation as a partial defence, but amending it as follows¹⁴⁷

The Commission provisionally recommends that reform of the plea should ensure that courts are in a position to take account of the accused’s personal characteristics insofar as they affect the gravity of provocation. However, with the possible exception of age, it is recommended that personal characteristics should not feature in relation to the question of self-control. The Commission notes that this reform would bring Irish law broadly into line with the law in Canada, Australia and New Zealand.

148. This recommendation was made notwithstanding the Law Reform Commission’s prior recommendation, for the abolition of the fixed penalty for murder.¹⁴⁸

Scotland

149. In Scotland, the scope of provocation is limited: the only grounds for it are violent conduct and infidelity (meaning that essentially the defence has progressed no further than *Mawgridge*).¹⁴⁹

143 Law Reform Commission of Canada *Homicide* (WP33, 1984), pp 73–74; see also Law Reform Commission of Canada *Recodifying Criminal Law* (R31, 1987), which collates the recommendations from a series of criminal law reform working papers into a draft criminal code, with second degree murder as described above and no defence of provocation.

144 Department of Justice *Reforming Criminal Code Defences: Provocation, Self Defence, and Defence of Property* (1998).

145 *People (DPP) v MacEoin* [1978] IR 27.

146 Law Reform Commission of Ireland, above n 93, paras 4.03–07.

147 Law Reform Commission of Ireland, above n 93, para 7.31. The Commission also welcomed the proposal, in the Criminal Law (Insanity) Bill 2002, to introduce a companion defence of diminished responsibility in Ireland because: “Properly construed, provocation assumes that the accused is mentally normal... provocation goes to culpability, while mental condition defences are concerned with criminal capacity. The Commission welcomes the recent publication of the Criminal Law (Insanity) Bill 2002, and notes that it seeks to preserve the distinction between culpability and capacity just outlined”.

148 Law Reform Commission *Report on Sentencing* (LRC 53–1996).

149 *R v Mawgridge*, above n 9.

150. We understand that the Scottish Law Commission is about to commence a provocation law reform project.¹⁵⁰

CONCLUSION

151. Because of the lengthy history of this report (see further chapter 1), consultation on the issues has been widely conducted with all stakeholders over a very long period. During the present iteration of the project, stakeholders consulted included the legal profession, the judiciary, the justice sector, other government agencies with an interest in relevant areas, and private sector groups with a particular interest in either mental health or women's issues.¹⁵¹ We encountered very widespread consensus across a substantial majority of stakeholders that the present operation of section 169 of the Crimes Act 1961 is unsatisfactory. Even the defence bar (which was the principal constituency defending the existence of the section, on the basis that it performs a useful and necessary function in the criminal justice system) indicated that reform of the partial defence framework would be supported to expand and clarify its scope; they were opposed to the repeal of partial defences, rather than particularly wedded to the current form of section 169.
152. The question is thus not whether something should be done about section 169, but what should be done about it.¹⁵²
153. Broadly, stakeholders' views as to the appropriate remedy were twofold. Those who considered that it is important to involve juries in the assessment of relative culpability, and similarly important to signal reduced culpability by means of a manslaughter verdict, favoured reform of the partial defence framework. This opinion was not wholly confined to the defence bar; some (a small minority) of Crown Solicitors shared it, as did some in the mental health area. For discussion of possible reform options, see further chapter 5.

150 http://www.scotlawcom.gov.uk/html/law_reform.html (last accessed 20 July 2007).

151 More specifically: the Criminal Law Committee of the New Zealand Law Society; all Crown Solicitors individually; criminal lawyers more generally by way of an open forum at the Criminal Law Symposium (2004); the Higher Courts judiciary; the Ministry of Justice; Crown Law Office; the New Zealand Police; the Ministry of Health; the Office for Disability Issues; the Ministry of Women's Affairs; the "GLBTI Policy" team at the Ministry of Social Development ("GLBTI" refers to gay, lesbian, bisexual, transgender, transsexual, fa'afafine, takatāpui, and intersex people); the Mental Health Commission; several practising forensic psychiatrists; Auckland Women Lawyers' Association; Wellington Women Lawyers' Association; the Women's Consultative Group of the New Zealand Law Society; the National Collective of Independent Women's Refuges.

152 If we have wrongly gauged the mood, and there is in fact appetite for the retention of section 169, our response would be as follows: we have significant reservations about the several arguments canvassed in this chapter, advocating provocation as a vehicle for the recognition of reduced culpability, but we acknowledge that this is a value judgment; that others hold views that differ from our own; and that the importance and correctness of such arguments is not to be lightly dismissed. But nonetheless, the question is whether, taking the objections to repeal at their highest, they offer sufficient reason to retain provocation when weighed against all of the reasons to abolish it. At the end of the day, we have simply made a different value judgment, which in essence weighs the problems associated with the defence of provocation against its benefits, and finds the defence substantially wanting.

154. Others agreed with our view that dealing with the issues on sentence, with the aid of a sentencing guideline addressing section 102 of the Sentencing Act 2002, could suffice or indeed be preferable: see further chapter 6.¹⁵³ However, some – particularly the Ministry of Health and some of the women’s groups – offered cautious or conditional support for this option, because no draft guideline was available for their review. Chapter 6 makes recommendations to address this concern.

153 See also *R v Fraser* (31 August 2007) HC WHA CRI2005-029-1456, para 35 Wilson J: “As an aside, these events well illustrate, in my view, why provocation should be seen as a potential mitigating factor when sentencing for murder, just as it is for all other offences. As a consequence, the partial defence of provocation, so as to reduce a charge of murder to one of manslaughter, should in my view no longer be part of our law but provocation should be a ground for imposing less than a life term.”

Chapter 5

Other options for recognising reduced culpability

155. In recognition of a significant body of opinion in favour of an option that permits jury involvement in decisions about relative culpability for homicide, we have considered the pros and cons of the various ways in which this might legitimately be achieved. Our view is that all of the options proposed below are problematic, for reasons that are briefly identified. Consequently we do not recommend any of them. Our preferred option, canvassed in chapter 6, is instead for judges to deal with provocation issues on sentence, aided by a sentencing guideline. The options are:
- a. a redrafted partial defence of provocation;
 - b. a smorgasbord of partial defences;
 - c. a generic partial defence;
 - d. degrees of murder;
 - e. culpable homicide.

OPTION 1: A REDRAFTED PARTIAL DEFENCE OF PROVOCATION

156. The first reform option is to attempt a redraft of section 169. However, the legal history of the provocation defence, canvassed in chapter 2, demonstrates that through the last century, as it has been developed by the courts, each reform option has been attempted and ultimately considered unsustainable. The discussion of the defence's conceptual and practical flaws in chapter 3 likewise indicates that the flaws would not be remedied, and indeed could be exacerbated, by its reform in the *Smith (Morgan)* style. The policy choices can be reduced to three:
- a. **A wholly objective approach.** We are not aware that anybody is proposing a return to the wholly objective *Bedder* approach. There appears, in the literature and case law, to be widespread agreement that it was appropriate to depart from it.¹⁵⁴ See further chapter 3, for the view that the

¹⁵⁴ See further ch 2, paras 25–26.

most fundamental flaw in the provocation defence is also the most simple to explain: an ordinary person does not, under any circumstances, homicidally lose self-control, and thus a return to *Bedder* would render the provocation defence redundant.

- b. **A mixed objective-subjective approach, with some grafting of the defendant's characteristics.** The present New Zealand approach is arguably only one variation on this theme; different formulations perhaps could be tried. However, our review of other jurisdictions that is described in chapter 4 indicates that, with widely varying statutory formulations, appellate courts in all jurisdictions interpret the applicable statute according to the majority approach in *Rongonui*.¹⁵⁵ This compellingly indicates to us that the present New Zealand position optimises what can be achieved with provocation under a mixed objective-subjective test: it is the approach that has independently been preferred by each jurisdiction's most eminent judges, regardless of the jurisdiction's statutory wording. There is also a lack of clarity and consensus about how the legislation might be differently worded and the outcome that is wanted; the reality is that these things will vary significantly amongst stakeholders and over time.¹⁵⁶ This is not likely to be a recipe for durable reform: there would appear to be a not inconsiderable risk that the constant tweaking that is historically evident would continue.
- c. **The wholly subjective *Smith (Morgan)* majority approach.** This approach asks: what does society expect of this defendant, taking into account all of his or her characteristics, as regards both gravity of the provocation and self-control? It has been described, pejoratively but perhaps accurately, as an "evaluative free-for-all".¹⁵⁷ It is an "altogether looser question", which asks the jury to do justice by applying a community standard with no guidance: there is no method by which the jury can assess what society expects of this particular defendant, other than the level of sympathy that they feel for that person. It is perhaps instructive that this approach was rejected as a viable option so quickly in England, essentially at the first opportunity.¹⁵⁸ Furthermore, a more subjective provocation test will inevitably be a more flawed provocation test, for all of the reasons outlined in chapter 3.

157. We thus do not consider the redrafting of section 169 to be feasible. If it was to be retained, we would argue that the section should be kept in its present form. However, we noted in chapter 4 that a number of the arguments for provocation's retention, if accepted, would in fact indicate a need for more wide-ranging reform of partial defences – that is, either more partial defences, or a generic partial defence.

155 Other than Ireland and Scotland, in both of which the provocation defence is a common law, not a statutory, defence. See further ch 4.

156 See further paras 91–92 above, regarding the tendency of the defence to evolve in response to cultural concerns.

157 Timothy Macklem and John Gardner "Compassion Without Respect? Nine Fallacies in *R v Smith*" [2001] Crim LR 623, 635; see also Power, above n 12, 874.

158 See further paras 65–70 above.

158. If provocation was retained, with a key rationale being the need for a forum by which the community view of relative culpability for murder can be signalled, it would seem logical to conclude that the community's view needs to be signalled in the whole range of cases, not confined to provocation. Already there are suspicions that, as the only partial defence, provocation is becoming a catch-all for any scenario that can be made to fit within it.¹⁵⁹

Interestingly, the defence of provocation appears to have developed enough flexibility to operate in those euthanasia cases that are capable of being adapted to fit within its particular requirements. In *R v Simpson* [(12 November 2001) HC AKL T010609 Potter J], Simpson was charged with murdering his mother who was in the final stages of terminal bowel cancer. The jury rejected his insanity plea and convicted him of manslaughter on the basis of provocation. Simpson's bipolar disorder made him particularly susceptible to the provocation and released an overwhelming and irresistible desire in him to alleviate his mother's suffering. The provocation consisted of her terminally ill state, the pitiful sight of her as she was dying, and her words: "Kit, Kit, I am in such pain. Do something." One interpretation of the result in *Simpson* is that provocation was being used as a de facto diminished responsibility defence. Another interpretation is that the defence was actually acting to alleviate culpability in respect of what was, in fact, a euthanasia case.

159. It has been said by one author that it is "pettifogging" to care too much about the label.¹⁶⁰ But, given that labelling is one of the core rationales put forward for retaining partial defences, we find this somewhat unconvincing. We are firmly of the view that, if a vehicle is needed for this kind of sympathetic societal response, it should be dealt with openly as a policy and legislative matter, not by shoehorning all manner of cases into provocation behind the closed doors of the jury room.
160. As a minimum, if section 169 was retained in its current form, the introduction of diminished responsibility would therefore need to be seriously considered.¹⁶¹ It is anomalous, and creates a significant gap in the law, to recognise loss of self-control as a mitigating circumstance, purportedly in recognition of human frailty, and yet fail to acknowledge those whose frailty is such that they cannot achieve ordinary self-control. In the absence of such reform, there would be an ongoing temptation to stretch the boundaries of section 169.

159 Tolmie, above n 8, 44. See Brookbanks, above n 91, paras 2.35, 2.41, 5.13, 6.03–05 for the view that provocation is an important defence option in New Zealand in the absence of a defence of diminished responsibility. For an example of provocation acting (arguably) as a Trojan horse for diminished responsibility, see *Rongonui* above n 24. On retrial, Rongonui again relied on provocation, and was convicted and sentenced for manslaughter: *R v Rongonui* (25 August 2000) HC WGN T2605/98. See also BJ Brown "Provocation, 'Characteristics' and Diminished Responsibility" (1983) 10 NZULR 378.

160 Brown, above n 159, 383.

161 With the burden of proof on the defendant to the balance of probabilities: see further n 165 below, and compare the insanity defence.

161. Other partial defence options that have been proposed from time to time include:
- a. excessive self defence;
 - b. mercy killing;
 - c. a defence specific to battered defendants;¹⁶²
 - d. a “demands of conscience” defence;¹⁶³
 - e. the defence of “extreme mental or emotional disturbance” (EMED) that appears in the United States’ Model Penal Code.¹⁶⁴
162. This begins to illustrate the problem. A whole range of factors may reduce a defendant’s culpability in homicide cases. Recognising some mitigating circumstances in the form of partial defences leads to calls for the recognition of others. There is no way of articulating the distinction between what is properly to be regarded as a partial defence, and what is “merely” a mitigating circumstance.
163. The other disadvantage (although it perhaps becomes less of a problem as the length of the partial defence list increases) is that whatever categories of partial defence are created, there will always be cracks into which “hard cases” will fall. Defence counsel in the interests of their clients will be required to argue that the law should be stretched to accommodate them, which in turn over time tends to produce strained constructions of the defences.

**OPTION 3:
A GENERIC
PARTIAL
DEFENCE**

164. A third approach, which would address both of the problems identified above, is to offer a generic partial defence for the consideration of the jury. For example, a Crimes Act statutory proviso might be devised, along the following lines:¹⁶⁵

If the Crown has discharged its burden of proving the ingredients of murder, notwithstanding anything to the contrary in sections 167 and 168 of this Act, the jury may nonetheless consider that in all of the circumstances of the case the defendant should instead be convicted of manslaughter, and may return a verdict accordingly.

165. As well as being a great deal more straightforward than attempting to devise a

¹⁶² Cato, above n 92, 44; but see also the Commission’s consideration and rejection of this option in R73.
¹⁶³ Horder, above n 75, ch 5. Horder also allocates partial excuses along a spectrum according to their rationale, from those close to justifications (i.e. excessive self defence), to partial denials of responsibility (i.e. diminished responsibility); and proposes second degree offences by reason of a partial defence for the whole range of offences, which would reduce what would otherwise have been a prison term to a non-custodial sentence (ch 4).

¹⁶⁴ Brookbanks, above n 91. For a discussion of EMED and the limited extent to which it has been adopted in the United States, see the report of the Law Commission for England and Wales, above n 37, Appendix F.

¹⁶⁵ A further issue would need to be addressed, if this kind of approach was adopted. Some Crown counsel have commented to us on the difficulties, when the foundation of a defence is mental condition, of placing the burden of rebuttal on the Crown. In the United Kingdom, defendants bear the burden of proof of diminished responsibility on the balance of probabilities, as they do with insanity. A partial defence that goes a long way towards merging the two defences, as per the *Smith (Morgan)* majority, creates difficulties for the Crown because it is almost impossible to overcome the hurdle of beyond reasonable doubt when mental condition is disputed (producing conflicting experts for the jury only has the effect of making the extent of the doubt clear). It seems reasonable to assume that the mentally ill or impaired would from time to time, perhaps often, seek to rely on a generic partial defence, as they presently do with provocation. Careful consideration would thus need to be given to where, and to what standard, the burden of proof should lie.

suitable menu of partial defences, and avoiding the problem of “hard cases”, a generic partial defence or a proviso of this kind would accurately reflect the fact that all a successful partial defence does is reduce the conviction from murder to manslaughter: once the trial is over, that is the sole extent of the “fair labelling”.

166. Its disadvantage is that it assumes the jury has some sort of in-built radar as to who is properly a murderer – “that there is some form of accepted community standard on the proper borderline between murder and manslaughter which juries are capable of applying”.¹⁶⁶ We doubt that this is the case, and similar doubts were expressed to us by members of the legal profession. The reality probably is that, in the absence of any legal guidance, the only delineation will be the extent to which a jury sympathises with various defendants and their predicaments. This has the potential to reduce homicide to a lottery: it is an invitation to jurors to dress up their prejudices as law, and substantially increases the risk that more weight will be placed on jury composition and the advocacy skills of defence counsel than on the legal merits of the case.¹⁶⁷
167. A generic partial defence would, in fact, be an oblique method of achieving “degrees of murder” in New Zealand. One reason why a “degrees of murder” approach has perhaps not found favour in this country is its implicit, and presumably politically unpalatable, signal that the superficially identical losses of murder victims can be crudely ranked. The generic partial defence avoids that problem in form only, as opposed to substance, by simply passing the buck to the jury.
168. It would, of course, produce a manslaughter rather than a (whatever degree of) murder conviction. A manslaughter conviction achieves two things: an overt signal of reduced culpability, and a very high likelihood of a finite sentence (although not a certainty, because the maximum for manslaughter is life). Post-2002, and subject to policy decisions that would need to be made, there is nothing to prevent a degrees of murder regime from achieving the same two things.

OPTION 4: DEGREES OF MURDER

169. The fourth option, therefore, would be to propose a legislative framework of degrees of murder. One example of this, in the context of a proposal to abolish the provocation partial defence, has been proposed by the Law Reform Commission of Canada:¹⁶⁸

Murder is first degree murder if committed:

- (a) pursuant to an agreement for valuable consideration;
- (b) with torture;
- (c) for the purpose of preparing, facilitating or concealing a crime or furthering an offender’s escape from detection, arrest or conviction;
- (d) for terrorist or political motives;
- (e) during the course of robbery, confinement, sexual assault or interference with transport facilities consisting of aircraft and ships;

166 James Chalmers “Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism” [2004] Crim LR 198, 205.

167 Chalmers, above n 166; see also “January 2004: Partial Defences to Murder” [2004] Crim LR 1.

168 R31, above n 143.

- (f) by means which the accused knows will cause the death of more than one person; or
 - (g) by premeditation in terms of a calculated and carefully considered plan other than for the purpose of mercy killing.
170. Moreover:¹⁶⁹
- Although there is nothing in the new Code on sentencing, the Commission's recommendation is that ordinary murder should carry no fixed or minimum penalty. Some murders, though, are heinous enough to merit very severe penalty. To reassure the public at this time that they will receive such penalty, the Code retains a provision on first degree murder.
171. The list of what is proposed for first-degree murder closely resembles section 104 of the Sentencing Act 2002, which creates a presumption of a 17-year minimum period of imprisonment in circumstances of aggravated murder:
- 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
 - (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
 - (f) if the deceased was a member of the police 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.
172. We would therefore suggest that, at least as proposed by the Law Reform Commission of Canada, degrees of murder would be largely redundant in New Zealand given the sentencing structure that already exists, and would add little

¹⁶⁹ Law Reform Commission of Canada, R31, above n 143, 59.

to our present proposal: to call everything murder, and ensure that certain kinds of murder are more harshly (or leniently) punished by reference to sections 102 to 104 of the Sentencing Act 2002, plus sentencing guidelines. The only difference would be the appellation of “first-degree” to some murder convictions, and we do not think that would achieve a great deal.

173. The only other example of which we are aware (at least amongst the jurisdictions to which New Zealand typically refers) is the work that the Law Commission for England and Wales has recently done as part of their review of the law of murder.¹⁷⁰ Their proposal is differently framed. First degree murder, with a mandatory life penalty, encompasses all intentional killing. However, intentional killing cases in which there is a partial defence are called second degree murder, and the life penalty is discretionary. It perhaps better achieves what is wanted by the proponents of partial defences: a separation of those defendants from all of the other murders (as opposed to Canada, which separates the aggravated murders but makes no distinction between partial defence killings and other non-aggravated intentional killing). However, the English approach will, of course, only work in a jurisdiction where partial defences are retained: it is a gloss on the partial defence framework, not an alternative to it.

OPTION 5: CULPABLE HOMICIDE

174. In 1976, the Criminal Law Reform Committee on Culpable Homicide proposed a single offence of “unlawful killing”, which would apply to conduct now dubbed “murder”. The Committee simultaneously proposed that the partial defence of provocation should be abolished, and that the maximum (as opposed to mandatory) penalty for unlawful killing should be life. The framework proposed was thus substantially similar to our own recommendations. The Committee reasoned that:¹⁷¹

Whether the combined offence be called “murder” or “unlawful killing” is a matter of terminology and does not affect the substance of what is proposed. We recognize, however, that “murder” has a special significance and reflects the abhorrence and condemnation of deliberate or reckless killing. But under our proposed amendment “unlawful killing” would include killing under provocation. In view of the pejorative quality of the term “murder” it is unacceptable that that name should be applied to cases of killing under provocation. Consequently we propose the name “unlawful killing”. We expect, nevertheless, that one who kills without provocation and receives a long sentence for unlawful killing will still in common parlance be called a murderer.

175. As such, this has been identified to us as an option that might rectify the labelling problem, and thus reduce the risk that juries reluctant to convict a defendant of murder in the absence of provocation will instead acquit or fail to reach a verdict.
176. The Crimes Bill 1989, as introduced, proposed to implement the Criminal Law Reform Committee’s recommendations, although it changed the proposed language to “culpable homicide”. However, after considering submissions to the Justice and Law Reform Select Committee, and the extent of the opposition to

¹⁷⁰ Above n 125.

¹⁷¹ Criminal Law Reform Committee *Report on Culpable Homicide* (Report 11, 1976) 4. The Committee further recommended that manslaughter in circumstances other than provocation should be removed from the homicide provisions, and new offences punishable by finite sentence introduced, that focused on the culpability of the defendant’s conduct rather than the consequences.

this change, the Crimes Consultative Committee (to whom the task of reporting on the Bill was eventually delegated) proposed a return to the language of “murder” for intentional killings:¹⁷²

The term “culpable homicide” in clause 122 attracted more attention than the contents of the clause itself. There was widespread support for the retention of the term “murder”...

177. Given that, in large part, the desire to retain partial defences is borne out of a desire for fair labelling, one might logically expect this to cut both ways. In other words, we do not find it entirely surprising that there would be support for the highly culpable to continue to be labelled as murderers. This was certainly the view expressed in articles of the period addressing the Crimes Bill 1989 proposals.¹⁷³ It was said that different labelling would have the undesirable effect of devaluing the significance of the crime by removing an aspect of its infamy. Secondly, there was, and still is, a view that the provoked are less culpable than other killers, and as such deserve a different label, which is not achieved by the “culpable homicide” proposal (whereby provoked unlawful killers are labelled the same as other intentional killers, albeit not “murderers”).
178. The argument for unlawful killing thus only offers a partial solution to the problems perceived with repealing provocation: it perhaps increases the chances that a jury which might otherwise be prompted to acquit by the stark language of murder would be willing to return the somewhat more neutral “culpable homicide” verdict.
179. The Criminal Law Reform Committee identified a further reason for the change, which we do not find compelling: that the extension of the crime to the less culpable provoked gave rise to a need to change its label. This is somewhat at odds with our own view that the provoked are no less culpable for labelling purposes than anyone presently dubbed a murderer.
180. This has left us to consider whether the arguable risk of acquittals in some cases poses a sufficient risk to warrant recommending a change that may in itself prompt even stronger and more widespread opposition.
181. Appendix A describes our review of all Auckland and Wellington homicide cases over a five-year period. This identified a sample of four out of a total of 81 cases in which provocation was successful (and thus four cases in which the risk of acquittal if provocation was repealed might arguably exist). Extrapolating this to the number of cases nationally,¹⁷⁴ that means nine cases out of 180 every five years – that is, not nine cases that will result in acquittals, but nine in which the risk is perceived.
182. We also examined the facts of the four cases in which provocation succeeded, to try to ascertain the extent to which they were cases in which a murder verdict might be considered anomalous. Two (i.e. half) were homosexual advance cases.

172 Crimes Consultative Committee, above n 11, 45. See also Cooke, above n 27; Charles Cato QC “Violent Offending and the Crimes Bill 1989: A Criticism” [1989] NZLJ 246; Fran Wright “Current Issues in Criminal Law” [2005] NZLJ 136.

173 Cooke, above n 27; Cato, above n 172. Cooke also describes, at 238, consultation on a similar initiative in England, which was similarly opposed.

174 Ministry of Justice statistics indicate that our sample captured around 45 percent of the equivalent national sample.

Arguably one might regard that as a basis for a sympathy verdict, if one considers it permissible to dress up bigotry against homosexuals as a sympathetic circumstance. We do not. Furthermore, having some confidence, as we do, in the conscientiousness of juries, we do not perceive the risk to be such that it warrants recourse to “culpable homicide”, in the light of the questions we have posed about what the reform would actually achieve, and its likely concomitant disadvantages.

CONCLUSION 183. Overall, therefore, we do not consider any of the reform options canvassed in this chapter to be viable. We recommend that the partial defence of provocation should be abolished in New Zealand by repealing section 169 of the Crimes Act 1961; the defendants who would otherwise have relied upon that partial defence should be convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise.

RECOMMENDATION

R1 The partial defence of provocation should be abolished in New Zealand by repealing section 169 of the Crimes Act 1961; the defendants who would otherwise have relied upon that partial defence should be convicted of murder; and evidence of alleged provocation in the circumstances of their particular case should be weighed with other aggravating and mitigating factors as part of the sentencing exercise.

Chapter 6

Provocation as a sentencing issue

ADDRESSING PROVOCATION ON SENTENCE: FOUR CONCERNS

184. Several concerns have been identified regarding the viability of attempting to deal with provocation issues by addressing them solely as a mitigating sentencing factor:¹⁷⁵
- a. addressing provocation issues at the sentencing stage will duplicate (and thus increase) the demands upon resources;
 - b. dealing with provocation on sentence will be less transparent than dealing with it at trial;
 - c. there will be a greater risk of sentencing inconsistency; and
 - d. defendants who would otherwise have succeeded with provocation will be at risk of harsher sentences.

Resource implications

185. We do not perceive any realistic risk that addressing provocation issues at the sentencing stage will have adverse resource implications. The perception that this may occur turns on the belief that provocation-related evidence will be adduced twice: first at trial, and then at the sentencing stage in a disputed facts hearing. Submitters have said to us that, at trial, regardless of the repeal of section 169, defence counsel will still want to put as much provocation-type evidence as possible before the jury in the hope of a sympathy verdict, and so the evidence will be offered to give context to the circumstances of the alleged offending, and possibly in support of other defences such as lack of intent. In the event that this strategy is unsuccessful, and a murder conviction follows, the same or similar material will be put forward again as part of a plea in mitigation. However, section 24 of the Sentencing Act 2002 provides that, in determining a sentence, a court may accept as proved any fact that was disclosed by evidence at the trial. It is not at all clear to us why it is thought that judges would ignore this and occupy scarce court time hearing evidence pertaining to provocation twice.¹⁷⁶

¹⁷⁵ See, in particular, Tolmie, above n 8; see also Brookbanks, above n 91, paras 2.13–14, 6.07–08.

¹⁷⁶ It also provides that the burden of rebutting any disputed mitigating fact is on the Crown, beyond reasonable doubt. In this respect, therefore, there will be no disadvantage for defendants relative to trial.

Transparency

186. In relation to transparency, the primary concern that was raised related to transparency of outcome in successful provocation cases. When provocation is successful, and results in a manslaughter verdict, it was said to us that the imposition of a finite sentence that is typically somewhat less than a minimum term imposed on a murder conviction is comprehensible to the public, and in accordance with the societal views expressed through the proxy of the jury verdict. By contrast, if a defendant is convicted of murder, and either a relatively low minimum term is imposed, or the judge elects to depart from the presumption of life and impose a finite sentence consistent with current sentencing levels in provocation cases, this will be at odds with the very serious nature of the verdict, will cause controversy, and could bring the criminal justice system into disrepute.
187. However, transparency of this kind only exists in relation to provocation cases that succeed, which Appendix A suggests may be only a small minority of cases in which the issue was raised. We would argue that, in every other respect, dealing with provocation at trial rather than solely on sentence is in fact contrary to the interests of transparency. In cases in which provocation is not successful – either because the trial judge considers that the evidential basis for it is insufficient to allow it to be put to the jury, or because the jury has not accepted the defence – little if anything is articulated about the way in which the issues have been dealt with, let alone publicly available. By contrast, if the partial defence is abolished, and provocation is dealt with solely as a sentencing issue, in all provocation cases sentencing judges will be required to state their reasons in open court, which will be open to critique and review, and may be taken on appeal.
188. We have also recently proposed the establishment of a Sentencing Council to draft sentencing guidelines, which will be implemented by the Sentencing Council Act 2007.¹⁷⁷ Under the process set out in that Act for developing and implementing sentencing guidelines, which includes a mandatory public consultation requirement, there will be an unprecedented level of transparency and public input in relation to sentence types and levels, and a significantly greater degree of public ownership than can be claimed for trials.

Consistency

189. In a similar vein to the transparency argument, it was said to us that, when a jury has reached a verdict of manslaughter after provocation has been run as a defence, that mitigating factor must be taken into account by the sentencing judge. The jury verdict confers, in effect, a societal stamp of approval that must be given weight, and as noted above, it will tend to result in both a finite sentence, and a sentence that is likely to be somewhat shorter than the lowest available minimum term for murder. Furthermore, what amounts to provocation is currently determined by judges and juries measuring the facts of each case

¹⁷⁷ New Zealand Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, Wellington, 2006).

against the legislative formula for the defence, whereas individual judges considering the issues informally may have differing but legitimately held views. The concern is thus that, if defendants who presently succeed with provocation are instead to be convicted of murder, with mitigation solely at the discretion of sentencing judges, outcomes will be uncertain for defendants. They may be harsher, if the judge does not accept the force of the alleged provocation as a mitigating argument, either as a matter of general principle, or in the light of the whole mix of mitigating and aggravating sentencing factors that are relevant in the particular case. Sentences in provocation cases may also be inconsistent between judges.

190. In our view, the extent of the consistency that is achieved by dealing with provocation as a partial defence at trial is somewhat overstated by the supporters of the defence. First, we note that the present situation as regards consistency of sentencing following a manslaughter conviction may fall somewhat short of what is desirable. Manslaughter is well recognised as a difficult offence on which to pass sentence, because of the very wide range of cases that fall within its scope. In our own review of homicide cases, provocation was successful in two “homosexual advance” cases, *Ali* and *Edwards*, the factual circumstances of which were quite similar. *Edwards* received a prison sentence of nine years; *Ali* a sentence of three.¹⁷⁸ There may thus be some room for debate as to whether the jury’s return of a manslaughter verdict does indeed do a great deal to guide the sentencing judge and promote consistency of sentencing outcomes.
191. Furthermore, as with transparency, the consistency argument put forward above focuses wholly on the importance of maintaining the status quo for defendants in successful provocation cases. However, if one is concerned about achieving sentencing consistency, one presumably ought to be concerned about achieving it in all cases. To the extent that real consistency is presently achieved, which we doubt, it is achieved only by treating defendants convicted of manslaughter as like cases, and defendants convicted of murder somewhat differently. The implicit assumption is that juries are correctly discriminating between the two categories of defendant. We doubt that this is the case, or at least that juries are any better than judges at this task. Any given jury can make its decision only on the evidence in the single case before it, whereas a sentencing judge – particularly a sentencing judge assisted by a guideline – will have a considerably broader overview of the whole range of cases. One possible response to this is to argue that juries are the best proxy we have for society; as such, if a jury has decided to convict a defendant of manslaughter instead of murder, or vice versa, there is nothing more to be said: that is the best measure of consistency that we can hope to achieve. However, we would suggest that judges, too, are charged with acting as a proxy for society when they impose sentence in every other kind of case. Because we regard matters of aggravation as a continuum, rather than considering murder to be a different and unique class of case, we do not find any logic in the implication that judges and their sentencing judgments are somehow rendered inadequate in this context, such that their conclusions and their reasons need to be bolstered by a jury verdict.

178 See further Appendix A.

Risk of harsher sentences

192. Finally, it was said to us that, if provocation is repealed, and dealt with as a mitigating factor on sentence, higher sentences will result because defendants who would formerly have been convicted of manslaughter by reason of provocation will be convicted of murder, and will be sentenced more harshly simply because of the higher murder tariff.¹⁷⁹ Concerns of this kind are arguably borne out by *Tyne v Tasmania*,¹⁸⁰ the only murder case in which the issue of provocation has been considered and accepted under the new Tasmanian regime (provocation was abolished in that jurisdiction in 2003). In *Tyne*, a sentence of 16 years with an minimum period of imprisonment of 8 years was appealed on the basis that it was manifestly excessive, because but for the repeal of section 160 of the Tasmanian Criminal Code, the appellant would have been sentenced for manslaughter by reason of provocation. It was submitted that he should have been sentenced as if the conviction had been reduced. His appeal was dismissed:

It is difficult to put the matter more succinctly than did the learned sentencing judge when he said that provocation is no longer a defence to murder and the accused is to be sentenced for murder, not manslaughter... There is no longer any reason to impose a sentence for manslaughter instead of murder because of provocation. Provocation is taken into account in the exercise of the sentencing discretion for murder. The degree of provocation is just an aspect of the sentencing discretion. In a suitable case, no doubt it could be urged that greater mitigatory weight than usual should be given to the provocation because not only did the insult cause the accused to lose the power of self-control, but it was so grave it would also have caused a reasonable person to lose that power... However, it is not contended on this appeal that the learned sentencing judge failed to give sufficient weight to the issue of provocation, nor is it contended that the sentence is manifestly excessive for any reason other than it is well outside the range of sentences imposed for the crime of murder reduced to manslaughter by reason of the partial defence of provocation... I would dismiss the appeal.¹⁸¹

Between the abolition of mandatory sentences of life imprisonment for murder in 1994 and the repeal of s 160 in 2003, sentences for manslaughter in provocation cases were substantially less than those for murder. The only reason for the great disparity between murder sentences and manslaughter sentences in provocation cases was the existence of s 160. Now that s 160 has been repealed, there is no reason for such a great disparity. When a murder has been brought about or contributed to by provocation, that is now simply a mitigating factor whose weight will depend on the circumstances.¹⁸²

193. In New Zealand, the concern is amplified by the courts' approach to section 102 of the Sentencing Act 2002, which provides:

179 Under sections 102 to 104 of the Sentencing Act 2002, there is a presumption of life imprisonment for murder, with a requirement upon sentencing judges to specify a minimum period of imprisonment of at least 10 years, and 17 in aggravated cases. By contrast, manslaughter has an available maximum penalty of life imprisonment, but typically finite sentences are imposed, many in single figures. Under section 102(1), the presumption can only be displaced if a sentence of life imprisonment would be "manifestly unjust"; the burden of displacing the presumption rests on the defendant; and the Court of Appeal has consistently held that the standard for rebutting the presumption is high.

180 [2005] TASSC 119.

181 *Tyne v Tasmania*, above n 180, paras 18–20 Underwood CJ.

182 *Tyne v Tasmania*, above n 180, para 26 Blow J.

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.

194. To date, the courts have taken a conservative approach to section 102, as it appears the legislature intended. In *R v Rapira*,¹⁸³ the Court of Appeal held that the conclusion that the imposition of a sentence of life imprisonment would be manifestly unjust in terms of section 102 will be reached in exceptional cases only. Referring to *Hansard*, the Court noted that examples of potentially exceptional cases might include those involving mercy killing, or where there is evidence of prolonged and severe abuse. In *R v O'Brien*,¹⁸⁴ considering the issue of low intelligence bordering on mild intellectual impairment, the Court held that this was seldom likely to justify a departure from the statutory presumption. There may be cases where the circumstances of a murder may not be so warranting of denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that it would be manifestly unjust to impose a sentence of life imprisonment; however, *O'Brien* was not such a case.
195. Our terms of reference asked us to consider whether section 102 of the Sentencing Act 2002 should be amended to address this issue.
196. From a policy perspective, it seems to us that the *Tyne* approach is exactly what should occur. That is, if provocation is repealed on the policy basis that the defendants who rely upon it are not inherently more deserving of favourable treatment than many others who are presently convicted of murder, then it would make no sense to endorse and take steps to ensure an ongoing lower tariff simply for provocation. It may be that a more flexible approach to sentencing for murder ought to be taken to allow better recognition of the wide range of mitigating factors (including provocation) that can be present in cases of intentional killing, but that is a different issue.
197. Secondly, there appears to be an assumption that the provocation defence as it operates in the sentencing context confers a universal benefit on defendants, so that the proper position for the defence bar to take is opposition to our recommendation for repeal of the defence. In reality, our recommendation has the potential to work in the favour of some defendants. Just as judges are presently highly likely to reflect a manslaughter verdict with a reduced sentence, the converse applies: if a jury has clearly rejected the provocation argument by convicting of murder, judges will tend to sentence accordingly. It treats the issue as one of black and white, as opposed to a continuum where the defendant may fail to meet the legal threshold for provocation, but nonetheless have issues to put to the judge that are worthy of consideration. For some defendants, therefore, our proposed reform actually enhances the opportunity to have these mitigating factors considered, rather than reducing it. There is no net disadvantage to

183 [2003] 3 NZLR 794; (2003) 20 CRNZ 396 (CA); see also *R v Mayes* [2004] 1 NZLR 71 (CA).

184 (2003) 20 CRNZ 572 (CA).

defendants as a class.¹⁸⁵ If this argument is correct, then extrapolating it to our sample of cases reviewed in Appendix A, four defendants might, perhaps, be exposed to some risk by the repeal of provocation, whereas 11 (who were unsuccessful in their attempts to rely on the provocation defence) might improve their sentencing prospects.

198. Nonetheless, we consider that something must be done to ensure that, when section 169 is repealed, relevant mitigating factors in the sentencing context can be properly addressed.

OPTIONS FOR ENSURING ADEQUATE ACCOUNT CAN BE TAKEN OF MITIGATING FACTORS IN MURDER CASES

199. We have considered whether this objective might be achieved, not by amending the sentencing legislation, but by the more circuitous means of relying upon expressions of legislative intent in the course of the passage of the Crimes (Abolition of Defence of Provocation) Amendment Bill (such as speeches in the House, press releases, explanatory note to the Bill as introduced, and select committee reports). However, given the exigencies of policy and legislative development, there would be no guarantee that this would occur sufficiently often or with clarity and consistency. Even if they did, these kinds of statements are not binding and would not invariably be referred to by the courts; furthermore, in general, we do not think that the courts should be forced to have recourse to preparatory legislative materials in interpreting legislation.

200. We have therefore considered instead whether an amendment to section 102 itself is required. One option for doing so would be to change the test from “manifestly unjust” to some lesser threshold in order to weaken the presumption in favour of life imprisonment. However, we are not convinced that the threshold, as currently worded, is set at too high a level. While the test must be sufficiently flexible to allow the presence of substantial mitigating factors to rebut the presumption, the present wording arguably provides room for that. Any modification to it may undermine the message that life imprisonment remains the norm in cases of intentional killing.

201. As an alternative, we have considered whether section 102 might be modified by the inclusion of examples of the principal types of mitigation that are likely to rebut the presumption. However, this would be unsatisfactory for two reasons.

202. First, it would be difficult to find a form of words that would properly capture the factors being addressed without reverting to some of the complexities that have bedevilled partial defences at trial. Certainly it would be undesirable to include provocation as a mitigating factor justifying a rebuttal of the presumption if that had the result of introducing exactly the same sorts of problems that have led us to recommend the repeal of section 169, and it might be clumsy and difficult, if not impossible, to find a statutory form of words that avoided that result.

203. Secondly, the inclusion of statutory examples in provisions of this sort can cause difficulty. That is exemplified by section 100 of the Sentencing Act, which as enacted in 2002 gave examples of special circumstances (including the retention

185 To similar effect, the Law Commission for England and Wales, above n 37, para 3.42 noted that it had received submissions from victim support groups, to the effect that abolishing provocation and dealing with the issue by way of a disputed facts hearing may assist victims in feeling that they have had an opportunity to respond to allegations made by the accused against the deceased, in a way that is not always possible in the forum of a trial.

of employment) justifying deferment of the commencement of the sentence of imprisonment. These examples were written in overly inclusive language and, because they had statutory force, resulted in the wider use of deferment that had been intended. They were accordingly repealed in 2004. In the context of section 102, the provision of examples (such as provocation, mercy killing, excessive self-defence, and diminished responsibility through mental impairment) would also inevitably be written in broad language and would thus also carry the real risk of an overly inclusive interpretation. This would result in a greater use of section 102 than would be desirable, or at the least an undue measure of inconsistency in its use.

204. However, in our view, there is an alternative to the provision of statutory examples which can achieve the result that is intended by such examples without the risks associated with them. We consider that a sentencing guideline offers the best method of ensuring that full and fair account can be taken of mitigating factors in murder cases.

A SENTENCING GUIDELINE

205. The Sentencing Council Act 2007, which has just been passed by Parliament, implements the Law Commission's *Sentencing Guidelines and Parole Reform* recommendations,¹⁸⁶ and in particular establishes a Sentencing Council whose principal function will be to draft and promulgate sentencing guidelines for the guidance of sentencing judges. A court must impose a sentence that is consistent with any sentencing guidelines that are relevant to the case, unless the court is satisfied that it would be contrary to the interests of justice to do so. This should ensure a high measure of consistency in judicial approach to the sentencing task, while leaving flexibility for the judge to depart from the guidelines where this is required in the circumstances of the individual case.

206. The establishment of the Sentencing Council allows for the development of guidelines which can be much more detailed and nuanced than is possible through guidance provided by way of legislative instrument. In our view, this therefore provides the appropriate vehicle for determining and providing guidance on the range of circumstances in which the presumption in favour of life imprisonment for murder should be rebutted.

207. As one example of the practical benefit of this, concern was expressed to us in consultation by more than one stakeholder group that provocation can cut both ways: when a battered woman or a mentally impaired offender is the defendant, it may confer a benefit on that person; but when they are the victims, it can have the implicit effect of devaluing that loss of life. A partial defence proffers too blunt a tool to respond to this issue: it always signals that the offender is less culpable by virtue of a manslaughter conviction, regardless of the factual circumstances. A sentencing guideline, on the other hand, can indicate bands of finite sentence for different degrees of culpability, accompanied by a textual narrative calling attention to likely issues. The process of drafting the guideline, which will involve mandatory public consultation, can also be expected to facilitate public debate and perform an educative function.

208. In the event that section 169 is repealed, the Sentencing Council established by the Sentencing Council Act 2007 can be expected to develop the necessary

¹⁸⁶ New Zealand Law Commission, above n 177.

guideline. However, a number of stakeholders who supported the repeal of provocation in principle did so cautiously and conditionally, in the absence of a sentencing guideline. There was a desire for exposure to at least a draft guideline, to convey some sense of its possible shape. We agree that this is important. The Sentencing Establishment Unit is presently based at the Law Commission, and is drafting guidelines in advance of the formal establishment of the Sentencing Council (with a view to ensuring that the Council has a reasonable body of work to consider on its establishment, and thus expediting the commencement of guidelines). We recommend that the Unit should give priority to developing a guideline addressing departure from section 102 of the Sentencing Act 2002, as it ought to operate if section 169 of the Crimes Act 1961 was repealed. The guidance should cover not only the relevance of provocation under section 102, but also the range of other mitigating circumstances that might justify rebuttal of the presumption.

209. Clearly the final shape of a guideline will be a matter for the Sentencing Council, and subsequently for Parliament. However, if a guideline can be drafted, in consultation with groups who have expressed an interest in it, it may assist both those groups and the government in determining the likely sentencing environment in the absence of a provocation defence, and thus whether they support its repeal.

RECOMMENDATION

- R2 The Sentencing Establishment Unit should draft a guideline addressing departure from section 102 of the Sentencing Act 2002 as it ought to operate if section 169 of the Crimes Act 1961 was repealed. The guidance should cover not only the relevance of provocation under section 102, but also the range of other mitigating circumstances that might justify rebuttal of the presumption. Priority should be given to this work, with a view to ensuring that a draft guideline is available in time to inform the views of those considering our recommendation for repeal.

Appendix A

Current operation of the defence of provocation

INTRODUCTION

In order to assess the way in which the defence of provocation is currently operating – that is, how often it is relied on, by whom and in which circumstances – we collected data from all of the homicide files held by the Crown prosecutors in Auckland and Wellington concerning trials that occurred between 2001 and 2005 (inclusive).¹⁸⁷

The following data was collected about each case: age of accused; sex of accused; sex of victim; ethnic origin of accused; relationship between victim and accused; motive for killing; defences relied on; characteristics relied on (if any); and outcome or verdict.

The original data did not include information about the facts of each case. In relation to provocation cases, it also did not disclose how often the defence was put to the jury; it recorded only the number of cases in which it was raised.

After the data was analysed, therefore, we re-examined the cases in which provocation was raised by the defence, to determine the actual numbers in which provocation was put to the jury. We also researched the facts of the five cases in which the defence raised provocation and a manslaughter conviction was returned. Material from the appeals against murder convictions in cases where provocation was unsuccessful was also considered. This information, in conjunction with that already recorded on the data sheets, forms the basis for our findings.

There were a total of 87 cases in this sample, although some of these involved multiple defendants or multiple victims, and six of the cases were re-trials. When a case involved a re-trial, the data from the original trial has not been included in the data

¹⁸⁷ Ministry of Justice statistics indicate that this sample captures approximately 45 percent of the equivalent national sample of murder cases.

analysis in order to avoid double counting.¹⁸⁸ The tables in this Appendix therefore present the information taken from 81 cases.

STATISTICAL METHOD

The data has been analysed for statistical significance using Fisher's test of independence. This tests the hypothesis that the row and column variables of the tables are independent – that is, the fact that an accused or victim is in a certain category for one variable has no effect on the category they are in for the second variable. As a general rule, if the p-value is less than 0.05 the hypothesis of independence is rejected; in other words, a p-value of less than 0.05 demonstrates that there is less than one chance in 20 of the relationship between the variables having occurred by chance.¹⁸⁹

Because Fisher's test describes the relationship between two variables, it is not suitable for assessing the relationship between variables in three-way tables (for example, Tables 23 and 25). Nor is it suitable for category variables that are not mutually exclusive, which occurs where a case falls into more than one category (for example, an accused may have more than one motive: see Tables 15, 16 and 29).

Because of the small sample size, it is difficult to detect any statistically significant relationships. However, it is still the case that research concerning the number of times provocation is relied on, how often that reliance is successful and in which circumstances, can inform policy decisions about the possible reform or abolition of the defence of provocation.

SUMMARY OF FINDINGS

Based on the sample of 81 cases, it is apparent that provocation is being successfully relied on in a very limited range of cases. Although it was relied on in 15 cases where the accused was charged with murder (see Table 17), the defence accounted for only four manslaughter convictions. There were five cases in which a manslaughter verdict was returned after provocation was put to the jury, but in one of these cases, it is most likely the verdict was based on a finding of lack of intent.¹⁹⁰

188 When a retrial occurs, most variables (age, sex and ethnicity of accused, sex of victim, relationship between victim and accused, and motive for killing) do not change from the original trial. There are other variables that, in theory, may change (defences relied on, outcome or verdict, and characteristics relied on in a provocation case). However, in this sample there were only two retrial cases in which provocation was in issue: *Turaki* [2005] 3 NZLR 329 and *Suluape* (2002) 19 CRNZ 492. None of the variables on the data sheets for these cases changed between trials, except for the outcome in *Suluape* (the reason for the retrial was a hung jury in the first trial). As *Suluape* was also the only case in which a woman accused raised the defence of provocation, it was thought desirable to exclude her first trial from the data analysis, to more accurately reflect the situation of women who kill and seek to rely on provocation as a partial excuse; for consistency, all original trials were thus excluded.

189 Statistical tests were carried out using the R statistical software package, available at www.r-project.org.

190 *Laungaue* (1 September 2006) CA32/06, para 13, Chambers J for the Court. The victim, named Harvey, had approached drunken participants of a street brawl carrying a Samurai sword, in an attempt to make them disperse. Laungaue got hold of the sword, and he and his colleagues pursued and assaulted Harvey. Ultimately Laungaue struck Harvey's head and neck a number of times with the sword; one of these blows pierced Harvey's eye socket and his brain, as a result of which he died in hospital later the same night. Laungaue was convicted of manslaughter and sentenced to eight and a half years' imprisonment.

The findings challenge current perceptions concerning the operation and significance of the defence. For example, provocation is not more likely to be relied on when the accused is known to the victim (see Table 16), nor is it more likely to be relied on by men than women (see Table 10) or when men kill women (Tables 21 and 22).

The research also indicates that the context in which provocation is successfully argued is changing over time. Although men are still raising provocation in cases where their sexuality is challenged (see Table 26), the defence was not successful in the cases where the man's female partner (the victim) was having an affair or had left him for another man (seen as the traditional "crime of passion" basis for the defence). However, the defence was successful in two cases in a different sexual motive context: where men argued that they killed as the result of an unwanted homosexual advance. This type of killing accounted for half of the successful provocation cases in this sample. (See Table 27 and accompanying commentary.)

The research also shows that women who kill in response to long-term domestic violence do not often rely on the defence. In this sample only one of the seven women accused of murder relied on provocation (see Table 10), and she was also the only woman to kill her abusive partner. Although she successfully relied on the defence, the facts of *Suluape* indicate that this was not the paradigmatic killing out of fear by a battered woman: it appears that the accused may also have been motivated by sexual jealousy, and the sentencing judge did not consider that she suffered from "battered women's syndrome" (argued by some to amount to a relevant characteristic for the purposes of the defence of provocation).¹⁹¹

The defence of provocation is also rarely successful for defendants with mental impairments. Although it is argued that, in the absence of a defence of diminished responsibility in New Zealand, provocation is an important partial defence to retain, this research indicates it does not often operate to partially excuse this group of offenders. Three defendants in this sample raised the defence and argued they had a form of mental impairment that amounted to a relevant characteristic. The only one of this group who successfully relied on the defence was suffering from bipolar disorder when he killed his terminally ill mother. (See Table 28 and accompanying commentary.)

The research also indicates that provocation is almost always put to the jury when it is raised. In this sample, the defence was put to the jury in 14 of the 15 cases in which it was relied on by the accused. (See the discussion on page 94.)

Characteristics are also commonly put forward to the jury as an explanation for the killing, regardless of the type of characteristic. In all of the five cases in this sample in which a characteristic was relied on by the defence, the jury was instructed to consider the relevance of the characteristic proffered (see the discussion on pages 99–100.) In three of the four successful provocation cases, the defendant relied on a characteristic. (See Table 29 and accompanying commentary.)

191 Although the sentencing judge in this case indicated that he did not consider the syndrome was made out on the facts of the case, the Court of Appeal was willing to take into account "the sustained pattern of abusive and insulting conduct of the deceased" with the effect of reducing the defendant's sentence on appeal: *R v Suluape* (2002) 19 CRNZ 492 (CA), para 18 ff.

It is also thought that the necessary, but complicated, jury directions that accompany the consideration of the defence of provocation, especially when a characteristic is relied on, can increase the risk of a misdirection. However, in this sample, there were no appeals on the basis of misdirections regarding the use of characteristics or the “evaluative” inquiry. In only one of the three appeals concerning the defence of provocation were jury directions at issue. In the other two cases the appellant argued that provocation should have been put to the jury. Only once was this argument successful. (See the discussion on page 102.)

FREQUENCIES

The following tables present the frequencies of each variable taken from the 81 cases. Some tables (for example, Tables 6 and 7) reflect multiple occurrences per case of the variable and thus show totals greater than 81 (for example, an accused may have more than one motive for the killing or rely on more than one defence).

TABLE 1: AGE OF ACCUSED FREQUENCY TABLE

Age of accused	Frequency
10 - 16 years	10
17 - 24 years	26
25 - 39 years	24
40 + years	21
Total	81

TABLE 2: SEX OF ACCUSED FREQUENCY TABLE

Sex of accused	Frequency
Male	74
Female	7
Total	81

TABLE 3: SEX OF VICTIM FREQUENCY TABLE

Sex of victim	Frequency
Male	58
Female	16
Multiple victims	7
Total	81

TABLE 4: ETHNICITY OF ACCUSED FREQUENCY TABLE

Ethnicity of accused	Frequency
Caucasian	20
Maori	30
Pacific Islander	20
Asian/Indian	6
Other	5
Unknown	0
Total	81

TABLE 5: RELATIONSHIP BETWEEN VICTIM/ACCUSED FREQUENCY TABLE

Relationship	Frequency
Family/caregiver	13
Friend/work mate	16
Spouse/de facto/lover	5
Former spouse/de facto/lover	4
Stranger	34
Other	2
Unknown	0
Multiple victims	7
Total	81

TABLE 6: MOTIVE FREQUENCY TABLE

Motive	Frequency
Facilitate crime/organised crime	20
Domestic/family dispute	7
Other dispute	25
Influence of drugs/alcohol	27
Sexual jealousy	6
Unwanted sexual advance	3
Racial/religious/personal insult	3
Mercy killing	2
Unknown	3
Other	17
Total	113

TABLE 7: DEFENCES RELIED UPON FREQUENCY TABLE

Defence used	Frequency
Lack of intent	39
Self defence	11
Insanity	11
Automatism	0
Provocation	15
Infanticide	1
Identity	16
Not a party	3
Causation	4
Unknown	7
Total	107

TABLE 8: CHARACTERISTICS RELIED UPON FREQUENCY TABLE

Characteristic	Frequency
Stress	0
Depression/mental impairment	3
Ethnicity	0
Religion	1
Battering/history of violence or sexual abuse	1
Age	1
None	10
Other	0
Total	16

TABLE 9: OUTCOME/VERDICT FREQUENCY TABLE

Outcome	Frequency
Pre-trial murder plea	1
Pre-trial manslaughter plea	2
Murder plea during trial	2
Manslaughter plea during trial	0
Guilty murder verdict	37
Guilty manslaughter verdict	18
Not guilty verdict	2
Section 347 discharge	6
Other	4
Not guilty by reason of insanity	9
Total	81

WHO RELIES ON THE DEFENCE OF PROVOCATION?

The following tables are basic contingency tables that illustrate the relationship between the use of provocation as a defence and other categorical variables. Table 10, for example, shows the relationship between the use of provocation and the sex of the accused. Of the 81 accused, 74 were male. Of these 74 males, 14 relied on the defence of provocation, whereas one out of the seven female accused relied on provocation.

TABLE 10: SEX OF ACCUSED BY USE OF PROVOCATION DEFENCE

Sex of accused	Defence		
	Provocation used	Provocation not used	Total
Male	14	60	74
Female	1	6	7
Total	15	66	81

Fishers exact test of independence p-value = 1

TABLE 11: SEX OF VICTIM BY USE OF PROVOCATION DEFENCE

Sex of victim	Defence		
	Provocation used	Provocation not used	Total
Male	11	47	58
Female	2	14	16
Multiple victims	2	5	7
Total	15	66	81

Fishers exact test of independence p-value = 0.6414

TABLE 12: AGE OF ACCUSED BY USE OF PROVOCATION DEFENCE

Age of accused	Defence		
	Provocation used	Provocation not used	Total
10 - 16 years	2	8	10
17 - 24 years	5	21	26
25 - 39 years	4	20	24
40 + years	4	17	21
Total	15	66	81

Fishers exact test of independence p-value = 1

TABLE 13: ETHNICITY OF ACCUSED BY USE OF PROVOCATION DEFENCE

Ethnicity of accused	Defence		
	Provocation used	Provocation not used	Total
Caucasian	3	17	20
Maori	4	26	30
Pacific Islander	6	14	20
Asian/Indian	2	4	6
Other	0	5	5
Unknown	0	0	0
Total	15	66	81

Fishers exact test of independence p-value = 0.3643

TABLE 14: RELATIONSHIP BETWEEN VICTIM/ACCUSED BY USE OF PROVOCATION DEFENCE

Relationship	Defence		
	Provocation used	Provocation not used	Total
Family/caregiver	2	11	13
Friend/work mate	3	13	16
Spouse/de facto/lover	2	3	5
Former spouse/de facto/lover	1	3	4
Stranger	4	30	34
Other	1	1	2
Unknown	0	0	0
Multiple victims	2	5	7
Total	15	66	81

Fishers exact test of independence p-value = 0.3808

TABLE 15: MOTIVE BY USE OF PROVOCATION DEFENCE

Motive	Defence		
	Provocation used	Provocation not used	Total
Facilitate crime/organised crime	0	20	20
Domestic/family dispute	2	5	7
Other dispute	8	17	25
Influence of drugs/alcohol	8	19	27
Sexual jealousy	3	3	6
Unwanted sexual advance	3	0	3
Racial/religious/personal insult	1	2	3
Mercy killing	1	1	2
Unknown	0	3	3
Other	0	17	17
Total	26	87	113

In Tables 10–15, the hypothesis tested by Fisher’s test of independence cannot be rejected. This means that the sex of the accused, the sex of the victim, and the type of relationship between the victim and the accused do not determine whether provocation is relied on. Even when the relationship categories are combined into two main categories (acquaintance, stranger or “other”) and the three most common defences are examined (lack of intent, insanity and provocation), the relationship between category of relationship and defence raised is not statistically significant: see Table 16.

TABLE 16: RELATIONSHIP BY DEFENCE USED

Relationship	Defence used				
	Lack of intent	Insanity	Provocation	Others	Total
Acquaintance	13	8	8	19	48
Stranger	22	3	4	17	46
Other/unknown/multiple victims	4	0	3	6	13
Total	39	11	15	42	107

DEFENCES RELIED ON AND THE OUTCOME OF THE CASE

Table 17 shows the relationship between the defences relied on and the outcome or verdict.¹⁹² It illustrates that there were only five manslaughter verdicts in the 15 cases in which provocation was raised.

Although the data sheets did not record the number of times the defence was both raised and put to the jury, further examination of the case files indicated that in 14 of the 15 cases, provocation was put to the jury.¹⁹³ This means that the success rate of the defence, once it is put to the jury, is slightly higher than indicated by the data sheet analysis.

In some cases it is possible to tell which defence relied on was successful, but because a manslaughter verdict can indicate either lack of intent or successful reliance on provocation,¹⁹⁴ research based only on the data sheets could not accurately report the success rates of each defence when those two were run together. However, in light of the comments by the sentencing judge in one case, to the effect that the verdict was based upon lack of intent, it seems the defence was only successfully relied on four times.¹⁹⁵ These four cases will be classified as the “successful” provocation cases in the tables that use this terminology (see Tables 21–24 for example).

192 The column labelled “Other” includes cases in which the jury was unable to reach a verdict, or where there was a guilty plea to a lesser offence, or a stay of prosecution.

193 The one case in which provocation was not put to the jury was *Tuese* (14 June 2005) CA503/04 (an unsuccessful appeal on this point).

194 See for example, *Laungaue*, above n 190, and *Edwards*. In these cases the accused argued on lack of intent as well as provocation and may well have been convicted of manslaughter on this basis (although the sentencing judge in *Edwards* was of the view that “provocation was the more likely reason for the verdict”, which has led us to count it as a successful case: *Edwards* (16 September 2004) HC AKL T2003-004-025591, para 39, Frater J; see also *R v Edwards* [2005] 2 NZLR 709 (CA), para 12, Chambers J for the Court).

195 *Laungaue*, above n 190.

TABLE 17: DEFENCE USED BY VERDICT

Defence used	Outcome/verdict										Total
	Pre-trial murder plea	Pre-trial manslaughter plea	Murder plea during trial	Manslaughter plea during trial	Guilty murder verdict	Guilty manslaughter verdict	Not guilty verdict	Section 347 discharge	Other	Not guilty by reason of insanity	
Lack of intent	0	1	0	0	20	12	2	3	1	0	39
Self defence	0	0	0	0	6	3	1	1	0	0	11
Insanity	0	0	0	0	1	1	0	0	0	9	11
Automatism	0	0	0	0	0	0	0	0	0	0	0
Provocation	0	0	0	0	10	5	0	0	0	0	15
Infanticide	0	0	0	0	1	0	0	0	0	0	1
Identity	0	0	0	0	12	2	0	0	2	0	16
Not a party	0	0	0	0	1	0	1	1	0	0	3
Causation	0	0	0	0	2	0	0	2	0	0	4
Unknown	1	1	1	0	0	0	0	3	1	0	7
Total	1	2	1	0	53	23	4	10	4	9	107

Table 18 compares the success rate of provocation when argued as the only defence with its success when argued in conjunction with other defences. Although the relationship is not statistically significant, the table shows that the partial defence of provocation was successful in both cases in this sample where it was the only defence relied on by the accused.

TABLE 18: COMPARISON OF PROVOCATION ARGUED ALONE OR WITH OTHER DEFENCES BY VERDICT

Defence used	Outcome		
	Guilty murder verdict	Guilty manslaughter verdict	Total
Provocation only	0	2	2
Provocation + any other defence	10	3	13
Total	10	5	15

Fishers exact test of independence p-value = 0.09524

GENDER ANALYSIS

The defence of provocation has been criticised as one that may operate to partially excuse men who kill their female intimates in anger. Although this is one observation that appears to support abolition of the defence, concern is also expressed that abolition may potentially disadvantage (female) victims of domestic violence, on those rare occasions when they kill their abuser out of fear or despair. Provocation is therefore favourably viewed by some as a defence that may partially excuse these women who may be unable to rely on self-defence if the killing was not in response to an imminent threat of harm.

The data provides some information about the use of the defence of provocation by both men and women in general, and by men and women in the context of domestic relationships.

Table 19 shows that there are more male victims than female victims and that this is true for both male and female offenders. Table 20 shows that neither men nor women are statistically more likely to kill acquaintances than strangers.

TABLE 19: SEX OF VICTIM BY SEX OF ACCUSED

Sex of accused	Sex of victim			Total
	Male	Female	Multiple victims	
Male	52	15	7	74
Female	6	1	0	7
Total	58	16	7	81

Fishers exact test of independence p-value = 1

TABLE 20: SEX OF ACCUSED BY RELATIONSHIP: ACQUAINTANCE OR STRANGER (EXCLUDING 'OTHER' 'UNKNOWN' AND 'MULTIPLE VICTIMS')

Sex of accused	Relationship	
	Acquaintance	Stranger
Male	34	31
Female	4	3
Total	42	37

Fishers exact test of independence p-value = 1

The next tables compare the sex of the accused (Table 21) and the sex of the victim (Table 22) with the successful use of provocation. Neither table demonstrates a statistically significant relationship: men and women were equally likely to raise a successful provocation defence, and the successful use of the defence was not affected by the sex of the victim.

TABLE 21: SUCCESSFUL USE OF PROVOCATION BY SEX OF ACCUSED

Sex of accused	Success		Total
	Provocation successful	Provocation not successful	
Male	3	11	14
Female	1	0	1
Total	4	11	15

Fishers exact test of independence p-value = 0.2667

TABLE 22: SUCCESSFUL USE OF PROVOCATION BY SEX OF VICTIM

Sex of victim	Success		Total
	Provocation successful	Provocation not successful	
Male	3	8	11
Female	1	1	2
Multiple victims	0	2	2
Total	4	11	15

Fishers exact test of independence p-value = 1

When the sex of the accused is compared to the sex of the victim and the success rate of the defence (Table 23), it does not appear that men who kill women are statistically more likely to succeed in their use of the provocation defence than women who kill men.

TABLE 23: SEX OF VICTIM BY SEX OF ACCUSED BY SUCCESSFUL USE OF PROVOCATION

Sex of accused	Sex of victim	Success		
		Provocation successful	Provocation not successful	Total
Male	Male	2	8	10
	Female	1	1	2
	Multiple victims	0	2	2
	Total	3	11	14
Female	Male	1	0	1
	Female	0	0	0
	Multiple victims	0	0	0
	Total	1	0	1

Commentators argue that it is rather the different contexts in which men and women kill, and seek to rely on provocation, that establish the defence's alleged gender bias. The data provides some information on these matters.

In Table 24, there is no statistically significant connection between the relationship of the victim with the accused and successful reliance on provocation.

TABLE 24: SUCCESSFUL USE OF PROVOCATION BY RELATIONSHIP BETWEEN VICTIM/ACCUSED

Relationship	Success		
	Provocation successful	Provocation not successful	Total
Family/caregiver	2	0	2
Friend/work mate	0	3	3
Spouse/de facto/lover	1	1	2
Former spouse/de facto/lover	0	1	1
Stranger	1	3	4
Other	0	1	1
Unknown	0	0	0
Multiple victims	0	2	2
Total	4	11	15

Fishers exact test of independence p-value = 0.2601

Table 25 records the frequency of cases in which a domestic or family dispute was the motive for the killing. In the only case of this type in which a man relied on the defence of provocation, it was unsuccessful. It was successful in the only case in which a woman relied on the defence of provocation in this context (or indeed any context).

TABLE 25: DOMESTIC/FAMILY DISPUTE CASES BY DEFENCE (PROVOCATION OR NOT) BY SEX OF ACCUSED BY VERDICT

Defence	Sex of accused	Outcome/verdict						Total
		Pre-trial murder plea	Pre-trial manslaughter plea	Murder plea during trial	Guilty murder verdict	Guilty manslaughter verdict	Not guilty by reason of insanity	
Provocation	Male	0	0	0	1	0	0	1
	Female	0	0	0	0	1	0	1
	Total	0	0	0	1	1	0	2
Non-provocation	Male	1	1	1	1	0	1	5
	Female	0	0	0	0	0	0	0
	Total	1	1	1	1	0	1	5

Table 26 indicates that men are more likely to raise the defence of provocation when they are motivated to kill because of sexual jealousy or unwanted sexual advances than when they kill for other reasons.

TABLE 26: MALE ACCUSED USE OF PROVOCATION DEFENCE IN SEXUAL MOTIVE/OTHER CASES

	Sexual motive cases	Non-sexual motive cases	Total
Provocation	4	10	14
Non-provocation	3	57	60
Total	7	67	74

Fishers exact test of independence p-value = 0.0211

However, Table 27 shows that men are not more likely to succeed with provocation in sexual motive cases than in any other contexts.

TABLE 27: MALE ACCUSED SUCCESSFUL USE OF PROVOCATION DEFENCE IN SEXUAL MOTIVE/OTHER CASES

	Sexual motive cases	Non-sexual motive cases	Total
Successful	2	1	3
Unsuccessful	2	9	11
Total	4	10	14

Fishers exact test of independence p-value = 0.1758

Table 28 shows that men are not more likely to successfully rely on the defence of provocation in sexual motive cases than women.

Notably, the two cases in which the provocation defence was successful in relation to a male accused were argued as unwanted homosexual advance cases. By way of comparison, the one case in which a female accused successfully relied on the defence was coded as both a sexual jealousy case and one in which the accused was a victim of domestic violence: see the discussion of the facts of Suluape below.

TABLE 28: SEXUAL MOTIVE CASES (SEXUAL JEALOUSY OR UNWANTED SEXUAL ADVANCE) BY DEFENCE (PROVOCATION OR NOT) BY SEX OF ACCUSED BY VERDICT

Defence	Sex of accused	Outcome/verdict			
		Guilty murder verdict	Guilty manslaughter verdict	Not guilty by reason of insanity	Total
Provocation	Male	2	2	0	4
	Female	0	1	0	1
	Total	2	3	0	5
Non-provocation	Male	2	0	1	3
	Female	0	0	0	0
	Total	2	0	1	3

RELIANCE ON CHARACTERISTICS

Under section 169, if an accused has a characteristic, or characteristics, that operate to render the alleged provocation more severe, those characteristics may be taken into account when assessing whether the defence is available.

In this sample, the defendant identified a relevant characteristic in five cases.

In *Ali*, the accused argued that the provocation (an alleged homosexual advance) was more severe to him because of being a Muslim.

In *Simpson* the accused suffered from an undiagnosed bipolar disorder (classified in the data sheet as “mental impairment”).

In *Suluape* the accused relied on a history of domestic violence and abuse or “battering” as a characteristic.

In *Seu* the accused, an inmate at Rimutaka Prison, allegedly developed post-traumatic stress disorder due to a number of assaults he had previously suffered (including childhood beatings from his father). Although the jury was instructed to take this possibility into account, the Crown challenged the accused’s attributed version of the assaults he suffered.¹⁹⁶

In *Gorrie* the accused also relied on the impact of his childhood as amounting to a characteristic rendering the provocation more severe (his ex-partner did not want him to take their three-year old son for a ride in his car). In this case a number of claims by the accused were put to the jury to consider as “mental impairment” characteristics: that he was suffering from severe clinical depression (and so was more vulnerable to the particular actions of the deceased); that he was not loved by his parents so that the love previously given to him by the deceased was very important; that his love for his child compensated for this lack of love as a child, and so his concern over the loss of access to his child was heightened; and that he suffered from a conduct disorder – being resistant to control and reacting against authority and control, due to the discipline from his own father. In this case the Crown also challenged the factual basis for these claims.¹⁹⁷

196 *R v Seu* (8 December 2005) CA81/05 Glazebrook J for the Court.

197 *R v Gorrie* (8 August 2002) CA372/01 McGrath J for the Court.

The accused in *Ali* also raised age as a relevant characteristic. However, in *R v Rongonui* the Court of Appeal held that age is not intended to be treated as a characteristic going to assessment of the severity of the provocation; it may instead operate as a modifier of the ordinary power of self-control.¹⁹⁸

Although it is certainly a jury decision to determine the factual question of whether the accused had a particular characteristic, it is the judge's decision as to whether it amounts to a characteristic as a question of law for the purposes of section 169. The data sheets alone do not indicate whether the characteristic relied on, or the defence of provocation itself, was put to the jury. However, we were able to locate the relevant appeals or the judge's summing-up for the five cases in which characteristics were raised by the accused. In all five cases the characteristics were put to the jury.

RELATIONSHIP
BETWEEN RELIANCE
ON CHARACTERISTICS
AND SUCCESSFUL USE
OF PROVOCATION

Table 29 compares the number of times a characteristic was relied on against the outcome of the case (note that in one case, *Ali*, the accused relied on two characteristics).

TABLE 29: SUCCESSFUL USE OF PROVOCATION BY CHARACTERISTIC RELIED UPON

Characteristic	Success		
	Provocation successful	Provocation not successful	Total
Stress	0	0	0
Depression/mental impairment	1	2	3
Ethnicity	0	0	0
Religion	1	0	1
Battering/history of violence or sexual abuse	1	0	1
Age	1	0	1
None	1	9	10
Other	0	0	0
Total	5	11	16

Only one of the seven female defendants in this sample killed her male partner following a history of domestic violence, and the facts of this case indicate it was not the paradigmatic killing in despair or fear (see the discussion of the facts below). This accused was also the only woman to rely on the defence of provocation.

With regard to the other group that we were specifically asked to consider – the mentally ill or impaired – the frequency data sheets recorded defendants with mental disability or mental impairment in two different ways: those who relied on insanity, and those who relied on the defence of provocation and identified their disability as a characteristic affecting the gravity of the provocation. The frequency information (Table 7) indicates that insanity was relied on 11 times. Of the 15 times provocation was relied on, depression or mental impairment was raised as a characteristic three times (Table 8).

198 *Rongonui* [2000] 2 NZLR 385 (CA), para 231, Tipping J.

Table 29 shows that in the three cases where depression or mental impairment was relied on as a characteristic, provocation was successful in only one of these cases (the case in which the accused also relied on insanity). The facts of this case (*Simpson*) are discussed below.

One of the arguable implications of the way section 169(2)(a) of the defence of provocation is applied (taking into account the characteristics of the accused in relation to the gravity of the provocation but not in relation to the effect it may have on the ordinary power of self-control), is that, once a relevant characteristic is identified, it is more likely that the accused will successfully rely on provocation. There are two possible reasons for this. First, an overwhelming majority of ordinary people never encounter provocation sufficient to drive them to homicidal violence. Logically it would seem to follow that, when provocation is alleged in circumstances that are in truth quite ordinary circumstances (such as an unwanted sexual advance, or a relationship failure), the loss of self-control is more likely to be regarded as indefensible in the absence of a characteristic that exacerbates the provocation's gravity. Secondly, once a characteristic is identified, even if the jury suspects that self-control, as well as gravity, was modified by the characteristic, proof of this beyond reasonable doubt is likely to be a difficult burden for the Crown to discharge.

The next table (Table 30) shows the number of cases in which a characteristic was relied on and the outcome. The p-value indicates that the relationship between the reliance on a characteristic and the success of the defence was not statistically significant. However, in three out of the four cases in which provocation was successfully argued, the accused did rely on a characteristic.

TABLE 30: SUCCESSFUL USE OF PROVOCATION BY CHARACTERISTIC USED OR NOT

	Success		Total
	Provocation successful	Provocation not successful	
Characteristic used	3	2	5
Characteristic not used	1	9	10
Total	4	11	15

Fishers exact test of independence p-value = 0.07692

APPEALS ON THE BASIS OF MISDIRECTION OR FAILURE TO LEAVE PROVOCATION TO THE JURY

Another concern about the current application of the defence of provocation is that it requires jury directions (particularly concerning the relevance of any characteristics) that may be difficult for the jury to follow; furthermore, the judge may make unintentional errors of law when directing the jury, given the complexity of the law. The data sheets did not provide any information on either of these matters.

With regard to the complexity of jury directions, there is certainly anecdotal evidence that jurors find the instructions on the defence of provocation “an all but impenetrable and incomprehensible mess”.¹⁹⁹ However, analysis of the appeals from the murder convictions in the cases where the accused

199 Comment from the submission of the District Court Jury Trial Judges' Committee: see *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, Wellington, 2001) 39.

unsuccessfully relied on provocation did not identify any appeals that succeeded because of a misdirection on the law.

Of the 12 cases in which provocation was unsuccessful (including, for this purpose, one of the original trials otherwise excluded from the data), there were a total of eight appeals. In only three of these appeals (two concerned the same defendant, who appealed after both his trial and his retrial)²⁰⁰ was an error of law concerning the defence of provocation one of the grounds. In two instances (both regarding the same accused) the appeal was successful, but not on the basis of an error of law with regard to the judge's directions regarding the evaluative inquiry.

Two of these three appeals were based on the claim that provocation should have been put to the jury, and only one was successful on this basis (which turned on the requirement that provocation must emanate from the victim). The low number of appeals from a judge's decision to withhold the defence from the jury may be because the defence is almost always put to the jury when raised by the defence, and the jury are often (although not invariably) instructed to consider the characteristics identified by the defence. This research confirms both of these propositions.

FACTS OF THE FOUR SUCCESSFUL PROVOCATION CASES

Current concerns about abolishing the partial defence of provocation have included particular reference to two groups: battered women who kill their abusive partners, and defendants who are mentally ill or impaired. We were asked to consider whether these defendants, in particular, would be disadvantaged by the repeal of the partial defence of provocation. One other more general concern is that, in the absence of a partial defence, juries might prefer to acquit an accused for whom they feel some sympathy, rather than convict of murder. (Of course, it would still be open to juries to return a manslaughter verdict, but they would need to do so on the basis of lack of intent.)

In order to examine whether these concerns are supported by this research, the facts of the four successful provocation cases are set out below. Two of these cases concern defendants who were either a victim of domestic violence or had a recognised mental disability. In the other two cases, the victim allegedly made an unwanted homosexual advance.

Suluape

Epifania Suluape, 53, was married to Paulo Suluape, an internationally renowned Samoan tattooist, for 24 years. She had four children from her previous marriage, five from her marriage to Paulo, and also looked after her husband's physically disabled mother and the eight children of her husband's brother, whose wife had died.²⁰¹

200 *Tuese* (14 June 2005) CA503/04 (unsuccessful appeal on the refusal of the judge to put provocation to the jury); *Turaki* [2005] 3 NZLR 329; (2005) 21 CRNZ 875 (successful appeal on the basis that provocation should have been put to the jury even though it did not emanate from the victim, because the victim was acting as a "party" to the provocation); *Turaki* (23 November 2006) CA47/06, para 21, Baragwanath J for the Court (holding that the judge was in error in directing that the partial defence does not apply if the appellant was acting in uncontrolled anger, and that acting out of the motives of retaliation, revenge, retribution or anger would disqualify him from the partial defence).

201 *Laungae*, above n 190, para 8.

Paulo travelled extensively and Suluape was left to look after the household. The marriage had been under strain for some years, and it was not disputed that Suluape had been subjected to physical and emotional violence, including bashings, cutting with a machete, infliction of a venereal disease and continued infidelities.

In October 1999 Paulo organised a tattooists' convention on Apia, which was of great cultural significance to the Samoan community. Paulo was accompanied by a Swedish female tattooist (Heidi) with whom he cohabitated at the convention quite openly. This was a grave insult to Suluape and her family.

In November of the same year, Paulo made it clear that he was going to leave Suluape for Heidi and would not be coming back. Suluape went into the house and spent 10 to 15 minutes talking to the children and having a drink of water. She then took an axe and walked out to the sleepout where Paulo was playing the electric organ. She put the axe down on a chair where Paulo could not see it and asked him again about the state of their marriage. He confirmed that he was going to leave. At this point, Suluape picked up the axe and struck Paulo from behind with the flat end of the blade. When he fell to the ground, Suluape continued to attack him. There were at least nine blows to his head that shattered his skull and caused his death within a few minutes. The fact that all the blows were concentrated in the same area indicated to the pathologist that it was not a frenzied attack.

Suluape then left the sleepout, went inside the house and showered and changed her clothes. After watching television with her children, she went to bed. The next morning she took the younger children to school. Paulo's body was eventually discovered later that morning by the couple's 18-year-old daughter, who called the police. Suluape denied any involvement until confronted by the evidence of her bloodstained clothing, when she admitted what had happened.

Suluape was convicted of manslaughter at her second trial and sentenced to seven and a half years' imprisonment, reduced to five years on appeal.

Simpson

Florence Marjorie Simpson (aged 82) was terminally ill with bowel cancer. The accused, her son Chris Simpson, was a doctor who was subsequently diagnosed with bipolar disorder that had manifested itself in the months prior to the killing.

Simpson had asked not to have anything to do with the medical care of his dying mother. He had found it very difficult to be with her during the final stages of her illness, because she was in an immense amount of pain despite drugs for pain relief. At one point Simpson's mother had said: "Kit, Kit I am in such pain, do something". She had earlier said that she did not want to die a lingering, painful death.

On the night she died, Simpson was called to his mother's house because her condition was worsening. He took his medical kit with him, containing the drugs (morphine and pethidine) with which he tried to kill her. He drank brandy with his relatives and became increasingly irrational. His behaviour was described as bizarre, exceeding his usual abruptness and rudeness: it included yelling at

relatives; he filled a syringe with drugs and squirted it at a relative; and was said to be shouting, pacing and waving his arms about. His bipolar disorder had been manifesting itself in the preceding few months in a “hypomaniac state” of increasing intensity.

Simpson was allegedly put under pressure by his relatives to alleviate his mother’s pain. He then went into his mother’s room and injected her with what he considered would be a sufficient quantity of drugs to kill her. She did not die quickly so Simpson administered a second injection (five times the normal dose of pethidine). She still did not die so Simpson attempted to suffocate her with a pillow. When this failed he took the cord from her morphine pump and strangled her. He then placed her body on the floor and her feet on the bed, and called the police, explaining when they arrived that she must have fallen out of bed, become entangled in the cord and strangled herself. Simpson later admitted strangling his mother but argued he was insane at the time.

Simpson was convicted of manslaughter and sentenced to three years’ imprisonment.

Ali

Barry Hart, aged 56, was killed by his nephew by marriage, Amsheen Ali, aged 16 at the time of the killing, over Labour Weekend 2003 during a barbecue at Hart’s house.²⁰² Ali and a friend (Nadan) had tried to persuade Hart to lend them a car so they could go nightclubbing. Their repeated requests were refused which upset them. The sentencing judge referred to it as “a humiliating experience” for Ali. They smoked cannabis with Hart and drank a little alcohol. Ali picked up a knife from the kitchen at one point, played with it, and subsequently put it in the couch while he watched television.

At the time of the killing, all the other guests had left: only Hart and Ali were left inside the house, and Nadan was outside smoking. Ali’s evidence was that Hart made what he took to be a homosexual advance towards him – hugging him, rubbing his hands on Ali’s body and attempting to kiss him once on the neck. At trial, but not at any time previously, Ali alleged that he was scared that Hart would rape him. Ali allegedly pushed Hart away on a number of occasions, before he grabbed the knife and stabbed Hart at least five times, including once in the back, once in the chest, and once in the neck. Ali called out for Nadan who then became involved in the “scuffle”. The pathologist reported that two of the wounds would have caused rapid unconsciousness and death.

Ali and Nadan then left Hart’s house, locking it and taking with them his car keys, wallet, credit cards (which they had taken from his pockets) and some cannabis. Ali subsequently returned to collect the knife. They then drove off, collected two other Fijian Indian friends and drove around Auckland for a number of hours. Ali told the friends about the killing but then said he was just joking. As part of that confession, Ali made no mention of any homosexual advance.

Nadan and Ali left Hart’s car in central Auckland, after wiping it down to remove fingerprints and taking out the CD stacker and car stereo to make it look as though the car had been broken into by others. They disposed of Hart’s wallet, credit cards and other possessions. Ali was arrested the next afternoon at a

202 *R v Ali* (19 August 2004) HC AKL CRI2003-292-1224, para 3, Williams J.

soccer match. He admitted killing Hart but said he did not mean to.

Ali was convicted of manslaughter and sentenced to three years' imprisonment.

Edwards

David McNee, aged 55, was “a man who enjoyed a high public profile”.²⁰³ He appeared on television and was a designer of some note. To his friends and family he was kind, generous, outgoing and loyal. He was openly gay. The sentencing judge noted that in the weeks prior to his death, McNee engaged in numerous and varied sexual liaisons and was taking increasing risks.

The facts leading up to his death are reported in the sentencing decision.²⁰⁴ On the evening of 20 July 2003, Philip Edwards, aged 24 when sentenced, was with two friends in Karangahape Road in Auckland when he noticed a black Audi TT convertible driving slowly by. Edwards knew that the driver, McNee, was looking for someone to pick up, and as Edwards had no money (he had been released from prison 10 days earlier), he jumped into the car when it stopped at the traffic lights. In the car, Edwards agreed to masturbate in front of McNee for \$120. McNee said his home was nearby and as Edwards needed a shower, they went there. After he showered, Edwards went into the main bedroom and performed what he referred to as “puppetry of the penis”. According to Edwards, McNee’s demeanour changed after he took amyl nitrite and started questioning Edwards about his previous homosexual experience. Edwards allegedly said he was not into that type of activity and was not gay. Despite this, Edwards did get on all fours, as asked to by McNee. McNee then allegedly started making animal noises, kissed Edwards’ leg, rubbed his hands on his buttocks and inserted his finger into his anus.

At this point, Edwards got to his feet, asked whether McNee thought he was a female, and started hitting him about the head with his fists. Edwards reported being “very angry” and said (at trial) that everything became a blur after the first couple of blows. (In his interview with the police, Edwards actually admitting striking McNee between 30 and 40 times, which was consistent with the state of his hands and the injuries sustained by McNee.)

When Edwards stopped beating McNee, McNee was on the floor and there was blood everywhere. McNee was not moving (although the pathologist was of the view that he would have lived for at least another 15 minutes). Edwards put a rug over McNee so he “would not have to look at him.” He showered, looked for the keys to McNee’s car, and took alcohol, clothes and McNee’s wallet. He then drove to meet up with friends who helped him unload the car and dispose of his bloodied clothes. Over the next eight days Edwards and his friends drank the alcohol, wore McNee’s clothes and drove around in his car. When Edwards was arrested he first denied knowing McNee, gave an implausible explanation as to how he came to have the car, and only admitting killing McNee when the interviewing officer told Edwards that his fingerprints had been found at McNee’s house. Edwards then said that McNee had thought he was gay, which he was not, so he killed him.

Edwards was convicted of manslaughter and sentenced to nine years’ imprisonment.

203 *Edwards*, above n 194, para 25.

204 *Edwards*, above n 194, paras 4–15.

Appendix B

Crimes (Abolition of Defence of Provocation) Amendment Bill

Crimes (Abolition of Defence of Provocation) Amendment Bill

Government Bill

Explanatory note

Hon Mark Burton

Crimes (Abolition of Defence of Provocation) Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Crimes (Abolition of Defence of Provocation) Amendment Act 2007.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act amended

This Act amends the Crimes Act 1961.

4 Exercise of right of way, etc

The proviso to section 58 is repealed.

5 Sections 169 and 170 repealed

The principal Act is amended—

- (a) by repealing section 169 (which relates to the defence of provocation); and
- (b) by repealing section 170 (which provides that an illegal arrest may be evidence of provocation).

CHAPTER 1

CHAPTER 2

CHAPTER 3

CHAPTER 4

CHAPTER 5

CHAPTER 6

APPENDICES

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