RECONCEPTUALISING THE CONTOURS OF SELF-DEFENCE IN THE CONTEXT OF VULNERABLE OFFENDERS: A RESPONSE TO THE NEW ZEALAND LAW COMMISSION

Nicola Wake and Alan Reed*

Well word gets around in a small, small town
They said he was a dangerous man
But mama was proud and she stood her ground
But she knew she was on the losing end.
Some folks whispered and some folks talked
But everybody looked the other way
And when time ran out there was no one about
On Independence Day.¹

Abstract: This article contends that there are compelling reasons for reconceptualising the contours of self-defence, and for the introduction of a bespoke partial defence complemented by jury directions and the admissibility of social framework evidence to assist vulnerable offenders who kill their abusers in a desperate attempt to protect themselves. The New Zealand Law Commission in 2016 recently recommended, inter alia, that self-defence be re-categorised and broadened to allow victims of family violence who kill to potentially claim a defence in the absence of an imminent threat of harm, standardised on an “all or nothing” perspective. In truth, a far wider contextualisation needs to apply, beyond the limited and constrained terms of reference before the Commission. The contours of self-defence applicability ought to extend to extra-familial vulnerable offenders, encompassing individuals subjected to human trafficking and/or modern slavery, those trapped by ostensible gang membership, and those experiencing third-party abuse who respond with lethal force. It is our assertion, after a comparative review of the theoretical and doctrinal precepts of a number of alternative legal systems, that the full and partial defence schema should be more nuanced. Extant laws fail to appropriately recognise the need for a de novo partial defence template and reflective individuated culpability thresholds.

* Dr Nicola Wake is Associate Professor of Law, Northumbria University, United Kingdom. Alan Reed is Professor of Criminal and Private International Law and Associate Pro Vice-Chancellor (Research and Innovation), Northumbria University, United Kingdom.


[(2016) 3:2 JICL 195–247]
I. Introduction

This article advances an alternative approach to the New Zealand Law Commission’s (the Commission) recent recommendations for victims of family violence who commit homicide. New Zealand criminal law is dangerously “out of step internationally in how it responds to victims of family violence who kill”, and the reform recommendations advanced by the Commission are designed to combat the issue. The report recommends, inter alia, that self-defence be modified to ensure that victims of family violence who kill are eligible to claim the defence in the absence of an “imminent” threat. This change is designed to be complemented by reforms to the Evidence Act 2006 and Sentencing Act 2002 to ensure that a broad range of family violence evidence is admissible during trial in support of the defence, in addition to constituting relevant mitigation at the sentencing stage. Other measures include potential changes to Prosecutorial Guidelines and the “three strikes” law in order to provide a more holistic approach to reform. Unfortunately the promulgated reforms are flawed in failing to consider extra-familial vulnerable offenders who kill in self-defence, and in advocating that revised self-defence provisions should operate on an “all-or-nothing” basis, whereby the defence either succeeds or it fails.

The proposals advanced herein draw upon experience of self-defence, duress and partial defence provisions across New Zealand, Victoria (Australia), Canada, the United States, and England and Wales. Importantly the recommendations canvassed reject the New Zealand Law Commission’s argument that a lower threshold self-defence test should apply to victims of abuse who kill their abuser only if a familial link is established. The narrow focus on this discrete category of vulnerable offender under the New Zealand Law Commission’s terms of reference meant the Commission was unable to “consider the law in respect of other defendants who may be less blameworthy in a comparative sense”. Real and hypothetical scenarios are advanced to demonstrate the extent to which individuals subjected to human trafficking and/or modern-day slavery, those trapped by ostensible gang

---

3 Ibid., p.102.
6 New Zealand Law Commission, Understanding Family Violence (n.4).
7 Ibid., para.1.17.
Reconceptualising the Contours of Self-Defence for Vulnerable Offenders

membership and those experiencing third-party abuse may similarly respond to that abuse with lethal force. In contrast to the Commission’s recommendations, compelling arguments are advanced for general as opposed to specific reforms to self-defence in the context of vulnerable offenders who kill an abuser.

The justificatory basis for self-defence is revisited, comparing affirmative self-defence in Victoria which is available in the context of family violence where the threat is not imminent and the force used is excessive, and the position in several US states where a partial imperfect self-defence provision operates in this context. This comparative analysis reveals that the full and partial defence schema should be more nuanced than the New Zealand Law Commission’s report suggests. Even if the Commission’s broader self-defence provisions are accepted by the Ministry of Justice, they will not assist extra-familial victims of abuse and for intra-familial victims, self-defence will not always be available on the facts. That is not to say a defence should be available axiomatically. A partial defence ought to be an option, and an appropriate, bespoke self-preservation defence is advanced herein.

The partial defence is designed to sit directly beneath self-defence. It would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious abuse from the victim against the defendant or another identified individual, but unlike affirmative self-defence the lack of an imminent threat and the use of excessive force would not necessarily negate the defence. The absence of imminence and proportionality requirements are justified on the basis that self-preservation is a partial rather than a complete defence. In cases where the defendant claims to have held a particular belief as regards the circumstances, the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; there must be an intelligible basis for the belief; if it is determined that D did genuinely hold it, and there was an intelligible basis for doing so, D is entitled to rely on it for the purposes of the partial defence, whether or not it was mistaken, or (if it was mistaken) the mistake was a reasonable one to have made. Importantly, the defence does not automatically apply where self-defence fails on grounds that the threat was not imminent or the force was excessive, otherwise the defence would be overly broad in ambit and subject to similar criticisms that were levelled at defensive homicide in Victoria. Appropriate threshold filter mechanisms operate to prevent the defence from being available in unmeritorious cases. The defence does not apply where the defendant intentionally incited serious violence or acted in a considered desire for revenge, and is qualified by a normal person test which requires that a person of the defendant’s age with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way in the

circumstances. Psychiatric conditions may be relevant to the normal person test in limited circumstances where the condition is especially probative, but evidence of voluntary intoxication remains irrelevant. In all cases, the trial judge may decline to leave the defence to the jury on the basis that no jury properly directed could reasonably conclude that the defence might apply.

II. Background to the Commission’s Issues Paper

Following earlier recommendations of the Commission,9 and a series of controversial cases during which the provocation defence was raised,10 the New Zealand government abolished the provocation defence in 2009.11 The Commission recommended that repeal of the partial defence be complemented by removal of the mandatory life sentence for murder in favour of sentencing discretion, the drafting of sentencing and parole guidelines, and reform of self-defence12 designed to better accommodate victims of family violence who kill.13 The mandatory life sentence for murder was replaced with a presumption in favour of a life sentence, unless “given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust”.14 Amendments to self-defence, which would have ensured the defence was not excluded simply because the threat faced was not imminent, were not progressed.

This has resulted in three key issues. The interpretation of self-defence in New Zealand continues to render it very difficult for the victim of family violence to successfully claim the defence; “immediacy of life threatening violence” is required in order to justify killing in self-defence; where a viable non-violent

11 Crimes (Provocation Repeal) Amendment Bill 2009 (NZ).
12 The Commission recommended that s.48 of the Crimes Act 1961 (NZ) be amended: “to make it clear that there can in fact be situations in which the use of force is reasonable even where the danger is not imminent but is inevitable”; and, “to require that whenever there is evidence capable of establishing a reasonable possibility that a defendant intended to act defensively, the question of whether the force used was reasonable is always a question for the jury”; New Zealand Law Commission, Some Criminal Defences with Particular Reference to Battered Defendants (n.9) paras.32 and 42.
13 New Zealand Law Commission, The Partial Defence of Provocation (n.9).
the victim shouting at him before allegedly losing self-control when the victim responded by engaging in a knife fight. This is a departure from the approach adopted in relation to self-induced self-defence which is permitted in both England and Wales and New South Wales, but the “tables must have turned”. The nature of the partial defence requires that self-induced provocation is excluded because a normal person of tolerance and self-restraint would not intentionally incite serious violence.

There is no loss of self-control requirement in the proposed framework, meaning that the defence may be more closely aligned with self-defence. In England and Wales, a defendant claiming self-defence may raise self-defence and loss of control. The problem is that the defendant will have to revert from alleging that she was acting reasonably in the circumstances, to asserting that she lost self-control. It has been suggested that this may not be such a problem in practice. Nevertheless, the loss of self-control requirement is difficult for victims of family violence to establish since rarely will the victim lose self-control in a behaviourist sense in response to a fear of serious violence.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply. The trial judge is also gatekeeper in relation to self-defence in New Zealand:

“If there is a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence, then the issue should be left to the jury. If, on the other hand, the judge is satisfied that it would be impossible for the jury to entertain a reasonable doubt that the defendant acted in the defence of himself or herself or another within the terms of s 48, then self-defence should be withdrawn from the jury”.

VI. Procedural and Evidential Issues

A. Social framework evidence

The defence is designed to be complemented by the use of social framework evidence. With regard to the admission of expert evidence, it is important to note the initial utility of “battered woman syndrome” in a forensic context lay in explaining the

---

302 Thank you to Professor Gavin Dingwall (De Montfort University) for making this point.
304 Vincent (CA) (n.49), [30].
circumstances of the abuse, but erroneous, albeit benevolent, application meant the term was frequently invoked as a relevant and defining characteristic of the “reasonable man” concept. The connotations associated with the term, and potential for misapplication render its future utility in depicting the nature of abuse doubtful, in preference of more gender neutral, and non-stigmatising, social framework evidence, considered further below. Importantly, social framework evidence engenders a departure from focusing on the psychological impact of the abuse, and highlights the relevance of the dynamics of the relationship, strategic responses designed to resist, avoid or escape the violence and the ramifications of those efforts, in addition to social and economic factors pertinent to the abuse.

A departure from pathologising the primary victim, and thereby fuelling the “abuse excuse” myth is mandated, and social framework evidence provides an appropriate route for future development.

The New Zealand Law Commission recommend that the Evidence Act 2006 (NZ) should be amended to include provisions based on ss.322J and 322M(2) of the Crimes Act 1958 (Vic) to provide for a broad range of family violence evidence to be admitted in support of claims of self-defence and to make it clear that such evidence may be relevant to both the subjective and objective elements of self-defence in s.48 of the Crimes Act 1961 (NZ). The recommended provision would allow the admission of evidence of the nature and dynamics of family violence to “dispel myths about family violence that exist within the community”. In Bracken, the court advocated that once family violence was accepted relevant, cross-examination of witnesses directed at matters made relevant by social framework evidence constitute adducing admissible evidence. The broader ambit of the proposed partial defence advanced herein would require amendments to such a provision in order to capture extra-familial homicide cases involving prior abuse. This would involve repudiation of the term “family member” and “family” from the current wording of the proposal. For example:

“Evidence of family violence, in relation to a person, includes evidence of any of the following: (a) the history of the relationship between the person and a family member [perpetrator], including violence by the [perpetrator] family member towards the person or by the person towards the family member [perpetrator] or by the family member [perpetrator] or the person in relation to any other family member [vulnerable individual known to the person].”

306 R v Thornton (No 2) [1996] 1 WLR 1174.
308 Ibid.
Additional clauses would pertain to, inter alia, the impact of coercive and controlling behaviour, domestic servitude, trafficking, and ostensible gang membership.

**B. Jury directions**

Unlike the New Zealand Law Commission recommendations which reject specific juror directions, the proposed partial defence would be supported by express juror directions modelled on the Jury Directions Act 2015 (Vic).\(^{310}\) Where requested by the defence, and where relevant, the trial judge must inform the jury that self-defence is in issue and that evidence of family violence may be relevant to determining whether the defendant acted in self-defence. It is possible for the trial judge to decline such a request, but only where there are good reasons to do so, for example, unnecessarily demeaning the victim. The following matters may be included in the direction:

(1) that family violence:
   (a) is not limited to physical abuse and may include sexual abuse and psychological abuse;
   (b) may involve intimidation, harassment and threats of abuse;
   (c) may consist of a single act; and
   (d) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.

(2) if relevant, that experience shows that:
   (a) people may react differently to family violence and there is no typical, proper or normal response to family violence; and
   (b) it is not uncommon for a person who has been subjected to family violence:
      (i) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner; and
      (ii) not to report family violence to police or seek assistance to stop family violence.

These juror directions would similarly be amended to capture the broader category of vulnerable offender the proposed reforms seek to accommodate. The juror directions are designed to complement the social framework evidence provisions, assist in counteracting myths surrounding the impact of abuse, and are designedly flexible in order to ensure that the trial judge can tailor individual directions to the specific facts of the case. These procedures are essential in order to “transform the way we collectively think about domestic violence”.\(^{311}\)

---

310 New Zealand Law Commission, Understanding Family Violence (n.4) para.7.97.
VII. Conclusion

The Commission’s terms of reference were limited to victims of family violence who commit homicide, unless “there are strong reasons for recommending general reform and the risk of unintended consequences is low”.

It is our contention that there are compelling reasons for reconceptualising self-defence and introducing a bespoke partial defence, complemented by juror directions and the admissibility of social framework evidence, to assist vulnerable offenders who kill their abuser(s) in a desperate attempt to protect themselves.

Abuse ought to be regarded as a complex form of entrapment whereby a pattern of coercive and controlling behaviour is undertaken engendering harm to the victim. This form of abuse extends beyond familial relationships, occurring in the contexts of human trafficking, ostensible gang membership, and third party abuse. The “similarities and intersections” between domestic violence, human trafficking and other forms of abuse should not be ignored.

An individual who kills in response to victimisation and/or abuse has already been failed by the system. The criminal justice system has an obligation to ensure appropriate defences remain an option for those individuals who tragically utilise lethal force in an attempt to defend themselves from further harm. The threshold test for criminal law defences should not differ dependent upon the relationship status of the victim and the perpetrator, but ought to focus on individuated culpability levels.

Drawing upon affirmative and partial self-defence formulations across New Zealand, Victoria, Canada, the United States and England and Wales, the reconceptualised affirmative and partial self-defence models advocated herein serve to provide an optimal model for appropriate future reform to the legal position in New Zealand. A more nuanced approach is deconstructed which would operate to ensure that the nature and impact of abuse is more readily understood within the criminal justice system, that deserving defendants are not excluded on the basis of their relationship status with the abuser, and importantly that the system does not fail these vulnerable individuals again; those “who have acted to save their lives should not be punished by [murder convictions and] long prison sentences”.