

## ARTICLE

**Moral Panic: The *Weatherston* Trial and the Demise of the Provocation Defence**

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The partial defence of provocation reduces a murder charge to manslaughter in circumstances where the deceased's provocative conduct is seen to provide a moral answer to the defendant's fatal loss of control. In New Zealand, the defence was repealed through the enactment of the Crimes (Provocation Repeal) Amendment Act 2009. This article critically examines its repeal and argues that it was a rash response. Indeed, following the media's intensive coverage of the *R v Weatherston* trial and the resultant moral panic, the Government took swift steps to remove this defence from our legal framework. This article analyses the approaches other countries have taken to the defence. For instance, the defence has been repealed in the Australian state of Victoria. Jurisdictions such as England and Wales now use other partial defences to address its latent defects. With New Zealand having taken no such action, the repeal of the provocation defence has effectively left a lacuna in New Zealand's criminal law system. This makes vulnerable groups such as battered women and domestic violence victims more susceptible to murder (as opposed to manslaughter) convictions, which they arguably do not deserve. On a wider level, the defence's repeal has amplified concerns that New Zealand's judicial system is unable to convict the perpetrators of such violence, and instead places an unreasonable burden on the victim. With judicial integrity at stake, and calls by some groups in society to reinstate the defence, this article analyses whether the provocation defence should be reintroduced and, if so, in what form.

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## I Introduction

In 2009, the extensive media coverage of *R v Weatherston* created a moral panic over the partial defence of provocation.<sup>1</sup> New Zealanders watched in horror as Clayton Weatherston attempted to use the partial defence codified in s 169 of the Crimes Act 1961 to justify the killing of his former girlfriend, Sophie Elliott.<sup>2</sup> Indeed, the facts of *Weatherston* alone are sufficiently gruesome to leave their imprint on New Zealand's collective memory.<sup>3</sup> However, it was Clayton's arrogant attempt to paint Sophie as the villain which shocked the nation. The result was an unprecedented call for the repeal of the "archaic" defence.<sup>4</sup>

The Government's response to these demands was swift. While there had always been concerns over the defence's operation and its application by juries, it was not until the *Weatherston* case that there was any great urgency for its repeal.<sup>5</sup> Despite previous legislative reluctance, the Government introduced the Crimes (Provocation Repeal) Amendment Bill 2009 to remove the provocation defence not only from the Crimes Act, but also from the common law.<sup>6</sup> The accused would no longer be able to raise the defence to reduce a murder charge to manslaughter. Instead, provocation was to be considered at sentencing as a mitigating factor in accordance with the Sentencing Act 2002. The Bill passed its final reading on 24 November 2009, and the Crimes (Provocation Repeal) Amendment Act 2009 came into force only months after Clayton's trial. Since then, the repeal of the partial defence has been condemned as a "knee-jerk" reaction on Parliament's part.<sup>7</sup> This article argues that, without introducing any new or alternative partial defences, the repeal does not address the specific issues experienced by battered women and abused children. Instead, it leaves these vulnerable groups liable to murder convictions and, consequently, a response that is more punitive than the criminal justice systems of other jurisdictions.<sup>8</sup>

This article will examine the role the media played in shaping public opinion around the partial defence of provocation, focussing on the *Weatherston* case. To what extent is

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- 1 *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009.
  - 2 See, for example, Jarrod Booker "Weatherston oblivious to the horror of a nation" *The New Zealand Herald* (New Zealand, 23 July 2009). It is unclear whether provocation acts as a justificatory or excusatory defence. See Law Reform Commission (Ireland) *Defences in Criminal Law* (LRC 95-2009, December 2009) at [4.43]–[4.44].
  - 3 *Weatherston* (HC), above n 1.
  - 4 "Provocation defence 'made killer a victim'" *The New Zealand Herald* (online ed, New Zealand, 23 July 2009); and "Weatherston trial: Call to abolish provocation defence" *The Press* (New Zealand, 26 July 2009).
  - 5 Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000); Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZL R73, 2001); and Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007).
  - 6 Crimes (Provocation Repeal) Amendment Bill 2009 (64-2).
  - 7 "Provocation defence repeal 'knee-jerk reaction'" *The New Zealand Herald* (online ed, New Zealand, 27 November 2009).
  - 8 Brenda Midson "Coercive Control and Criminal Responsibility: Victims Who Kill Their Abusers" (2016) 27 *Crim LF* 417 at 417. See also Julia Tolmie "Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation" [2005] *NZ L Rev* 25. Associate Professor Tolmie also submitted this article to the New South Wales Select Committee on the Partial Defence of Provocation in 2012.

the legislature—our primary political body—intrinsically influenced by the interests of the media? This article will begin with an analysis of the historical origins of the provocation defence in Part II, and the facts of the *Weatherston* case in Part III. It will then analyse the theories of moral panic in Part IV and the steps taken to repeal the provocation defence in New Zealand in Part V. Finally, the article will analyse the approaches that other jurisdictions have taken (Part VI), in order to determine whether the provocation defence or other partial defences should be introduced (Part VII). The article concludes with an analysis of the legacy of the defence's repeal, before recommending that Parliament reintroduces a modified version of the provocation defence that addresses the pitfalls of the original defence.

## II History of the Provocation Defence

The provocation defence is recognised as a concession to human frailty:<sup>9</sup> it reduces a murder conviction to manslaughter in circumstances where it would be inappropriate for the accused to be convicted of murder.<sup>10</sup> As a partial defence, it does not completely eliminate culpability. However, an offender who is convicted of manslaughter has their actions labelled as less morally culpable than those of a murderer.

The provocation defence originated in the common law. *Regina v Mawgridge* found that it was available in relation to a gross insult, witnessing the attack of a friend, the unlawful deprivation of an Englishman's liberty, and where the defendant discovers his wife committing adultery.<sup>11</sup> In *Regina v Welsh* it was held that the violence used must be that of a reasonable man.<sup>12</sup> More recently, *Bedder v Director of Public Prosecutions* reemphasised this objective standard.<sup>13</sup> The Judge held that the defence would succeed where provocation had caused an ordinary reasonable man to fly into a murderous rage; individual characteristics were to be excluded.<sup>14</sup>

In New Zealand, the defence was codified in s 169 of the Crimes Act. It was intended to modify the wholly objective approach of *Bedder*:

### 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

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9 *Re Curtis* (1756) Fost 135, 168 ER 67 at 68 noted that “in all cases of homicide on sudden provocation, the law indulgeth to human frailty, and to that alone”. Coleridge J also stated in *Regina v Kirkham* (1839) 8 Car & P 117, 173 ER 422 at 424 that “the law condescends to human frailty”.

10 Jeremy Horder *Provocation and Responsibility* (Clarendon Press, Oxford, 1992) at 2.

11 *Regina v Mawgridge* (1706) Kel 119 at 135–138, 84 ER 1107 (QB) at 1114–1115.

12 *Regina v Welsh* (1869) 11 Cox CC 336 (Central Criminal Court) at 338.

13 *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119 (HL) at 1121.

14 At 1121.

Section 169(2)(a) imported a mixed objective-subjective test. Over time, two approaches to this section have developed. The first approach saw the accused's individual characteristics as relevant only "to their effect on the gravity of the provocation".<sup>15</sup> The self-control exercised had to be that of an ordinary person facing provocation of equivalent gravity.<sup>16</sup> The second approach saw the accused's individual characteristics as relevant in all contexts, including those which reduce the accused's power of self-control.<sup>17</sup> The objective question was, "how much ought society to expect of this accused?"<sup>18</sup> In *R v McGregor*, the Court held that the accused must exercise the self-control of an ordinary man, except where his particular characteristics weakened his power of self-control.<sup>19</sup> However, this decision was later discredited. Instead, in *R v McCarthy*, the Court stated that the provocative conduct must have caused the accused to lose self-control to the point where he committed homicide.<sup>20</sup> The Court also had to determine whether a person with the accused's characteristics and an ordinary power of self-control would have acted the same way.<sup>21</sup> This position was confirmed in *R v Campbell*.<sup>22</sup> In *R v Rongonui*, New Zealand's leading authority on s 169, the majority applied the gravity and self-control distinction of *Campbell*.<sup>23</sup> The overarching question for the jury to determine was whether a person with the accused's characteristics would have resisted that particular level of provocation.<sup>24</sup> That hypothetical person was to have the self-control of an ordinary person.<sup>25</sup> *Rongonui* remained New Zealand's leading authority until the Crimes (Provocation Repeal) Amendment Act repealed the defence.<sup>26</sup>

### III *R v Weatherston*

On 9 January 2008, Clayton Weatherston, an economics tutor at the University of Otago, visited the home of his former girlfriend and pupil, Sophie Elliot.<sup>27</sup> She was packing her bag to leave for employment at the Treasury in Wellington the following day.

Sophie's mother, Mrs Elliott, opened the door to Clayton. Sophie came down and told Clayton she was packing. They went to her bedroom. A short time later, Sophie returned to her mother. She did not know what Clayton wanted; he was "just sitting there".<sup>28</sup> After Sophie went back to her bedroom, Mrs Elliott heard Sophie scream: "Don't Clayton, don't Clayton."<sup>29</sup> She rushed to her daughter's aid but was locked out of the bedroom. Mrs Elliot unlocked the door with a skewer to find Clayton repeatedly stabbing Sophie in the chest.

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15 Law Commission *The Partial Defence of Provocation*, above n 5, at 9.

16 At 9.

17 At 9.

18 At 21.

19 *The Queen v McGregor* [1962] NZLR 1069 (CA) at 1082.

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

21 At 558.

22 *R v Campbell* [1997] 1 NZLR 16 (CA) at 29.

23 *R v Rongonui* [2000] 2 NZLR 385 (CA) at [137]. See *Campbell*, above n 22, at 26.

24 *Rongonui*, above n 23, at [235].

25 At [235].

26 Above n 23.

27 The following facts are as set out in *Weatherston*, above n 1 (HC), at [6]–[9].

28 At [7].

29 Lesley Elliott and William O'Brien *Sophie's Legacy: A Mother's Story of her Family's Loss and Their Quest for Change* (Longacre, Auckland, 2011) at 19.

When the first constable arrived, Clayton explained that he killed Sophie ““because of the emotional pain she had caused him over the past year””.<sup>30</sup>

Clayton used a knife and a pair of scissors to kill Sophie, inflicting 216 wounds and blunt trauma to her body. Mutilated areas included her eyes, breasts and genital area. He also cut off her ears and nose. Dr Martin Sage, a pathologist at the trial, noted that Sophie died from blood loss due to Clayton’s ““persistent, focused and determined attack””.<sup>31</sup>

During his trial at the Christchurch High Court in mid-2009, Clayton admitted having killed Sophie. However, he entered a guilty plea for manslaughter, arguing he was provoked under s 169 of the Crimes Act. His defence team, Judith Ablett-Kerr QC and Greg King, stressed Sophie had provoked Clayton by lunging towards him with a pair of scissors.<sup>32</sup>

On 22 July 2009, the jury found Clayton guilty of murder. Potter J sentenced Clayton to a minimum of 18 years non-parole in prison, which he is currently still serving.<sup>33</sup>

## IV Provoking Moral Panic

### A *Theoretical origins*

Numerous theorists have explored the concept of moral panic. At its crux, moral panic is an exaggerated fear or public concern over “a perceived threat to the social order”.<sup>34</sup> The media is notorious for its skills in moulding and exploiting such concerns through extensive coverage of the issue. Stanley Cohen’s classic definition sees the phenomena as socially constructed:<sup>35</sup>

Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic passes over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes ... in legal and social policy or even in the way the society conceives itself.

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30 *Weatherston*, above n 1 (HC), at [8].

31 At [9].

32 Kay Sinclair “Killing result of provocation: defence” *Otago Daily Times* (online ed, New Zealand, 26 June 2009).

33 *Weatherston* (HC), above n 1, at [54].

34 Charles Krinsky “Introduction: The Moral Panic Concept” in Charles Krinsky (ed) *The Ashgate Research Companion to Moral Panics* (Ashgate, Surrey, 2013) 1 at 1.

35 Stanley Cohen *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed, Routledge, London, 2002) at 1.

Subsequently, a moral panic has also been defined as an intense or disproportionate reaction to a supposed danger.<sup>36</sup> The “condition, episode ... or persons” is a threat because it contravenes societal rules.<sup>37</sup> The media targets this deviancy and moral entrepreneurs sustain it as “a source of moral decline”.<sup>38</sup> In extreme cases, the discourse established by these groups results in an official response from the state, in the form of legislative or policy change.<sup>39</sup> While the moral panic may subside, it leaves behind an undeniable legacy, a redefinition of societal boundaries. The question, then, is whether that legacy is positive or negative. As is to be expected, the answer to such a broad question is always open to debate.

B *The provocation defence: a sudden or prolonged attack upon the heart of New Zealand's judicial system?*

The media coverage of *Weatherston* triggered a moral panic among New Zealanders over the provocation defence. While the graphic nature of Clayton's conduct appalled New Zealanders in general, it was Clayton's *character* that seriously rattled the nation.<sup>40</sup> New Zealanders were unable to comprehend how Clayton, a man from an ordinary background, could not only kill Sophie but also attack her memory in Court. This necessarily brought the provocation defence “suddenly ... in[to] the limelight”.<sup>41</sup>

While Clayton's trial resurrected old concerns, such as the defence's ability to justify or normalise male violence against women, the main issue lay elsewhere. Many New Zealanders cited the defence as promoting a culture of victim-blaming.<sup>42</sup> In its 2007 report, the Law Commission expressed concerns over the defence's general endorsement of violence, and not merely in relation to attacks against minority groups such as battered women and homosexuals.<sup>43</sup> Although relevant, these comments were merely acting as a soft target or foil for the issue at hand.<sup>44</sup> New Zealanders discussed the provocation defence like never before, not because they were overly concerned with its operation, but rather with the operation of the judicial and criminal system as a whole. New Zealanders “perceived ... [there to be] a threat to the social order”: the inability of the judiciary to convict offenders for crimes they had committed.<sup>45</sup> The age-old belief that the system favours the offender was once again at issue.

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36 Scott Poynting and George Morgan (eds) *Outrageous! Moral panics in Australia* (ACYS Publishing, Hobart (Tasmania), 2007) at 1.

37 At 1.

38 Kenneth Thompson *Moral Panics* (Routledge, London, 1998) at 52.

39 Chas Critcher “Moral Panic Analysis: Past, Present and Future” (2008) 2 *Sociology Compass* 1127 at 1130 and 1136. See also Erich Goode and Nachman Ben-Yehuda *Moral Panics: The Social Construction of Deviance* (2nd ed, Wiley-Blackwell, Chichester, 2009) for a more specific analysis of the nature and construction of moral panics.

40 See “The Killing of Sophie Elliott” (documentary, Project Melting Pot, 2009). For the trailer of the documentary, see MeltingPotPro “The Killing of Sophie Elliot” (13 June 2011) YouTube <[www.youtube.com](http://www.youtube.com)>.

41 Cohen, above n 35, at 1.

42 “Should ‘provocation’ be allowed as a partial defence of murder?” *The New Zealand Herald* (online ed, New Zealand, 27 November 2009).

43 Law Commission *The Partial Defence of Provocation*, above n 5, at [99].

44 Cohen, above n 35, at xii.

45 Thompson, above n 38, at 8.

C *Changes in societal beliefs: the gay panic or the crime of passion defence—a redundant and archaic element of New Zealand's legal framework?*

Numerous groups have long called for the provocation defence to be repealed. For example, gay rights groups have argued that the defence justified homophobic attacks. These arguments point to a string of cases where the victim, a homosexual male, was killed by the accused over a non-violent sexual advance.<sup>46</sup> While *R v Faisauvale* led to a conviction of murder,<sup>47</sup> most cases led to a finding of manslaughter.<sup>48</sup> In *R v Ambach*, the defendant raised the provocation defence to justify violence against gay persons.<sup>49</sup> The trial took place in 2009, around the time Clayton was before the High Court. The accused, Ferdinand Ambach, rammed the severed neck of a banjo down the victim's throat after a non-violent sexual advance.<sup>50</sup> Here, unlike in *Weatherston*, the provocation defence succeeded. Ferdinand was sentenced to 12 years imprisonment only days after Clayton.

The concurrent media coverage of *Ambach* and *Weatherston* compounded New Zealanders' concerns that the provocation defence condoned male heterosexual rage. This goes against New Zealand's commitment to a more liberal and egalitarian society. It not only justified violence against women and homosexual men, but also trivialised and normalised such attacks, by placing the blame for such behaviour squarely on the shoulders of the deceased. New Zealanders believed that women like Sophie should be able to leave their partners without being attacked. Similarly, homosexual men who made non-violent sexual advances did not deserve to be brutally beaten to death. A defence which justified such actions and allowed for the flagrant "besmirch[ing]" of the deceased's character in Court was despicable indeed.<sup>51</sup> The defence smelled strongly of New Zealand's patriarchal past—a past in which ideas of male heterosexual privilege would not die.

D *Media involvement in the courts: free media and a fair trial, or moral panic amongst the masses?*

According to Alexandra Kerry:<sup>52</sup>

A journalist is supposed to present an unbiased portrait of an event, a view devoid of intimate emotions. This is impossible, of course. The framing of an image, by its very composition, represents a choice. The photographer chooses what to show and what to exclude.

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46 See, for example, *R v Ali* HC Auckland CRI-2003-292-1224, 19 August 2004 at [4]; *R v Faisauvale* HC Auckland CRI-2004-004-15319, 21 October 2005 at [34]; and *R v Edwards* HC Auckland T2003-004-025591, 16 September 2004 at [48].

47 *Faisauvale*, above n 46.

48 See *Ali*, above n 46; and *Edwards*, above n 46.

49 *R v Ambach* HC Auckland CRI-2007-004-27374, 18 September 2009 at [13].

50 At [3]–[5].

51 (18 August 2009) 656 NZPD 5648.

52 Alexandra Kerry "Excerpt from 'Notes from the Trail'" *USA Today* (online ed, 4 September 2008).

Indeed, the role of a journalist—and the media in general—is to provide a balanced analysis of a situation.<sup>53</sup> However, this ideal can be difficult to achieve. Since no one person can be a witness to every event in the world, the public relies predominantly upon the media for such information. This reliance is problematic because the media's retelling of these events constitutes a reconstruction of our social reality. In deciding how to represent a situation, the media necessarily decides not only which events are newsworthy, but also “what to show and what to exclude” in relation to those events.<sup>54</sup> Consequently, the media is always telling a story and reconstructing our understanding of reality in its representations of the world.<sup>55</sup> The media thereby plays a fundamental role in influencing both public and political opinion over topical issues. Indeed, the more emphasis it places on an issue, the more likely the public will be aware of the issue at hand and respond accordingly to the rhetoric that is produced. As Foucault notes, discourse is power, and “[p]ower is everywhere”.<sup>56</sup> The media is thereby powerful as they present the discourse that is constantly projected, heard and often adopted by the public.<sup>57</sup>

In New Zealand, the televising of court cases was permitted in 1995 to promote judicial transparency and the principle of open justice.<sup>58</sup> The *In-Court Media Coverage Guidelines* regulate media coverage of trials.<sup>59</sup> For example, still photographs and films “must provide or assist in providing an accurate, fair and balanced report of the hearing”, and must always be published in context.<sup>60</sup> However, despite these guidelines, allowing cameras in

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53 Broadcasting Act 1989, s 4(1)(d). See *In-Court Media Coverage Guidelines 2016* (Courts of New Zealand, 2016); and “Statement of Principles” New Zealand Press Council <[www.presscouncil.org.nz](http://www.presscouncil.org.nz)> at Principle 1. Principle 1 of the New Zealand Press Council Principles note that “publications should be bound at all times by accuracy, fairness and balance, and should not deliberately mislead or misinform readers by commission or omission. In articles of controversy or disagreement, a fair voice must be given to the opposition view.” This requirement for accuracy and fairness is also required in the use of any “headlines, sub-headings, and captions”. At Principle 6. *Scott v Scott* [1913] AC 417, a leading case and starting position on the open justice principle of court proceedings, also emphasises the role of the media in upholding this principle. Noted exceptions to open court proceedings included wardship and children's proceedings, lunacy, and where publicity could destroy the case's subject matter. See David Burrows ““To be heard in the dining hall...”: Scott 100 years on” (6 August 2015) ICLR <[www.iclr.co.uk](http://www.iclr.co.uk)>. Furthermore, this need to provide a balanced view is a justifiable limitation on the right to freedom of expression. New Zealand Bill of Rights Act 1990, s 5.

54 Kerry, above n 52.

55 Gaye Tuchman *Making News: A Study in the Construction of Reality* (Free Press, New York, 1978) at 1.

56 Michel Foucault *The History of Sexuality* (Pantheon Boks, New York, 1978) vol 1 at 93.

57 At 93.

58 Rod Vaughn “Judges zoom in on courtroom cameras” (16 August 2013) Auckland District Law Society <[www.adls.org.nz](http://www.adls.org.nz)>. See also *In-Court Media Coverage Guidelines*, above n 53, at [9].

59 *In-Court Media Coverage Guidelines*, above n 53. See also *In-Court Media Coverage – a consultation paper* (Courts of New Zealand, March 2014). The consultation paper reviewed, at the request of the Chief Justice, the use of the media to cover in-court proceedings. It acknowledged there are two dominating principles: first, the principle of open justice, and secondly, the right of a defendant to a fair trial. In relation to the first principle, it noted that “the media is the surrogate of the public; its eyes and ears, and ... it is through media publications that the public has access to and can gain knowledge of what happens in courts”. However, where the two principles conflict, “the right to a fair trial trumps open justice”. At [35]–[36].

60 *In-Court Media Coverage Guidelines*, above n 53, at [2]. This rule also applies to recordings.



court has been criticised as giving the media the opportunity to sensationalise trials for commercial benefit. Former Law Society President Temm noted:<sup>61</sup>

Look at the Clayton Weatherston trial in Christchurch. Seeing his face on our evening news night after night, showing in a minute and a half what was five hours of evidence with a voice-over by a reporter full of adjectives ... There are murder trials going on every single week in New Zealand, but the television media select which ones they are going to give priority to. They choose those ones and then they drive their own agenda.

Choosing the stories that are to be given priority is part of the media's filtering system. Indeed, with the facts of the *Weatherston* case being so extreme, there was inevitably going to be a genuine public interest in the case. And with Clayton electing to give evidence at the trial, the media were provided with numerous opportunities to witness his narcissistic personality. This fed-in to their ability to engage their target audience with a detailed coverage of the case and rigorous debate over the defence's operation (including whether it should remain a part of New Zealand's legal system). In this sense, the intense nature of *Weatherston* meant that, regardless of which clips and photographs the media chose to show, their coverage of the case would have inevitably influenced public opinion.

This influence is dangerous. As emphasised by the Rethinking Crime and Punishment group in their oral submission to the Justice and Electoral Committee on the Victims of Crime Reform Bill 2011:<sup>62</sup>

Great care and wisdom will be needed to prevent rhetorical appeals to victims' suffering in the courtroom from deteriorating into a public skewering of the offender. At its worst, it could lead to the "Oprahfication" of justice, with the TV cameras capturing every twitch of the offender for signs of defiance or remorse, and the New Zealand viewing public casting their votes accordingly.

Accordingly, one could argue that Clayton's trial was "Oprahfi[ed]" by the media. For instance, each news article and video focussed extensively on Clayton's narcissistic behaviour. The documentary "The Killing of Sophie Elliott" captured several clips of Clayton cruelly smirking while giving evidence in the dock.<sup>63</sup> His arrogance was blatant as he dismissed the Crown Prosecutor with "Were you not listening, Mr Bates? Were you lying, Mr Bates? ... I'm sorry I just had to do that."<sup>64</sup> The documentary appeared to legitimise his attack, with other clips showing Clayton's anxiety as a child, his concerns over his academic performance and insecurities with his sexual prowess. It is highly likely that many New Zealanders formulated their opinion of Clayton accordingly.<sup>65</sup>

Perhaps more concerningly, the media also looked beyond Clayton and focused greatly on his defence counsel. The arguments forwarded by Judith Ablett-Kerr QC and Greg King, along with their questioning of witnesses, were well-documented. For example, the media

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61 *Courting Compassion – Managing Emotion in the Courtroom* (Rethinking Crime and Punishment, September 2012) at 1.

62 Kim Workman, director of Rethinking Crime and Punishment "Oral Submission to Justice and Electoral Committee on the Victims of Crime Reform Bill 2011" (5 April 2012) at 3.

63 "The Killing of Sophie Elliott", above n 40.

64 "The Killing of Sophie Elliott", above n 40, at 0:46–0:58.

65 See, for example, "Weatherston takes the stand at murder trial" (1 News, 8 July 2009) YouTube <[www.youtube.com](http://www.youtube.com)>.

readily noted the defence's dismissal of Sophie as a promiscuous and possessive girlfriend.<sup>66</sup> They were equally quick to share footage of Ablett-Kerr questioning Sophie's friend, Erin van de Walter, over whether she and Sophie enjoyed rating their lovers' sexual performance.<sup>67</sup> Other articles honed in on King's submission that Robert Alexander, Sophie's economics supervisor, had an intense dislike for Clayton.<sup>68</sup> In highlighting these arguments, the media portrayed a judicial system out of touch with New Zealanders' core expectations. New Zealanders expect the accused, and not the victim or witnesses, to be the person on trial. Instead, the use of the provocation defence in the *Weatherston* case effectively shifted the blame onto Sophie and her supporters. For the accused to be instigating the trial was an example of "justice turned inside out".<sup>69</sup> At a larger level, this fuelled the nation-wide concern that the provocation defence and the criminal justice system were no longer effective.

Furthermore, the media also placed great emphasis on Sophie's beauty and achievements. This was to highlight the potential lost in her death. For instance, many news clips of the *Weatherston* trial began with adjacent photos of Sophie and Clayton. Others included a sequence of close-up photos of Sophie between the in-court coverage of the trial.<sup>70</sup> Through this stark contrasting of offender and victim, it is likely that New Zealanders over-identified with Sophie's plight. For example, showing a photo of Sophie and her mother on the day Clayton was sentenced promoted public sympathy and detracted from the legal issue at hand.<sup>71</sup> Indeed, Potter J, at a conference with senior Australian judges, noted that the media coverage of Clayton's trial had caused the public to grow "to despise Weatherston and [to have] sympathy only for his victim".<sup>72</sup> Evidentially, there is an obvious need for the media to take care in the reporting of criminal trials because, at times, their readers may be too readily "invited to identify with [the] victims" without understanding the entire situation.<sup>73</sup>

Indeed, the media coverage of Clayton's High Court trial caused much debate, both during and after the proceedings. Believing that the debate had compromised the fairness of the trial, Clayton's counsel lodged an appeal.<sup>74</sup> They cited an interview with Dr Warren Young, Deputy President of the Law Commission, on 10 July 2009, as having undermined the provocation defence, at which point the trial should have been aborted.<sup>75</sup> The full

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66 See, for example, "Elliott known as 'psycho girlfriend'" (1 News, 1 July 2009) TVNZ <[www.tvnz.co.nz](http://www.tvnz.co.nz)>; and "Sophie Elliott portrayed as promiscuous, mean" (3 News, 30 June 2009) YouTube <[www.youtube.com](http://www.youtube.com)>.

67 "Sophie Elliott portrayed as promiscuous, mean", above n 66.

68 Kay Sinclair "Murder accused excessively competitive in relationships, court told" *Otago Daily Times* (online ed, New Zealand, 27 June 2009).

69 "Provocation defence 'made killer a victim'", above n 4.

70 Jarrod Booker "Jury finds Weatherston guilty of murder" *The New Zealand Herald* (online ed, New Zealand, 27 July 2009).

71 See, for example, John Hartevelt "Reminders of Sophie" *The Press* (online ed, New Zealand, 15 September 2009).

72 "Judge's secret Weatherston speech" *The Dominion Post* (online ed, New Zealand, 7 April 2011); and *Weatherston v R* [2011] NZCA 276 at [48].

73 Robert Reiner, Sonia Livingstone and Jessica Allen "From law and order to lynch mobs: crime news since the Second World War" in Paul Mason (ed) *Criminal Visions: Media representations of crime and justice* (Routledge, Abingdon, 2013) 13 at 26.

74 New Zealand Bill of Rights Act, s 25 sets minimum standards of criminal procedure requiring the trial to be fair.

75 See Interview with Dr Warren Young, Deputy President of the Law Commission (Greg Boyed, One News at 8, Television New Zealand, 10 July 2009) as cited in *Weatherston* (CA), above n 72,

interview, and segments of it, had been broadcast on national television. In rejecting this claim, the Court of Appeal noted that Young was speaking generally as a law reformer and on the basis of his previous work for the Law Commission.<sup>76</sup> In relation to two back-to-back *Listener* articles, “The Provocation Debate: A law both hated & hailed” and “The Final Insult”, the Court found that neither was prejudicial.<sup>77</sup> They were merely a response to a number of cases where the provocation defence was successfully raised.<sup>78</sup> The articles do not mention Clayton’s trial and the views were balanced.<sup>79</sup> Consequently, the Court of Appeal dismissed this claim, along with six others.

While the Court of Appeal found that media coverage did not prejudice Clayton’s trial, it did play a significant role in raising public concern over the operation of the provocation defence. The effect was that many New Zealanders called for Parliament to remove the defence from our criminal law system, so that offenders like Clayton and Ferdinand could no longer utilise it at the expense of their deceased victims. However, in advocating for removal rather than reform, they were unaware of how the defence could help the likes of battered women and those who have experienced domestic violence. In this sense, the media coverage of the *Weatherston* and *Ambach* trials, along with the discourses on the provocation defence, caused a moral panic over its operation. Although New Zealanders were rightly concerned about the defence, society’s reaction as a whole was “fundamentally inappropriate”.<sup>80</sup>

#### E *Moral crusaders: society’s guardians respond with one voice?*

As Cohen notes, while the media may instigate moral panic, it is moral crusaders and politicians who sustain it.<sup>81</sup> Following Clayton’s trial, the Elliott family called for the defence’s repeal. Gil Elliott made the following statement:<sup>82</sup>

We don’t like it. It is completely unnecessary and we hope it will be withdrawn now from the statute book ... I think there are people who will back us on that.

Indeed, the Sensible Sentencing Trust and Women’s Refuge were “will[ing to] back” such action.<sup>83</sup> Heather Henare, chief executive of the Women’s Refuge, argued that:<sup>84</sup>

This trial turned justice inside out. The killer became the victim and Sophie Elliott was portrayed to us all as he chose to describe her. Unfortunately for Clayton Weatherston, the jury didn’t buy it and nor did the hundreds of thousands of New Zealanders who watched him giggling on television ... I believe there will be a strong and justifiably angry reaction to the way this trial proceeded. New Zealanders hearing so many of the details

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at [13], n 2; and “Weatherston loses appeal against murder conviction” *Radio New Zealand* (online ed, New Zealand, 17 June 2011).

76 *Weatherston* (CA), above n 72, at [16].

77 At [13]. See David Lomas “The Provocation Debate: A law both hated & hailed” *New Zealand Listener* (online ed, New Zealand, 25 July 2009); and Ruth Laugesen “The Final Insult” *New Zealand Listener* (online ed, New Zealand, 25 July 2009).

78 *Weatherston* (CA), above n 72, at [13].

79 At [18].

80 Cohen, above n 35, at 172.

81 At 1.

82 “Provocation defence ‘made killer a victim’”, above n 4.

83 “Provocation defence ‘made killer a victim’”, above n 4.

84 “Provocation defence ‘made killer a victim’”, above n 4.

and seeing Weatherston taking the stand will have been absolutely dumbfounded that this remorseless killer has had a platform for his justifications and excuses—televised and thoroughly reported by the media.

In focusing on the defence's tendency to put the victim, instead of the accused on trial, Henare was appealing to New Zealanders' moral compass. Indeed, being part of a group aimed at preventing violence against women, this focus is understandable. Women who die at the hands of jealous partners should not have their reputations tarnished or their deaths trivialised in court. However, in denouncing the provocation defence completely, Henare only amplified New Zealanders' call for abolition.

#### F *Internalising the panic*

Following *Weatherston*, the Government was faced with great pressure for legal change from both the New Zealand public and moral crusaders. With the extensive media coverage of the trial and subsequent debates on the provocation defence, politicians were quick to address this issue of nationwide concern. For instance, Charles Chauvel MP and Lianne Dalziel MP dismissed the defence as being an “anachronistic relic of New Zealand's legal past [that] must be repealed”.<sup>85</sup> Only weeks later, on 4 August 2009, Simon Power MP introduced the Crimes (Provocation Repeal) Amendment Bill.<sup>86</sup> In introducing a Bill to completely remove the defence, the Government effectively internalised the moral panic. Like the rest of New Zealand, they believed that it would be “catastrophic” to retain the provocation defence in any form.<sup>87</sup> Consequently, the Government felt “justified in taking ... excessive precautionary measures” to remove a defence that had incited a fervour in the nation.<sup>88</sup>

## V Political and Legal Response: Crimes (Provocation Repeal) Amendment Bill 2009

### A *The moral panic reaches a peak*

Stuart Hall and others mark the start of moral panics as:<sup>89</sup>

When the official reaction to a person, group of persons or series of events is *out of all proportion* to the actual threat offered, when “experts”, in the form of police chiefs, the judiciary, politicians, and editors *perceive* the threat in all but identical terms, and appear to talk “with one voice” ...

However, with Mr Power's introduction of the Crimes (Provocation Repeal) Amendment Bill, the moral panic over the provocation defence had grown out of its infancy.<sup>90</sup> The

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85 New Zealand Labour Party “Provocation defence needs to be consigned to history” (press release, 23 July 2009).

86 Crimes (Provocation Repeal) Amendment Bill.

87 Cohen, above n 35, at 67.

88 At 67.

89 Stuart Hall and others *Policing the Crisis: Mugging, the State and Law and Order* (2nd ed, Palgrave Macmillan, New York, 2013) at 20 (emphasis in original).

90 Crimes (Provocation Repeal) Amendment Bill.

Government and politicians were no longer merely “talk[ing]” about the defence; they were taking swift action to change the law in a way that would have serious legal and social ramifications.

B *The provocation defence: “To be, or not to be, that is the question”*<sup>91</sup>

There have been calls for Parliament to repeal the provocation defence dating back to the 1970s, long before Mr Power introduced the Crimes (Provocation Repeal) Amendment Bill. Notably, in 1976, the Criminal Law Reform Committee argued for abolition on the basis that the law was “unnecessarily complex”.<sup>92</sup> Legislation was introduced in 1989,<sup>93</sup> but failed to pass due to public condemnation of such action as “radical” and “unnecessary.”<sup>94</sup>

More recently, both the Ministry of Justice and the Law Commission have also recommended the defence’s repeal.<sup>95</sup> Two Law Commission reports focussed on the consequences of the defence’s repeal to the likes of battered women and the mentally impaired.<sup>96</sup> A third report noted that such groups would not be affected, as the defence was not benefiting these groups.<sup>97</sup> Out of all 81 homicide trials conducted by Auckland and Wellington Crown prosecutors between 2001 and 2005, only 15 defendants raised the provocation defence and only four were successful.<sup>98</sup> Only one case, *R v Simpson*, identified the mental impairment of the accused as a relevant characteristic.<sup>99</sup> However, the circumstances of *Simpson* were more similar to that of a mercy killing. Consequently, it is unclear whether it was the mental impairment or the mercy killing aspect that led the jury to deliver its verdict.<sup>100</sup> This is especially so, given that two other defendants also raised some form of mental impairment, but were, despite this, still convicted of murder.<sup>101</sup> A further argument is that mentally-impaired persons were unable to meet the defence’s requirement of having the self-control of an ordinary person.<sup>102</sup> Returning to the cases of battered women, the Law Commission noted that only one case had successfully raised the provocation defence.<sup>103</sup> However, this case was problematic as it fitted the more typical instances of provocative killing; that is, killing in relation to sexual jealousy.<sup>104</sup> By

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91 William Shakespeare *Hamlet, Prince of Denmark* (III, i). See William Shakespeare “Hamlet, Prince of Denmark” in *The Complete Works* (Gramercy Books, New York, 1997) 1071 at 1088.

92 Criminal Law Reform Committee *Report on Culpable Homicide* (July 1976) at [5]–[16].

93 Crimes Bill 1989 (152-1).

94 Bernard Brown “Provocation in New Zealand: A Characteristic Solution” in Stanley Meng Hong Yeo (ed) *Partial Excuses to Murder* (The Federation Press, Sydney, 1991) 80 at 81.

95 See Cabinet Paper “Criminal Defences Reform: Necessity and Partial Defences (Provocation and Infanticide)” (18 November 2003) POL (03) 367 as cited in Law Commission *The Partial Defence of Provocation*, above n 5, at 15, n 7.

96 See Law Commission *Victims of Domestic Violence Who Offend*, above n 5; and Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 5.

97 See, for example, Law Commission *The Partial Defence of Provocation*, above n 5, at [109]–[112] on mentally ill or impaired persons.

98 At [113]–[114].

99 *R v Simpson* HC Auckland T010609, 12 October 2001 at [10] as cited in Law Commission *The Partial Defence of Provocation*, above n 5, at [114].

100 Law Commission *The Partial Defence of Provocation*, above n 5, at [114].

101 At [114].

102 At [110].

103 At [121].

104 At [121].

justifying jealous spouses killing battered women, the defence was in fact operating against their interests.<sup>105</sup>

It would be contrary to New Zealand values to retain a defence that not only failed to protect vulnerable interest groups, but also discriminated against these groups.<sup>106</sup> An ordinary reasonable person does not fly into a homicidal rage, and New Zealanders do not expect such a rage to be justified.<sup>107</sup> The Sentencing Act had removed the mandatory sentence of life imprisonment for murder. Instead, there is only a *presumptive* life sentence, which could be rebutted if it was considered unjust given the circumstances of the offender.<sup>108</sup> Accordingly, provoked killers who had the intention to kill would be treated like all other intentional killers.<sup>109</sup> Considering that the provocation defence routinely encountered difficulties in its application, the Law Commission recommended that provocation would be better addressed at the sentencing stage.<sup>110</sup> Such action would, according to Law Commission President Geoffrey Palmer, make the law more reliable. This is because judges are “better equipped to deal with the issues in a way that is consistent, and therefore more just, than juries are”.<sup>111</sup>

In light of this history, it could be argued that the Crimes (Provocation Repeal) Amendment Bill was not a rash reaction to the moral panic that New Zealand was experiencing. Instead, it was a reasonable response to reasonable expert advice. However, the speed at which the Bill was introduced and passed following the *Ambach* and *Weatherston* trials suggests otherwise. Indeed, following these trials, the Government seemed more than willing to abolish a defence that was not only a “perceived threat” to New Zealand society, but also to their authority.<sup>112</sup> The introduction of an earlier Crimes (Abolition of Defence of Provocation) Amendment Bill 2009 during Clayton’s trial by Mr Chauvel and Ms Dalziel, both of the Labour Party, demonstrates how Parliament’s law-making is *reactive*.<sup>113</sup> While this earlier Bill was dropped before the verdict in *Weatherston*, Mr Power’s Bill replaced it only too quickly. The situation was therefore plainly volatile—a classic characteristic of moral panic—and New Zealand’s law-making bodies failed to take a step back to thoroughly analyse the situation.<sup>114</sup>

### C *The first reading*

On introducing the Crimes (Provocation Repeal) Amendment Bill to the House of Representatives for its first reading on 18 August 2009, Mr Power echoed the Law Commission’s reasoning for the defence’s repeal.<sup>115</sup> He cited the Sentencing Act and its removal of mandatory life sentences for murder as fundamental.<sup>116</sup> Historically, the defence was used in relation to murder sentences of mandatory life imprisonment and,

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105 At [121].

106 At [96].

107 At [89] and [99].

108 Sentencing Act 2002, ss 102 and 103.

109 Geoffrey Palmer “Provocation no excuse for murder” Law Commission (press release, 26 October 2007).

110 Law Commission *The Partial Defence of Provocation*, above n 5, at 78–84.

111 Palmer, above n 109.

112 Krinsky, above n 34, at 1.

113 Crimes (Abolition of Defence of Provocation) Amendment Bill 2009 (61-1).

114 Goode and Ben-Yehuda, above n 39, at 37–43.

115 (18 August 2009) 656 NZPD 5646–5648.

116 At 5646–5647.

before this, capital punishment.<sup>117</sup> With life sentences now being presumptive rather than mandatory, the defence was redundant.<sup>118</sup> Provocation would move to the sentencing stage, thereby removing a complex defence from the realm of the jury.<sup>119</sup>

Additionally, Mr Power also cited moral arguments to repeal the provocation defence. For example, this “fundamentally flawed” defence allowed for the “besmirching” of the deceased victim:<sup>120</sup>

It effectively provides a defence for lashing out in anger, not just any anger but violent, homicidal rage. It rewards a lack of self-control by enabling an intentional killing to be categorised as something other than murder. When the Government is attempting to send the strong message that people must find ways other than violence to manage their anger, it is inappropriate and undesirable that anger be singled out as an overriding mitigating factor that could be seen to justify conviction for manslaughter rather than murder.

The majority of the House supported Mr Power’s arguments. Again, one of the characteristics of moral panic is consensus.<sup>121</sup> For example, Ms Dalziel and Mr Chauvel agreed the defence was gender biased, being predominantly used by men to justify their murderous actions against women and homosexual men.<sup>122</sup> They were joined in this opinion by Kevin Hague MP of the Green Party.<sup>123</sup> In contrast, ACT was the only party to call to for the defence’s retention in some form. David Garrett MP of the ACT Party commented that removing the defence would be like “throw[ing] the baby out with the bathwater”.<sup>124</sup> Since “the defence works for both sexes, all sexual orientations and all genders, [it] needs to be examined very closely”.<sup>125</sup> Indeed, ACT’s call to consider the defence “closely”, rather than repeal it completely, is telling. It indicates that it was, perhaps, the only party not being swept away in the moral panic.

#### D *The legal community responds: the moral panic cracks?*

Many lawyers were critical of the Crimes (Provocation Repeal) Amendment Bill. Peter Williams QC noted that a complete repeal of the provocation defence—a significant aspect of New Zealand’s criminal law system—would be a “very dangerous” move akin to “playing around with the onus of proof ... or any ... other basic [concept] of criminal law”.<sup>126</sup> Indeed, Peter Kaye, the defence lawyer in *Ambach*, saw the defence as providing for “compelling situations”.<sup>127</sup> Julia Tolmie describes those “compelling situations” as

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117 At 5646.

118 At 5647. See also Melanie Redding “A Partial Defence to Murder and a Sentencing Tariff for Manslaughter” (LLB (Hons) Dissertation, University of Otago, 2016) at 8.

119 At 5648.

120 At 5647.

121 Goode and Ben-Yehuda, above n 39, at 38-40.

122 (18 August 2009) 656 NZPD 5649–5650.

123 At 5653–5654.

124 At 5656.

125 At 5656.

126 Edward Gay “Partial defence of provocation set to be dumped” *The New Zealand Herald* (online ed, New Zealand, 23 July 2009).

127 “Banjo killer sentenced to 12 years in jail” *The New Zealand Herald* (online ed, New Zealand, 18 September 2009).

including the likes of battered women and abused children who have lashed out and killed the perpetrators of such violence.<sup>128</sup> Without this defence, they would be left to argue the more stringent requirements of imminence and proportionality under the defence of self-defence.<sup>129</sup>

In an interview following the *Weatherston* trial, Tolmie noted that the provocation defence was over-utilised by heterosexual men to justify the jealous killing of their former partners.<sup>130</sup> However, such problems could be adequately addressed by reform.<sup>131</sup> Since sexual rejection is a part of everyday life, it should be excluded.<sup>132</sup> It is only if reform cannot prevent this over-utilisation that Parliament should abolish the provocation defence.<sup>133</sup>

### E *Justice and Electoral Committee*

#### (1) Submissions to the Committee

Wellington Women Lawyers Association and Rainbow Wellington were amongst many to make submissions supporting the provocation defence's repeal.<sup>134</sup> In contrast, the New Zealand Law Society strongly opposed such action. They believed the defence should be retained until viable alternatives were established.<sup>135</sup> In particular, they were concerned about labelling all provoked killers as murderers.<sup>136</sup> To leave provocation to a judge was problematic as it ignored the value of the jury, as representatives of the ordinary reasonable person, in making such decisions.<sup>137</sup> But more importantly, without the defence, "juries might convict on the alternative charge of manslaughter based on their sympathy for the defendant rather than on rational grounds", thereby making the law uncertain.<sup>138</sup>

#### (2) The Committee's recommendations

Despite opposition from the New Zealand Law Society, the Justice and Electoral Committee supported the Crimes (Provocation Repeal) Amendment Bill. However, they recommended amending it to prevent the defence from being raised at common law.<sup>139</sup> The Committee recognised the need to develop some means of assessing provocation by the judiciary

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128 Tolmie, above n 8, at 45-46.

129 At 38-40.

130 Interview with Julia Tolmie, Associate Professor at the University of Auckland, Faculty of Law (Alison Mau, Breakfast, TVNZ, 23 July 2009).

131 Julia Tolmie "Julia Tolmie: Defence of provocation has its place" *The New Zealand Herald* (online ed, New Zealand, 7 September 2009).

132 Tolmie, above n 131.

133 Tomie, above n 131.

134 Wellington Women Lawyers Association "Submission to the Justice and Electoral Select Committee And Request to Appear before the Committee"; and Tony Simpson, Chair of Rainbow Wellington "Crimes (Provocation Repeal) Amendment Bill" (submission to the Justice and Electoral Select Committee).

135 New Zealand Law Society "Submission on Crimes (Provocation Repeal) Amendment Bill" at [4].

136 At [5].

137 At [5].

138 At [5].

139 Crimes (Provocation Repeal) Amendment Bill 2009 (64-2) (select committee report) at 2.



under s 102 of the Sentencing Act.<sup>140</sup> The Committee agreed with the Law Commission that battered women and the mentally impaired would not be affected by the Bill's passing.<sup>141</sup>

#### F *The second and third readings*

The Crimes (Provocation Repeal) Amendment Bill had its second reading, committee of the whole House and third reading on 24 November 2009.<sup>142</sup> At the second reading, the House amended the Bill based on the Justice and Electoral Committee's recommendation to abolish the existing common law partial defence of provocation. While there was further discussion on retaining the defence, the House was again "talk[ing] with one voice".<sup>143</sup>

Again, ACT was the only party to call to retain the defence. Rodney Hide MP noted:<sup>144</sup>

I ask members to ... think of themselves as, maybe, a brother of Sophie. I ask members to think of themselves going into that room ... and seeing her cuts to bits on the floor and Clayton Weatherston standing there with a dripping knife. What would members of this Parliament do? ... It seems to me that a reasonable man might, in a fit of rage ... "kill the bastard". And then that man is on a murder charge. But does he not have the defence that he was provoked to commit the murder by the actions of that terrible man, and that he did as a reasonable man would do? ... But this Parliament is saying ... if I was in that situation, I murdered the man, I must be charged with murder, and then I must defend the murder charge without the obvious and long-held defence of provocation. That seems to the ACT Party to be wrong.

Despite these arguments, with the moral panic being so strong, the House passed the Bill with 116 votes in favour and only five against.<sup>145</sup>

#### G *Repealing the provocation defence: the end of the moral panic?*

After the Crimes (Provocation Repeal) Amendment Act came in to force on 8 December 2009, the moral panic supposedly ended. Sections 4 and 5 removed the statutory provisions relating to provocation and the common law defence, respectively.<sup>146</sup> The provocation defence had seemingly disappeared from the New Zealand criminal law system. However, recent cases indicate that anger and provocation, could be used to negate the mens rea elements of homicide.<sup>147</sup> It has also reappeared in the guise of other

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140 At 2.

141 At 3.

142 (24 November 2009) 659 NZPD 8248–8275.

143 Hall and others, above n 89, at 20.

144 (24 November 2009) 659 NZPD 8256–8257.

145 At 8258.

146 Crimes Act 1961, ss 169 and 170.

147 See, for example, *Simpson v R* [2010] NZCA 140. At the time of the offending, Simpson was intoxicated and had suffered a blow to the head. The Court of Appeal acknowledged this case as a *rolled-up charge*, where there are multiple issues relevant to determining the intent of the accused in a defence of self-defence. While the Court did not make a decision as to whether anger or provocation could negate the mens rea elements of s 169 of the Crimes Act, it did consider that, in light of the number of factors at issue in the case, it would be "dangerous for the Jury to rely on Mr Simpson's actions as showing intent". At [55]. This approach was emulated in the case of *Wilson Apatu*, in which the defendant was also intoxicated and had

defences.<sup>148</sup> It is, therefore, questionable whether concerns over the provocation defence will ever cease. Instead, it seems certain that moral panics and the legacies of the provocation defence will continue to provoke New Zealand society.

## VI Crimes (Provocation Repeal) Amendment Act: A Good Legacy or a Knee-Jerk Reaction?

As Cohen notes, a moral panic often subsides without ongoing repercussions.<sup>149</sup> However, a moral panic can reformulate the way in which a “society conceives itself”, and have lasting legacies, such as changes in the law.<sup>150</sup> Indeed, with the repeal of the provocation defence, New Zealand society experienced a fundamental change in its operation. While Parliament passed the Crimes (Provocation Repeal) Amendment Act quickly, this factor alone is insufficient to argue that the legislation was, as Chris Comeskey and Robert Lithgow QC contend, a “knee-jerk reaction” and an example of “purely political grandstanding”.<sup>151</sup> In order to determine whether the Act left a positive legacy or was merely a “knee-jerk” reaction, it is necessary to examine the approaches other jurisdictions have taken towards the provocation defence.<sup>152</sup>

### A Other jurisdictions

The following foreign jurisdictions have considered the sentence imposed for homicide as directly relevant in determining whether to retain the provocation defence or not. Where a life sentence remains mandatory, there is a general tendency to keep the defence.

#### (1) Australia

There is some variance across Australia’s jurisdictions. The defence was abolished in Tasmania in 2003,<sup>153</sup> Victoria in 2005<sup>154</sup> and Western Australia in 2008.<sup>155</sup> The remaining states—the Australian Capital Territory, Northern Territory, New South Wales, Queensland and South Australia—have retained the defence in some form. Tasmania, Victoria, New South Wales and the Australian Capital Territory have discretionary sentencing for murder.

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suffered a kick to the head. See MRM Gale “Provoked to Action: The Implications of Repealing the Provocation Defence to Murder” (LLB (Hons), University of Otago, 2010) at 36–37.

148 See, for example *Nattrass-Bergquist v R* [2017] NZCA 552, where the defendants were found guilty of murder. The victim had taken the teenage defendants to a motel and allegedly offered to pay the defendants for sex. While the defence argued the teenagers had acted in self-defence, claims of provocation were also made during the trial. See “Provocation defence still being used” *The New Zealand Herald* (online ed, New Zealand, 27 April 2016).

149 Cohen, above n 35, at 1.

150 At 1. The speed at which the Crimes (Provocation Repeal) Amendment Act 2009 was passed parallels the enactment of the Indecent Publications Amendment Act 1954 following the Mazengarb Inquiry. See Alice Krzanich “Murder, Mazengarb and a Moral Panic: The Intersection of ‘Juvenile Delinquency’ and the Media in 1950s New Zealand” (2010) 16 *Auckland U L Rev* 164.

151 “Provocation defence repeal ‘knee-jerk reaction’”, above n 7.

152 “Provocation defence repeal ‘knee-jerk reaction’”, above n 7.

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

154 Crimes (Homicide) Act 2005 (Vic), s 3.

155 Criminal Law Amendment (Homicide) Act 2008 (WA).

## (a) New South Wales

New South Wales retains the partial defences of extreme provocation,<sup>156</sup> substantial impairment by abnormality of mind,<sup>157</sup> and excessive self-defence.<sup>158</sup> However, the Crimes Amendment (Provocation) Act 2014 has amended the provisions relating to the defence of extreme provocation.<sup>159</sup> These legislative changes were made on the unanimous recommendation of the Select Committee on the Partial Defence of Provocation to retain the defence while restricting its application.<sup>160</sup> These changes occurred against a backdrop of public concern in which the defence was successfully raised in a number of controversial cases, such as *R v Singh*.<sup>161</sup>

Under s 23(2) of the Crimes Act 1900 (NSW), there are four elements the accused must meet for the act to be considered as being “done in response to extreme provocation”. These elements focus on the accused’s response to the conduct of the deceased. For example, the first element requires the accused to have committed an act that causes death in response to the deceased’s conduct.<sup>162</sup> Under the second element, the deceased’s conduct must be a “serious indictable offence”.<sup>163</sup> The third and fourth elements require that deceased’s conduct to have caused the accused to lose self-control, and that conduct would have caused an ordinary person to lose self-control.<sup>164</sup> Consequently, while loss of self-control remains a key element of the provocation defence under s 23(2)(c), the test is an objective one, measured in accordance with the standard of the “ordinary person”.<sup>165</sup> The defence is limited in that it excludes conduct such as a non-violent sexual advance and situations where the accused “incite[s] the conduct in order to provide an excuse to use violence against the deceased”.<sup>166</sup> While these provisions do not directly tackle the issue of men killing their partners to protect their honour, the

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156 Crimes Act 1900 (NSW), s 23. Under s 23(7), “the onus is on the prosecution to prove beyond reasonable doubt that the act causing death was not in response to extreme provocation”.

157 Section 23A. The section applies to murder charges allegedly committed on or after 3 April 1998, and replaces the partial defence of diminished responsibility. It comes into play only when all issues under the murder charge, including provocation and self-defence, have been addressed and resolved in the Crown’s favour. See Judicial Commission of New South Wales *Criminal Trial Courts Bench Book* (Sydney, 2001) at [6-550].

158 Section 421. The test for excessive self-defence is subjective in its basis. It arises where although the accused believed it necessary, the action taken was not reasonable. The partial defence is a “fall back” defence, with defendants first arguing for full acquittal under self-defence. Legislative Council Select Committee on the partial defence of provocation *Inquiry into the partial defence of provocation: Defences and Partial Defences to Homicide* (New South Wales, 2012) at 3.

159 Crimes Amendment (Provocation) Act 2014 (NSW), sch 1.

160 See *Criminal Trials Courts Bench Book*, above n 157, at [6-440]. The defence was restricted “to ensure that it could not be used in cases where the provocation claimed was a non-violent sexual advance, infidelity or leaving a relationship”. (5 March 2014) New South Wales Legislative Council Parliamentary Debates 27034.

161 *R v Singh* [2010] VSC 299; and *Singh v R* (2012) NSWSC 637. The accused, Singh, killed his wife with a box cutter after learning she loved another man and her threatening to have him deported.

162 Crimes Act (NSW), s 23(2)(a).

163 Section 23(2)(b).

164 Loss of self-control must be to the extent of intending to kill or inflict grievous bodily harm on the deceased. Section 23(2)(d).

165 Sections 23(2)(c) and 23(2)(d).

166 Sections 23(3)(a) and 23(3)(b).

requirement that the deceased's conduct be a "serious indictable offence" has the likely effect of diminishing the number of such men who can raise the defence.

(b) Queensland

The partial defences of provocation and substantial impairment or diminished responsibility are available in Queensland.<sup>167</sup> Under the partial defence of provocation, the conduct must be within what is considered "'ordinary' for their circumstance".<sup>168</sup> While this is subjective, it still reflects a male understanding of violence because of the strict requirement of a "sudden and temporary loss of self-control".<sup>169</sup> Where there is a time lapse, the act of killing falls short of provocation, and is instead considered an act of premeditated revenge.<sup>170</sup> For battered women and female victims of domestic abuse, this position is highly problematic because it is male defendants who are more likely to react immediately to provocative conduct.<sup>171</sup>

Indeed, the media coverage of *R v Sebo* amplified concerns that the provocation defence favours men who kill in a heat of passion.<sup>172</sup> The Queensland Law Reform Commission released its report on the provocation defence the following year.<sup>173</sup> While it acknowledged the defence's flaws, the Commission recommended retaining the defence due to the mandatory life sentence for murder convictions.<sup>174</sup> However, with concerns over the defence's operation—for instance, in its ability to justify the killing of those who make an unwanted homosexual advance<sup>175</sup>—the state of Queensland found itself once again addressing the particularities of the defence.<sup>176</sup> Parliament reformed the law around the provocation defence with the Criminal Code and Other Legislation Amendment Act 2011. In particular, s 5(2) restricted the defence so that sudden provocation based on words alone is generally insufficient to trigger the defence. Consequently, the reform had

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167 Criminal Code Act 1899 (Qld), ss 304 and 304A.

168 Anna Carline and Patricia Easteal *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge, Abingdon, 2014) at 144.

169 At 145.

170 At 145.

171 At 145. Carline and Easteal note that "[t]he defence is more concerned with a one-off angry encounter as opposed to an ongoing abusive relationship, and hence fails adequately to acknowledge battered women's experiences of a 'slow-burn' of fear, despair and anger which eventually erupts into the killing of her batterer, usually when he is asleep, drunk, or otherwise indisposed." Donald Nicolson and Rohit Sanghvi "Battered Women and Provocation: The Implications of *R v Ahuwalia*" [1993] Crim LR 728 at 730 as cited in Carline and Easteal, above n 168, at 145.

172 *R v Sebo, ex parte Attorney-General of Queensland* [2007] QCA 426. In that case, the accused, Sebo, successfully raised the defence to justify the killing of his former girlfriend with a steering wheel lock following taunts about his sexual performance.

173 Queensland Law Reform Commission *A review of the excuse of accident and the defence of provocation* (QLRC R64, September 2008).

174 At 469.

175 The case of *R v Meerdink* [2010] QCA 273 raised concerns that the defence was being utilised as a gay panic defence. In that case, the defendants killed Wayne Ruks, after he made an unwanted homosexual advance outside a church in Maryborough. While the defendants received manslaughter convictions, this was because the defendants lacked the requisite mens rea to kill or cause serious harm, rather than on the basis their killing was mitigated due to gay panic. See Kellie Toole "Queensland still failing to act on a medieval murder defence" *The Conversation* (online ed, Melbourne, 5 May 2015).

176 Toole, above n 175.

the effect of removing the accused's ability to raise the provocation defence in relation to "an insult or of sexual possessiveness or jealousy in a domestic relationship, except where the circumstances were of 'an extreme and exceptional character'".<sup>177</sup> A later amendment to the Criminal Code Act 1899 (Qld) further excluded from the defence "an unwanted sexual advance" except in "circumstances of an exceptional character".<sup>178</sup> Even though the Code is expressed in gender-neutral language, the change is intended to make the law more equal, including for those from the LGBTI community.<sup>179</sup>

(c) Victoria

The defence of provocation was abolished in 2005 following media coverage of *R v Ramage*, a high-profile case seen to be the Australian equivalent of *Weatherston*.<sup>180</sup> While the provocation defence was repealed following *Ramage*, reforms to the law on self-defence meant that battered women could raise self-defence more readily.<sup>181</sup> Indeed, the Crimes (Homicide) Act 2005 led to significant changes: it clarified the law on self-defence and codified it as a full defence.<sup>182</sup> It also developed the provision for evidence of family violence in homicide trials.<sup>183</sup> More specifically, s 9AH(3) of the Crimes Act 1958 (Vic) sets out a range of family violence evidence that can be raised "to explain how family violence might have led the defendant to believe that their fatal violence was necessary and reasonable".<sup>184</sup> Furthermore, s 9AH(1) recognised that, in homicide cases involving family violence, the defendant can raise self-defence even where the threat was not immediate, or where the use of force was excessive. Together with s 9AE of the Crimes Act (Vic), which makes the self-defence and family violence protections available for manslaughter too, these 2005 reforms better addressed the traditional difficulties faced by women in raising the defence.<sup>185</sup>

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177 Claire de Than "Provoking a Range of Responses: The Provocation Defence in British Overseas Territories and Crown Dependencies" in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge, Abingdon, 2016) 207 at 212.

178 Criminal Law Amendment Act 2017 (Qld). See Criminal Code Act (Qld), s 304(4). In order to determine whether there are exceptional circumstances, the Court considers the history of violence, including sexual violence and conduct that has taken place between the accused and the deceased. See "Queensland Parliament Passes Bill to Amend Controversial 'Gay-Panic' Defence" Anderson Fredericks Turner <[www.aftlawyers.com.au](http://www.aftlawyers.com.au)>.

179 "Queensland Parliament Passes Bill to Amend Controversial 'Gay-Panic' Defence", above n 178.

180 *R v Ramage* [2004] VSC 508. The accused, Ramage, punched and strangled his wife, Julie, after learning their marriage was over. In its criticisms of the defence in 2003, the Victorian Law Reform Commission noted that "[t]he defence is structurally biased against women; provocation is not an appropriate indication of culpability; and violent loss of self-control is never excusable." Victorian Law Reform Commission *Defences to Homicide: Options Paper* (February 2003) at xviii.

181 The Crimes (Homicide) Act (Vic) repealed the provocation defence and further elaborated upon how the defence of self-defence was to operate in Victorian criminal law. See Bronwyn Naylor and Danielle Tyson "Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question" (2017) 6(3) *International Journal for Crime Justice, and Social Democracy* 72 at 75–76.

182 Naylor and Tyson, above n 181, at 75–76.

183 At 76.

184 At 76.

185 At 76.

Consequently, these reforms sought to address homicide within the framework of family violence by streamlining the defence of self-defence.<sup>186</sup> Another step to protect women who kill their violent partners was the creation of the charge of defensive homicide.<sup>187</sup> However, due to concerns that the defence was being manipulated by violent men to avoid murder convictions, the defence was abolished in 2014.<sup>188</sup> At the same time, Parliament instituted further reforms to the law on self-defence to recognise the importance and “potential relevance of family violence” to both duress and the defence of self-defence.<sup>189</sup> In particular, s 322J of the Crimes Act (Vic) now defines family violence and developed the list of family violence evidence in the former s 9AH. The 2014 amendments also provided guidance on jury directions to emphasise how family violence evidence is relevant to both duress and self-defence.<sup>190</sup> For example, the jury should appreciate how family violence extends beyond physical abuse; “that people react differently to experiencing family violence; and that it is not uncommon for a victim to stay with the abusive partner”.<sup>191</sup> These directions provide the jury with a fuller understanding of how family violence operates, so that they, in turn, are more likely to reach a verdict that safeguards the interests of those who are subjected to such violence.

## (2) The United Kingdom: England and Wales

The partial defence of provocation, as found in the common law, was abolished in 2009.<sup>192</sup> At the same time, the legislature amended the definition of the partial defence of diminished responsibility to murder.<sup>193</sup> The new definition in the Homicide Act 1957 (UK)

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186 Victorian Law Reform Commission *Defences to Homicide: Final Report* (October 2004) at xxix.

187 Kellie Toole “Defensive Homicide on Trial in Victoria” (2013) 39 Mon LR 473 at 473–474. The charge of defensive homicide was intended “to provide a safety net conviction for women who kill an abusive partner and cannot satisfy the test for self-defence”. At 473. As of 27 March 2013, there have been 24 convictions for defensive homicide. However only three of the offenders were women who had killed their abusive male partners. The other 21 offenders were men. At 437 and 504–505.

188 Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic). Robert Clark, Attorney-General of Victoria, believed violent men had “hijacked” the law in order to avoid a conviction for murder. His criticism of the defence was that it “ha[d] failed to work as intended and instead ... [was] wide open to offenders using it to escape full responsibility where they deserve to be convicted of murder”. Oliver Milman “Victoria will scrap ‘defensive homicide’ and offer simpler test for self-defence” *The Guardian* (online ed, London, 22 June 2014).

189 Naylor and Tyson, above n 181, at 77–78. Under s 322K(2) of the Crimes Act 1958 (Vic), self-defence requires a belief that “the conduct is necessary in self-defence” and that the conduct be “a reasonable response in the circumstances as the person perceives them”. This is particularly relevant to victims of family violence because s 322K, note 2 expressly includes within the ambit of self-defence “the prevention or termination of the unlawful deprivation of ... liberty”.

190 At 77. These directions were originally found in the Jury Directions Act 2013 (Vic) in ss 33(6) and 32(7). They are now found in ss 59 and 60 of the Jury Directions Act 2015 (Vic) respectively.

191 At 77.

192 Coroners and Justice Act 2009 (UK), s 56. See also Ministry of Justice (UK) *Partial defences to murder: loss of control and diminished responsibility; and infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009* (Circular 2010/13, October 2010) at [13].

193 Coroners and Justice Act, s 52.

provides that a defendant “who kills or is a party to the killing of another is not to be convicted of murder if [the defendant] was suffering from an abnormality of mental functioning”.<sup>194</sup>

In addition to these modifications, the partial defence of loss of control was introduced to replace the repealed provocation defence.<sup>195</sup> This defence operates on a similar basis to provocation in that it reduces a murder charge to manslaughter.<sup>196</sup> However, a key change is that the loss of control does not need to be sudden.<sup>197</sup> For battered women and victims of domestic abuse, this is a positive development because it recognises the gradual nature of their mistreatment: due to the “slow-burn” fear of domestic abuse, such victims usually kill their perpetrators when they are “asleep, drunk, or otherwise indisposed”.<sup>198</sup> There are three “qualifying triggers”—situations in which the accused’s loss of self-control is accepted.<sup>199</sup> Under s 55, these include situations where:

- the defendant fears “serious violence” (the fear trigger);<sup>200</sup>
- things have been said or done which create “circumstances of an extremely grave character” and cause the accused to justifiably feel they have been “seriously wronged” (the anger trigger);<sup>201</sup> or
- a combination of the first two situations has resulted.<sup>202</sup>

In relation to the fear trigger, a subjective test applies, and the fear of serious violence must correspond to the defendant or another identifiable person, such as a child.<sup>203</sup> However, with the anger trigger, the jury applies an objective test to determine whether the defendant’s feeling of being seriously wronged is justified.<sup>204</sup> The most significant aspect of this second trigger is that “the fact that a thing done or said constituted sexual infidelity is to be disregarded”.<sup>205</sup> However, where sexual infidelity is ignored and the circumstances are of an extremely grave character, whereby the defendant has “a justifiable sense of being seriously wronged”, it is then possible that these circumstances

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194 Homicide Act 1957 (UK), s 2(1). The abnormality is to be a “recognised medical condition” which “substantially impaired” the defendant from understanding the nature of their conduct; forming a rational judgement; or exercising self-control. Coroners and Justice Act, ss 52(1) and 52(1A).

195 Coroners and Justice Act, ss 54 and 55.

196 Section 54(7).

197 Section 54(2). The Government retained the requirement of loss of control, due to concern the new defence could be used for “unmeritorious cases” such as honour killings and homicides within the gang context. However, in not requiring the loss of control to be sudden, this requirement was intended to allow battered women to more readily raise the defence. Kate Fitz-Gibbon “Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control” (2013) 40 *Journal of Law and Society* 280 at 287.

198 Nicolson and Sanghvi, above n 171, at 730 as cited in Carline and Easteal, above n 168, at 145. A classic example is *R v Ahluwalia* [1992] 4 All ER 889 (CA), where the female defendant, after years of domestic abuse at the hands of her husband, killed him by pouring petrol over him in his sleep and setting him alight.

199 Coroners and Justice Act, s 54(1).

200 Section 55(3).

201 Section 55(4).

202 Section 55(5). See also Ministry of Justice, above n 192, at [15].

203 At [25]–[26].

204 At [29].

205 Coroners and Justice Act, s 55(6)(c).

could constitute a qualifying trigger.<sup>206</sup> While this exclusion is a positive step forward, in practice it can be difficult to implement because there is no clear understanding of what exactly constitutes “sexual infidelity”.<sup>207</sup>

### B *Crimes (Provocation Repeal) Amendment Act: a knee-jerk reaction*

In light of the legal developments in these foreign jurisdictions, it could be argued that New Zealand’s repeal of the provocation defence was not a “knee-jerk reaction”.<sup>208</sup> This is especially so when considering the Australian states, in particular Victoria where the defence was abolished following *Ramage*. With Victoria having removed mandatory life sentences for murder convictions, there was less hesitancy to abolish the provocation defence than there was in Queensland following *Sebo*. Similarly, since New Zealand no longer has a mandatory life sentence for murder, this perhaps indicates that the repeal of the provocation defence following the *Weatherston* and *Ambach* trials was merely to bring New Zealand law in line with other jurisdictions.

However, this argument is problematic. New Zealand has not introduced any partial defences to replace the provocation defence. Nor has it reformed the defence of self-defence, as was suggested by the Law Commission in 2007, to protect the interests of battered women and domestic violence victims.<sup>209</sup> This lies in stark contrast to Victoria, which has reformed the defence of self-defence.<sup>210</sup> Similarly, while England and Wales have abolished the provocation defence, they introduced the partial defence of loss of control to take its place. They have also modified the definition for the partial defence to murder of diminished responsibility. Subsequently, the repeal of the provocation defence in New Zealand appears to be a disproportionate reaction. In reacting to the moral panic created and sustained by the media, the enduring legacy is one of poor law reform. As the reforms to the defence of provocation in New South Wales and Queensland suggest, there may still be a need for the defence of provocation. In light of this conclusion, the next Part of this article analyses the possible steps New Zealand could take to remedy the situation.

## VII The Path Forward: The Introduction of New Partial Defences to Murder or a Streamlined Provocation Defence?

This section seeks to determine which of the options available to Parliament would most effectively address the gap in the criminal law system left by the partial defence of provocation. In particular, the question is whether, in introducing other partial defences to murder—including the partial defences of loss of control, excessive self-defence and diminished responsibility—such law change would address the failings of the repealed provocation defence. If not, it seems advisable that Parliament should re-introduce a streamlined version of the provocation defence, to directly address the shortcomings that were raised by various sectors of society in terms of the defence’s original operation.

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206 Ministry of Justice, above n 192, at [30] and [31]. For example, a woman may, upon discovering that her husband raped her sister, lose self-control and kill her husband. Sexual infidelity in this case is to be disregarded and the defendant’s actions are to be considered under s 55(4).

207 Fitz-Gibbon, above n 197, at 294–295.

208 “Provocation defence repeal ‘knee-jerk reaction’”, above n 7.

209 See Law Commission *The Partial Defence of Provocation*, above n 5.

210 See Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).



Indeed, in directly responding to these issues, Parliament is likely to create law change that not only protects vulnerable people, such as battered women and gay persons, but which also serves the interests of New Zealand society as a whole. Thus, such law change would go to the core of what caused the moral panic in the first place, notably its protection of offenders such as Clayton and Ferdinand. It would reorient our perceptions of New Zealand's judicial system to see that it can, and does, strive to protect the commonly-held values intrinsic in the fabric of New Zealand society.

#### A *Partial defence of loss of control*

In line with the approach of England and Wales, New Zealand could introduce the partial defence of loss of control. While the defence is intended to cater for the "unique circumstances ... [of] battered women" and to overcome the gendered dichotomy of the provocation defence, there are concerns that this new defence remains unable to adequately protect this interest group.<sup>211</sup> In particular, Barry Mitchell attributes this to how:<sup>212</sup>

[The loss of control defence] reflected a typically male reaction to provocation, but one which women were very unlikely to display. When men are provoked they become angry and lash out in the heat of the moment ... Women instinctively recognise that they cannot afford to react in the same way. They have to exercise self-control ...

Such concerns are particularly valid given that the defence operates in a similar manner to the defence of provocation. For instance, the defence of loss of control imports a mixed subjective and objective analysis.<sup>213</sup> It also focusses predominantly on the concept of a loss of self-control, which must be linked to a qualifying trigger (the fear trigger or the anger trigger), as detailed in s 55 of the Coroners and Justice Act. It requires the defendant to react in the same manner as a person of the same sex, age and "a normal degree of tolerance and self-restraint".<sup>214</sup> There is much concern that this male bias, as seen in the defence of provocation, could also persist in the partial defence of loss of self-control.

However, these concerns are diminished, to an extent, by the inclusion of the fear of serious violence as a qualifying trigger. Kate Fitz-Gibbon argues that the fear trigger better caters for the interests of battered women and homicides that occur in the context of family violence.<sup>215</sup> Oliver Quick and Celia Wells note that this element "recognises the close connection between the emotions of anger and fear and thus between provocation and self-defence".<sup>216</sup> Other scholars note that it is "a step in the right direction" because it "recognises that the psychology of killing can be complex, with several emotions working

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211 Fitz-Gibbon, above n 197, at 280 and 287–288.

212 Barry Mitchell "Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!" in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge, Abingdon, 2016) 39 at 42.

213 Fitz-Gibbon, above n 197, at 286.

214 Coroners and Justice Act, s 54(1)(c). This is essentially the ordinary person test found in the provocation defence as was in New Zealand, but with concession for gender and age.

215 Fitz-Gibbon, above n 197, at 289–290.

216 Oliver Quick and Celia Wells "Partial reform of partial defences: Developments in England and Wales" (2012) 45 *Australian and New Zealand Journal of Criminology* 337 at 343.

together”.<sup>217</sup> But despite this development, others have questioned whether the partial defence of loss of control would really help the likes of battered women.<sup>218</sup> Their concern is that, even though the loss of control no longer needs to be sudden, until there are changes in the normative understandings of the law, it is likely that these women’s actions would be assessed in the conventional male-biased manner.<sup>219</sup> Subsequently, if New Zealand were to adopt the partial defence of loss of control, the judiciary would need to develop an understanding of fear that takes into account the plight of such women.<sup>220</sup>

Similarly, in relation to the exclusion of sexual infidelity as a ground for loss of self-control, any approach must protect and promote the rights of battered women in a progressive society.<sup>221</sup> The particular concern, as Fitz-Gibbon notes, is in determining “what would constitute an act of ‘sexual infidelity’ in the operation of the new partial defence”.<sup>222</sup> This is because, historically, sexual infidelity has covered situations such as where the defendant personally witnesses, or hears from others about, the victim engaging in an act of sexual infidelity”.<sup>223</sup> Consequently, excluding sexual infidelity as a ground for the loss of control defence may render the law overly vague, in that the emphasis turns upon discerning what is and is not categorised as sexual infidelity. Since infidelity is usually associated with duties arising within the institution of marriage, there

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217 Amanda Clough “Loss of Self-control as a Defence: The Key to Replacing Provocation” (2010) 74 JCL 118 at 123 as cited in Fitz-Gibbon, above n 197, at 291; and Geraldine Mackenzie and Eric Colvin *Homicide in Abusive Relationships: A Report on Defences* (Report prepared for the Attorney-General and Minister for Industrial Relations, Queensland, July 2009) at 7 as cited in Fitz-Gibbon, above n 197, at 291.

218 See, for example, Jeremy Horder “Reshaping the Subjective Element in the Provocation Defence” (2005) 25 Oxford Journal of Legal Studies 123. Horder criticises the defence because of its strong gender bias and discrimination towards female defendants. For instance, he referred to the concept of loss of self-control, present in the provocation defence, as “the loss of self-control dilemma”. At 133. He was particularly concerned that the requirement of loss of self-control restricted that defence to “stereotypically ‘male’, violent reactions to provocation” and thereby excluded other female reactions including fear and despair. At 136. Similarly, Vincent McAviney acknowledges that the loss of control defence represents some positive developments in the law by providing a response to emotions such as fear, as well as removing “the ‘suddenness’ requirement” that was present in the provocation defence. Vincent McAviney “Coroners and Justice Act 2009: Replacing Provocation with Loss of Control” (28 October 2010) Inherently Human <<https://inherentlyhuman.wordpress.com>>. However, he argues that the defence is still “thoroughly connected to emotions of anger, the two being natural partners”. This is particularly so in that simply fearing violence is insufficient to fall within the qualifying trigger of a “fear of serious violence”. Coroners and Justice Act, s 55(3). Many women who are subject to abuse may have previously lost control, but at the time of the acts in question, they act in a calm and deliberate manner. Such women may thereby not be protected by the defence. Instead, only those women who openly lose control in fear of such violence will be readily identified and protected under the new defence. The second qualifying trigger is “a justifiable sense of being seriously wronged”. Coroners and Justice Act, s 55(4). McAviney argues that this trigger “is still too accommodating”. This is because it continues to provide an excuse for those killings which occur in response to anger, and in turn the stereotypical male response to such situations. For a more detailed analysis, see Vincent Patrick McAviney “Should Anger Mitigate Murder? An Examination of the Doctrine of Loss of Control” (MJur Thesis, Durham University, 2011).

219 Fitz-Gibbon, above n 197, at 292.

220 At 295–296.

221 At 295–296.

222 At 294.

223 At 294.

is the greater concern that the defence will perpetuate gender bias and discriminatory narratives against women.

#### B *Partial defence of excessive self-defence*

Alternatively, New Zealand could adopt the partial defence of excessive self-defence. However, since the defence of self-defence is a full defence, it would be preferable if the Government first reformed the conventional form of self-defence to better accommodate the interests of battered women and victims of domestic violence. The reforms should focus on creating a lower threshold for such interest groups to raise the defence.<sup>224</sup> For instance, the Law Commission recommended amending the defence's imminence test to better recognise those circumstances in which victims of abuse kill their perpetrator, even when the threat is not considered imminent.<sup>225</sup>

#### C *Partial defence of diminished responsibility*

The partial defence of diminished responsibility is another option New Zealand could pursue. It requires an abnormality of mental functioning that has impaired the defendant's capacity to analyse the situation and exercise self-control.<sup>226</sup> The major concern with this defence is that it stereotypes victims of domestic abuse.<sup>227</sup> For example, in the case of battered women, it would attribute the killing of their abusive partner to a psychological abnormality, rather than a desperate attempt to escape the cycle of abuse.<sup>228</sup>

#### D *Reintroducing a revised partial defence of provocation*

Reintroducing the partial defence of provocation is advisable, albeit with reforms to overcome the inherent gender bias and other pitfalls of the original iteration. While the use of the partial defence of loss of control in England and Wales has made positive developments—for instance, in its inclusion of the fear of serious violence as a qualifying trigger—it appears to be, in certain respects, a rehashed version of the provocation defence. It would therefore be better for Parliament to directly address the flaws inherent in the provocation defence, rather than introduce new defences that only partially tackle these issues. In line with the Australian states—in particular, New South Wales—New Zealand could restrict the provocation defence to situations where the deceased's conduct constituted a "serious indictable offence".<sup>229</sup> Similarly, it would be helpful to define certain

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224 Sam Sachdeva "Family violence victims who kill abusers should have self-defence claim: Law Commission" *Stuff* (online ed, New Zealand, 12 May 2016).

225 The New Zealand Law Commission recognised that self-defence requires the judge and jury to focus on the imminent threat arising from a discrete incident. This focus is "difficult to reconcile with contemporary understandings of family violence" where "[t]actics of coercion and control can mean there is a constant and ongoing threat." Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, May 2016) at [25].

226 Victoria Rea "A Critique of the New Zealand Law Commission's Decision to Not Introduce a Partial Defence for Victims of Family Violence Who Commit Homicide" (LLB (Hons) Dissertation, Victoria University of Wellington, 2016) at 15.

227 At 16.

228 At 15–16.

229 Crimes Act (NSW), s23(2)(b).

limits to the defence, such as exclusion for non-violent sexual advances, sudden provocation based on words alone, and situations where the accused incited conduct in the deceased so as to provide an excuse for violence consequently used against the deceased. The New Zealand Government could even take the approach of excluding sexual infidelity as a ground to raise the defence, along the lines taken in the United Kingdom's partial defence of loss of control. However, since sexual infidelity is difficult to define, that approach risks rendering the law difficult to apply, and may even work against the interests of battered women and victims of domestic abuse.

Furthermore, while the Family Violence Death Review Committee has called for the introduction of a partial defence for victims of family violence, the reintroduction of a more streamlined provocation defence would help protect *all* citizens.<sup>230</sup> Indeed, Professor Warren Brookbanks notes that the provocation defence's reduction of a murder charge to manslaughter provides for a "much broader [range of] sentencing options".<sup>231</sup> Instead, under the current system, "we've got a situation where you either have murder or nothing".<sup>232</sup> This position is problematic because for many regular members of society, if they were to witness a close attack on a third party and "respond in extreme passion" by killing the attacker, they would find themselves traversing a "bleak landscape" in their attempt to defend the homicide charge.<sup>233</sup> Of greater concern, it is likely the jury would enter a manslaughter charge out of compassion, thereby rendering the law uncertain. That is, it would be unclear whether the jurors are appropriately considering how the law should apply, or rather, whether they are incorporating their own subjective emotions as to how the law should be developed to bring justice to the case before them. In this sense, as Stephen Bonnar QC notes, there are many circumstances in which a provoked killer should not be labelled a murderer, and in which the provocation defence should be available.<sup>234</sup> While self-defence is available for those who use force to ward off an attack, the provocation defence serves a different purpose: that is, to aid the person who, in traumatic circumstances, loses control and causes a fatal injury.<sup>235</sup> Reintroducing the provocation defence would therefore help to address such situations, and alleviate the current "bleak[ness]" of our criminal law system.<sup>236</sup>

## VIII Conclusion: A Public Concern that Will Not Die

While there have long been concerns over the provocation defence, the media coverage of *Weatherston* triggered a moral panic among New Zealand society. The extensive coverage of such a brutal homicide on our television screens, in the newspapers and online meant New Zealanders could not escape a discussion over the defence's operation. Calls to repeal the defence were clearly an overreaction to what were two high-profile

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230 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, Wellington, 2014) at 103.

231 Sasha Borissenko "Issues Paper may awaken provocation debate" (12 November 2015) New Zealand Law Society <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

232 Borissenko, above n 231.

233 Borissenko, above n 231.

234 "Legal support for provocation defence" *Radio New Zealand* (online ed, New Zealand, 26 June 2014).

235 Borissenko, above n 231.

236 Borissenko, above n 231.

cases: *Weatherston* and *Ambach*. The underlying and perhaps unacknowledged reason behind the call for repeal was that the defence was a “perceived threat” to the operation of New Zealand’s judicial and criminal law systems.<sup>237</sup>

While the legacy of the Crimes (Provocation Repeal) Amendment Act may not be a positive one, it is significant in revealing the extent to which our legislature is subject to moral panic and influence from the media. Indeed, although the legislature considered repealing or at least reforming the provocation defence prior to Clayton’s trial, it was the media who brought such concerns “in[to] the limelight”.<sup>238</sup> The media was active in not only setting New Zealand’s political agenda, but also in making politicians react to this agenda. This influence was evident in the legislature’s hasty enactment of the Crimes (Provocation Repeal) Amendment Act. Parliament failed to step back to analyse the moral panic that arose over the defence’s operation. Instead, it enacted “knee-jerk” legislation that failed to adequately consider the implications of a complete repeal of the provocation defence, effectively leaving a hole in our legal system.<sup>239</sup> One important ongoing repercussion is that vulnerable persons who kill due to domestic abuse are not afforded the protection they deserve. Since the Crimes (Provocation Repeal) Amendment Act has failed to adequately address the defects inherent in the provocation defence, it is only a matter of time before Parliament will need to readdress the issue.

To conclude, while New Zealand could introduce other partial defences to murder—such as the partial defences of loss of control, excessive self-defence or diminished responsibility—it would be more effective to address the particular drawbacks of the provocation defence. This article has shown how there is still a need for the defence to protect members of society who, in a traumatic situation, lose self-control and use fatal force.<sup>240</sup> Although the defence has typically worked against the interests of battered women, victims of domestic abuse and members of the LGBTI community, the reforms in New South Wales and Queensland demonstrate how the defence can be limited to protect such groups while also serving the general interests of the community. Accordingly, this article argues that the provocation defence should be reintroduced on the condition that it excludes non-violent sexual advances and provocation based solely on words as grounds to raise the defence. Similarly, the defence should exclude circumstances where the accused incited the conduct in the deceased so as to justify the consequent use of violence against the deceased. Finally, the defence should, as is the case in New South Wales, only be raised where the conduct of the deceased constitutes “a serious indictable offence”.<sup>241</sup> If the New Zealand Parliament were to enact such a law change, the provocation defence would be able to better serve the interests of vulnerable New Zealand citizens and, in turn, society as a whole.

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237 Krinsky, above n 34, at 1.

238 Cohen, above n 35, at 1.

239 “Provocation defence repeal ‘knee-jerk reaction’”, above n 7.

240 Borissenko, above n 231.

241 Crimes Act (NSW), s 23(2)(b).