

# **Crimes (Provocation Repeal) Amendment Bill**

Government Bill

As reported from the Justice and Electoral  
Committee

## **Commentary**

### **Recommendation**

The Justice and Electoral Committee has examined the Crimes (Provocation Repeal) Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

This bill as introduced proposes to abolish the partial defence of provocation, by repealing sections 169 and 170 of the Crimes Act 1961. Section 169 of the Crimes Act provides that culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation as defined by the section; section 170 provides that an illegal arrest does not necessarily reduce the offence of murder to manslaughter, but if the offender knows of the illegality then it may be evidence of provocation.

### **Partial defence of provocation abolished**

We note that the codification of the partial defence of provocation was a reflection of the existing common law partial defence. For the avoidance of doubt, we recommend inserting new clause 5 to make it clear that the common law partial defence would also be abolished by the bill. This would avoid the possibility of defence counsel relying on the defence, so far as it has any effect as a principle of the common law of New Zealand, in cases of culpable homicide.

### **Issues raised in submissions**

Although we do not recommend amendments as a result of submissions we received on the bill, we considered it would be useful to discuss some of the issues that were raised.

### **Considering matters of provocation at sentencing**

We heard suggestions that considerations of provocation should be taken into account when a defendant is being sentenced. The bill does not propose amending the Sentencing Act 2002 to expressly allow provocation to be considered as a mitigating factor at sentence. However, we note that this would not prevent the sentencing judge from using his or her discretion under section 102 of the Sentencing Act to take into account the existence and degree of provocation-related considerations, together with any other relevant aggravating or mitigating factors, to determine whether a sentence of life imprisonment would be “manifestly unjust” for an offender convicted of murder. We acknowledge that there might be extreme instances where it would be justifiable for a sentence less than life imprisonment to be imposed by the sentencing judge.

While we consider that the term “manifestly unjust” is a high threshold, we are confident that the term is flexible enough to capture appropriate cases in which provocation-related factors are present. Following the abolition of the partial defence, we would expect the courts, over time, to develop judicial guidance as to how such factors should be taken into account when determining whether a sentence of life imprisonment would be manifestly unjust for an offender convicted of murder.

**Battered and mentally ill or impaired defendants**

Proponents of the statutory partial defence of provocation have suggested that abolishing it might unfairly prejudice certain groups of defendants, such as “battered” or mentally ill or impaired defendants, whom society would rather see convicted of manslaughter than murder. The Law Commission in its report *The Partial Defence of Provocation*,<sup>1</sup> reviewed all homicide cases in the Auckland and Wellington areas from 2001 to 2005, and found that in only one of the 15 cases in which the partial defence was relied upon was it successfully proven by a battered defendant. We agree that such defendants would not be unduly disadvantaged by the abolition of the defence. We consider that for the majority of such defendants it would be more appropriate for them to rely on self-defence, which would result in an acquittal rather than a manslaughter conviction.

We further note that as the partial defence requires a defendant to have the power of self-control of an ordinary person, mentally impaired defendants would generally be precluded from relying upon it. Therefore abolishing the statutory partial defence of provocation would not adversely affect mentally impaired defendants.

**Defence of diminished responsibility**

We heard suggestions that the defence of diminished responsibility should be considered as an alternative to the partial defence of provocation. This defence would reduce a defendant’s liability from murder to manslaughter if the defendant were found to have been suffering mental incapacity short of total impairment.

We note that the Law Commission in its report *Some Criminal Defences with Particular Reference to Battered Defendants*<sup>2</sup> concluded that the concept of diminished responsibility is difficult to define, and found that there has been difficulty applying the English defence of diminished responsibility. In our view the flexibility provided by section 9 of the Sentencing Act, which allows the court to take into account an offender’s limited intellectual capacity or understanding, weakens the rationale for introducing such a defence.

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<sup>1</sup> Law Commission, *The Partial Defence of Provocation*, NZLC Report 98, 2007.

<sup>2</sup> Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, NZC Report 73, 2001.

## **Appendix**

### **Committee process**

The Crimes (Provocation Repeal) Amendment Bill was referred to us on 18 August 2009. The closing date for submissions was 31 August 2009. We received and considered 14 submissions from interested groups and individuals. We heard four submissions.

We received advice from the Ministry of Justice.

### **Committee membership**

Chester Borrows (Chairperson)

Jacinda Ardern

Kanwaljit Singh Bakshi

Simon Bridges

Dr Kennedy Graham

Hon Nathan Guy

Hon David Parker

Lynne Pillay

Paul Quinn

(Kevin Hague was a non-voting member for this item of business)

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

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*Hon Simon Power*

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### **The Parliament of New Zealand enacts as follows:**

- 1 Title**  
This Act is the Crimes (Provocation Repeal) Amendment Act **2009**.
- 2 Commencement**  
This Act comes into force on the day after the date on which it receives the Royal assent. 5
- 3 Principal Act amended**  
This Act amends the Crimes Act 1961.
- 4 Sections 169 and 170 repealed**  
Sections 169 and 170 are repealed. 10

**5 Partial defence of provocation abolished**

The partial defence of provocation in cases of culpable homicide, in so far as it has any effect as a rule or principle of common law in New Zealand, is abolished.

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**Legislative history**

4 August 2009  
18 August 2009

Introduction (Bill 64–2)  
First reading and referral to Justice and Electoral  
Committee

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