

Crimes (Abolition of Defence of Provocation) Amendment Bill

Member's Bill

Explanatory note

General policy statement

The bill amends the Crimes Act 1961, removing the partial defence of provocation found in sections 58, 169 and 170 in accordance with a recent recommendation of the Law Commission.

The partial defence of provocation is an anachronistic relic of New Zealand's legal past. It is superfluous to New Zealand's current criminal legislative framework. Issues of provocation can now be sufficiently dealt with as mitigating factors in sentencing—found in section 9(2)(c) of the Sentencing Act 2002—without creating a deficit of justice.

The Law Commission report, *The Partial Defence of Provocation* (NZLC R98) released in October 2007 recommended that the provocation defence contained in section 169 of the Crimes Act 1961 be repealed.

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

The report explains why the problems with the partial defence are such that they cannot be overcome by redrafting it. In particular, the Commission did not believe that the policy basis for the defence was sound.

The Law Commission reported earlier on this issue in 2001, and recommended repeal then. In 2004, the Government asked the Commission to consider several further matters (including the implications of repeal for battered women, and people who were mentally ill or impaired) and the 2007 report was the result of that additional work. It found that provocation is successfully relied upon by very few such defendants. Instead, Crown prosecution files showed that during a five-year period, provocation was successfully relied upon in only four out of 81 murder cases.

The Law Commission identified that the defence is overwhelmingly used by men and often used in situations where they say their sexuality has been threatened—when their partner has left them for another man, or they are propositioned by another man. The evidence as to what allegedly incited this homicidal loss of self-control is entirely in the hands of the person who has silenced forever the only other witness to the events.

Partial defences are only available in homicide cases. They apply in circumstances that, but for the defence, would constitute murder and result in the lesser conviction for manslaughter. Historically, the rationale for this was to avoid the mandatory sentence for murder (formerly capital punishment, and subsequently life imprisonment) in cases with mitigating circumstances. Most of the countries that retain the defence still have mandatory life sentences for murder.

The repeal does not exclude anyone convicted of murder from recognition of any relevant mitigating circumstances. That can occur on sentence. With the life sentence no longer being mandatory for murder in New Zealand (Sentencing Act 2002), sentencing judges have discretion to impose a finite sentence.

The existence of the partial defence has been described as “a blot on the criminal law” and it is time that it is removed.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause and provides that the bill comes into force on the day after the date on which it receives the Royal assent.

Clause 3 amends the Crimes Act 1961.

Clause 4 repeals section 169 which provides a defence of provocation to a charge of murder which when made out reduces the charge to manslaughter, and section 170 which provides that an illegal arrest may be evidence of provocation.

Hon Lianne Dalziel

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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Crimes (Abolition of Defence of Provocation) 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**
(1) Section 169 is repealed (which relates to the defence of provocation). 10

- (2) Section 170 is repealed (which provides that an illegal arrest may be evidence of provocation).
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