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Crimes (Abolition of Defence of Provocation) Amendment Bill 2009 (*Members Bill - Lianne Dalziel*)

Date of Introduction:	30 July 2009
Member:	Hon Lianne Dalziel
Select Committee:	As at 03 August, 1st Reading not held.
Published: 04 August 2009 Prepared by John McSoriley BA LL.B, Barrister Legislative Analyst P: (04) 471-9626 (Ext. 9626) F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The aim of the Bill is to amend the Crimes Act 1961 (the Act) to remove the partial defence of provocation.

Background

The defence of provocation

In its report on the partial defence of provocation¹ the Law Commission described the partial defence of provocation:

¹ ["The Partial Defence of Provocation", Law Commission Report 98 \(NZLC R98\)](#), New Zealand Law Commission, Wellington, 2007, Summary pp. 9-13.

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

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

169 Provocation

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

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

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

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

Judicial interpretation of Section 169

The Law Commission pointed out that the use of the word "sufficient" ("the sufficiency test") in Section 169(2)(a) is the "most troublesome" aspect of the provocation defence.

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

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

"In England, the equivalent legislation has been considered by the House of Lords or the Privy Council on five occasions between 1978 and 2005, and numerous times by the English Court of Appeal. In *R v Smith (Morgan)* [2001] 1 AC 146; [2000] 4 All ER 289 (HL), the House of Lords divided 3:2 in favour of the second approach (i.e. the approach that had been preferred by the Rongonui minority). However, only a few years later, the Privy Council in *Attorney-General for Jersey v Holley* [2005] UKPC 23 (PC) divided 6:3 in the opposite direction, preferring the first approach (the approach of the

Rongonui majority). Like the majority judges in Rongonui, Lord Nicholls writing for the majority in Holley expressed views to the effect that the law is unsatisfactory and beyond rescue by the courts.

"The present position of the English Court of Appeal is that Holley – somewhat unconventionally, given its status as a Privy Council decision pertaining to Jersey – should be taken as the leading authority for the purposes of English law. At present, therefore, the English and New Zealand appellate courts are aligned in their approach to provocation, as is the High Court of Australia. However, historically, provocation has caused considerable and continual difficulty in the courts. The extraordinary number and frequency of appellate decisions, and the lack of consensus apparent in them, illustrates the fraught nature of the defence. History demonstrates that the law is susceptible to change as appellate benches change, and ongoing pressure for change can be expected in New Zealand, because there is considerable dissatisfaction with the present state of the law. One problem is that New Zealand lacks the “companion” defence of diminished responsibility that has done much to persuade English academics and judges that self-control can justly be objectively assessed”.

The need for reform

The Law Commission has the view that “... the volatile nature of the case law clearly indicates a need for either repeal or reform. Not only is it volatile; its practical application is also difficult. As a matter of legal theory, the approach articulated by Tipping J for the majority in Rongonui is impeccably expressed. Nonetheless, we consider that it is debatable whether, in practice, juries are able to apply it. In our view, appellate courts and juries have struggled (and continue to struggle) to come to grips with the provocation defence for one very simple reason: the defence is irretrievably flawed. Some of the flaws are such that the defence does not in fact fulfil its policy purposes,”

"First, it purports to be a partial excuse, but arguably does not give effect to the spirit of excuse philosophy (recognition of human frailty), because defendants who through no fault of their own are unable to demonstrate an ordinary facility for self-control are excluded from the scope of the defence.

"Secondly, it envisages a “bifurcation” between a defendant’s perceptions of heightened provocation gravity, which may be affected by particular characteristics, and their capacity for ordinary self-control, which must be wholly objectively assessed.

"Thirdly, it assumes that there is in fact such a phenomenon as a loss of self-control.

"Fourthly, if the phenomenon of loss of self-control exists, it further assumes that the ordinary person, faced with a severely grave provocation, will in consequence resort to homicidal violence, when in fact it is arguable that only the most extraordinary person does this.

"And finally, the tensions that can be observed in the legal development of the provocation defence can arguably be seen as a response to liberal motives – that is, a desire to meaningfully recognise increasing social diversity. However, in its practical application, we would suggest that the provocation defence backfires in this regard, because of the stereotypical effect of requiring defendants to define their characteristics, and the defence’s bias in favour of the interests of heterosexual men”.

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

"Set against all of the problems identified with the partial defence of provocation, and notwithstanding the abolition of the mandatory life sentence in New Zealand, there are said to be some sound reasons to retain it". ... "The same reasons surface repeatedly, throughout the literature and other forums from which we have sought feedback. They are, first, that it would be fundamentally wrong in principle for the criminal law to fail to tangibly recognise a degree of culpability short of murder, and the provocation defence is a desirable mechanism for achieving this. Secondly, a majority of jurisdictions with which New Zealand typically compares itself still offer a provocation defence. And thirdly, practical problems are thought to be likely to arise when attempting to address provocation at the sentencing stage. It is certainly true that the majority of our fellow jurisdictions still retain a defence of provocation, but the majority of them also still have a mandatory life sentence for murder. While the abolition of provocation does not follow automatically from that change (the partial defence has been retained in the Australian Capital Territory and New South Wales, notwithstanding the abolition of the mandatory sentence in both of those states), the weight of opinion in Commonwealth jurisdictions that, like New Zealand, have discretionary sentencing for murder is quite different. Arguments relating to a majority of jurisdictions retaining a partial defence of provocation are misconceived: the appropriate comparator is jurisdictions that have abolished the mandatory sentence for murder.

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

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

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

The recommendation of the Law Commission to abolish the partial defence of provocation

"Given the level of support that we identified for partial defences as a mechanism for recognising reduced culpability, we considered the merits of the various ways in which this might be achieved.

The options are: a redrafted partial defence of provocation; a smorgasbord of partial defences; a generic partial defence; degrees of murder; and culpable homicide".

"Ultimately, we do not consider any of them viable, and consequently do not recommend any of them; our preferred option is instead for judges to deal with provocation issues on sentence, aided by a sentencing guideline.

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

"There are some issues around sentencing that will need to be considered and addressed if section 169 is repealed and provocation removed to the sentencing arena".. "Sentencing guidelines may assist in this regard".

Main Provision

Repeal of partial defence of provocation

The provision of the Crimes Act 1961 which provides for the partial defence of provocation and the provision which provides that an illegal arrest may be evidence of provocation are repealed (*Clause 4, repealing Sections 169 and 170 of the Crimes Act 1961*).

Comment

Section 170 of the Crimes Act 1961 (which is headed; "Illegal arrest may be evidence of provocation") provides: "... an illegal arrest shall not necessarily reduce the offence from murder to manslaughter; but if the illegality was known to the offender it may be evidence of provocation".

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