

# New Zealand Law Society

## Submission on Crimes (Provocation Repeal) Amendment Bill

1. The Society's Criminal Law Committee has many times discussed whether or not the defence of provocation should remain, particularly in relation to the Law Commission discussion document and report on the topic.
2. The Law Commission's recommendation to abolish the partial defence of provocation without introducing alternatives was in the context of its proposals for a Sentencing Council and sentencing guidelines, which are now not continuing.
3. Provocation as a defence is problematic, in that it is not easy to explain or for a jury to understand.
4. The Criminal Law Committee has been, and continues to be of the view that the defence of provocation should be retained pending the development of other forms of defence.
5. The committee's position is based on four grounds:
  - the labelling of people as murderers who have been subject to provocation is not always appropriate;
  - the determination of whether there was sufficient provocation to reduce the charge to manslaughter requires the input of the community as a whole rather than just that of the sentencing judge;
  - the committee is not convinced that sentencing guideline cases would enable finite sentences to be imposed for murder which would reflect a lesser culpability;
  - if the partial defence were to be abolished, juries might convict on the alternative charge of manslaughter based on their sympathy for the defendant rather than on rational grounds.
6. Other forms of defence could include, for example, diminished responsibility or degrees of murder.

7. **Attached** for the information of the select committee is a letter dated 20 December 2004 to Dr Warren Young, Law Commission, (with attachment) setting out the position of the Society's Criminal Law Committee.

John Marshall QC  
President  
31.8.09



# New Zealand Law Society

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20 December 2004

Dr Warren Young  
Law Commission  
DX SP23534  
WELLINGTON

By email: [wyoung@lawcom.govt.nz](mailto:wyoung@lawcom.govt.nz)

Dear Warren

## Provocation

You requested the Society's Criminal Law Committee to advise the Commission of the Society's position on the abolition or otherwise of provocation and, were abolition to occur, any corresponding amendment to the Sentencing Act 2002.

As you know, the Committee took the opportunity to raise the issue at the recent Criminal Law Symposium. I note that you were present at that discussion. The general tenor of that discussion, and indeed the general view of the Society, is that the partial defence of provocation should remain. The Society is opposed to abolition.

I note your argument that the defence creates an anomaly by allowing certain mitigating factors, and not others, to address the charge rather than the sentence. The committee believes that this anomaly of itself is not a good reason for repeal. In the experience of many practitioners, provocation by the victim is often the central causative factor in homicide cases. Most intentional killings arise because the deceased has angered his or her killer in some way. Killing for other reasons, or for no reason at all, is not common. Thus, singling out provocation is perhaps not as anomalous as it may appear.

The committee considers that there is still value in having the input of a jury for our most serious crime. The input of juries into a charge is still relevant in other matters; for example the differentiation between robbery and theft where one is an included verdict of the other. As one attendee at the Symposium pointed out, were provocation to be removed, juries might find other, perhaps arbitrary, ways to lessen the culpability of an accused. If a route cannot be found to reduce murder to manslaughter the result might be a greater incidence of hung juries, or acquittals. I **attach** a letter from my colleague Aaron Perkins, which summarises these practical considerations well.

Were evidence of provocation to become relevant only to the mitigation of a sentence, the same argument between Crown and defence would be necessary, but this would be before a judge, rather than a jury. It is clear that the majority of lawyers feel strongly that the role of juries should be retained, and not diminished. Further, as Judith Ablett Kerr QC pointed out, mitigation of sentence for a murder conviction has a different effect to that of conviction for a lesser charge. Although a life sentence is no longer mandatory for murder, it should be the norm. The alternative is to diminish the significance of the crime of murder.

I make one final point. The Criminal Law Committee has, in the past, argued strongly for the introduction of a defence of diminished responsibility. Consideration of this does not appear to be a priority, and I

apprehend that there is no political imperative for this. However, it seems that the absence of such a defence has been a possible factor in recent judicial interpretations of provocation, and the committee feels that the partial defence of provocation must remain, until diminished responsibility of some kind is introduced. New Zealand would be almost unique in the western world to have neither defence available.

Please feel free to contact me at any time to discuss the above matters further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morgan', written in a cursive style.

Philip Morgan QC  
**Convener, Criminal Law Committee**

14 December 2004

Philip J Morgan QC  
P O Box 19021  
HAMILTON

Dear Sir

### **PROVOCATION - CRIMINAL LAW COMMITTEE**

I attended the Criminal Law Symposium on 26 November and enjoyed the brief lunchtime discussion regarding provocation. I had intended contributing but thought that I might monopolise the session given the limited time available and the number of comments I had in mind to make.

Perhaps you might like to add the following observations (of someone who operates at the "coalface") into the no doubt considerable volume of material you already have on this issue.

#### Practical consequences of abolishing provocation

As I understand the theory, in the absence of the defence of provocation, the jury would find the accused guilty of murder rather than manslaughter and it would be for the trial Judge (who cannot know what view the jury may have formed as to what, if any, provocation was in fact involved) to reflect the deceased's provocative behaviour in the sentence to be imposed. This of course presupposes that the jury plays its part!

I believe it is naive to think that juries will find an accused who was the subject of significant provocation (of the sort/degree that would currently result in a manslaughter conviction) guilty of murder. They won't. If juries do not have Section 169 as a route to find manslaughter, they will try to find their own route (perhaps by "finding" a lack of murderous intent). If they cannot find a route, there will be a hung jury or possibly, an unwarranted acquittal. The process will become less rather than more pure. If a jury were to find manslaughter for inappropriate reasons the trial Judge will nonetheless need to assume it was for a legitimate reason and sentence on the basis of a lack of murderous intent. The Judge would also need to factor in the provocation (effectively for a second time) as the verdict could not be regarded as having done so. Further, a juror reading in the media of the reasons for the sentence imposed may find that the Judge accepted provocation that had been soundly rejected by the jury or, had rejected provocation that the jury had accepted and possibly felt quite passionate about.

Most jurors, I suggest, think of murder as a most serious matter resulting in a correspondingly serious sentence. Most would know that a sentence of life imprisonment is the norm albeit they appreciate this does not normally mean imprisonment for life. They are likely to be aware of the now much tougher sentencing regime for murder and would read of minimum non parole periods in the teens or higher. Even if, at some point, it became common knowledge that a finding of murder did not necessarily involve a sentence of life imprisonment, many jurors would not be prepared to take the risk of such a sentence if they felt that the accused was driven to lethal force by the conduct of the deceased. There is little or no prospect that 12 jurors will all agree, in such

circumstances, to find murder on the assumption that the trial Judge will view the facts in the same way they do and will therefore accord leniency in sentencing.

I listened with interest to Judith Ablett Kerr's primary objection to the proposal – it would demean/diminish murder in the eyes of the public. The merit in her point may be inversely proportionate to the merit (if any) in my point. If I am right, then those cases that Judith is concerned about will not result in murder verdicts.

### Is there a need for reform?

As you are no doubt aware, both the *Select Committee of the House of Lords on Murder and Life Imprisonment* and the *Criminal Law Revision Committee of England and Wales* recommended that provocation be retained. The four Australian states that now have a sentencing discretion for murder also retain a provocation defence. I contend that Professor Young's principal argument for reform – that provocation is singled out for special treatment as a defence against murder when other possible mitigating factors are not – is not a good enough reason for New Zealand to go out on a limb when regard is had to the risks involved.

Further, provocation by a deceased is so often the central potential mitigating factor that it warrants "special treatment". Most intentional killings arise because the deceased has angered his/her killer in some way. Killing for no, or some other reason is not common. Whether and to what extent the deceased has contributed to his/her own demise by provoking the killer will always be at the heart of a significant proportion of cases so far as a jury is concerned. In any event, Section 102 to 104 Sentencing Act 2002 may have application where other mitigating factors are of sufficient importance to warrant being reflected in the sentence; Section 102 enables a sentence other than life imprisonment while the mitigation may affect the length of any minimum non-parole period under Section 103.

No-one disputes that Section 169 is a complex provision but juries are assumed to cope with other complex provisions (e.g. Section 66(2), Section 48 – which also involves both a subjective and objective test, some fraud provisions). If it is assumed that some juries do not fully understand the directions they receive on provocation, they surely do appreciate as a minimum that, provocative conduct by the deceased may warrant a reduction in the charge, not all such conduct will qualify and that it is for the Crown to satisfy them that a reduction should not be made. The jury is well positioned to determine the relevant facts and to make an assessment of the accused's culpability vis-à-vis the behaviour of the deceased.

I suggest that the current standard judicial direction on provocation could be more helpful in providing the desired level of jury understanding of Section 169. I recall Judges (long since retired) who were less inclined to be shackled by the standard direction and made the provision more "user friendly". In any event, counsel have a role to play in educating the jury and an experienced prosecutor/defence counsel can supplement the judicial directions. I believe juries are well capable of achieving the required level of understanding of the provision if it is fully and carefully explained. I am firmly of this view where the case does not call for the ordinary person to be modified. I accept Section 169 is a more difficult concept if modification is required. In any event, juries are better placed than was once the case; they now routinely receive a copy of the provision but more importantly, a detailed *Question Trail* which (even if they didn't fully understand the provision) helps to ensure they address each of the issues that arise with provocation.

While concerns about the complexity of the provision are understandable, the essential question is whether Section 169 is serving a useful social purpose and is being applied by juries in a consistent manner. I contend that the answer to both questions is, yes. In my experience, juries

are remarkably consistent. Looking objectively at the behaviour of a deceased, I find that jury verdicts are quite predictable. This suggests to me that provocation is working well.

In 2001, (i.e. prior to s102 Sentencing Act) Simon Moore (Auckland Crown Solicitor) made a written submission to the Law Commission on the issue of disputed facts on sentencing. Included in his submission were his views on why provocation should be retained:

- (a) *It would be undesirable to lose community input into the assessment of provocation. Despite the legal complexity of the current legal test, juries appear quite capable of applying the test sensibly to the facts. The matter at issue (whether particular conduct would have caused someone with an ordinary power of self control to lose control) is an archetypal jury issue, and it would be unfortunate to take that assessment away from a jury of ordinary citizens.*
- (b) *An advantage of the present system is that all matters by way of defence must be advanced by the accused in a single forum before a single tribunal of fact. If the accused were provided two opportunities to advance such matters, this could allow or indeed encourage tactical use of the "second bite at the cherry". An additional risk is that an accused might present a different, even wholly inconsistent, version of events at the sentencing hearing.*
- (c) *There is a risk that the test might be seen to be applied inconsistently by different judges. Under the present system twelve members of the public must agree, which provides an element of moderation and consistency. This provides a natural buffer against the perception of inconsistency.*
- (d) *Although the facility to impose a lesser sentence for murder appears at first blush to cater to unusual or exceptional cases, the reality is that most murders are either domestic killings or semi-domestic killings where the parties are known to each other. Our experience suggests that there would be relatively few cases where the accused could not point to some matter of mitigation by way of alleged provocation or self-defence. It seems likely that making provocation an issue on sentencing would result in a very large number of disputed sentencing hearings. On a practical level the accused would have nothing to lose by attempting to raise issues of provocation at sentence, irrespective of the merits of such a claim.*
- (e) *Evidence as to provocative acts would likely still be called at trial, with the potential for some doubling-up at the sentencing hearing. In most cases alleged matters of provocation would no doubt be admissible evidence to establish the circumstances leading to the killing, with possible relevance to intent or self-defence.*
- (f) *The immediate family members of a deceased are often witnesses to the killing, or to the immediately surrounding circumstances. Requiring such people to give evidence a second time at a sentencing hearing is an unattractive prospect. Immediate family members are of course "victims" of the offence under the Victims of Offences Act 1987.*
- (g) *As to those cases where there are genuine matters of mitigation, the Parole Board is in our view the appropriate body to make informed decisions about early release.*

In summary, I contend that it would be a clear mistake to abolish provocation primarily because the theoretical advantages will not marry with the practical realities. This is an instance where those who make important decisions of this sort would do well to take on board the experiences of those operating at the "coalface". I note that Mr Moore and all Common Law Partners in this firm support my view.

Yours faithfully  
**MEREDITH CONNELL**

**Aaron Perkins**  
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