

Submission to the Justice and Electoral Select Committee

And Request to Appear before the Committee

Wellington Women Lawyers Association

Crimes (Provocation Repeal) Amendment Bill

Introduction

- 1 This submission is made by the Wellington Women Lawyers Association (WWLA), PO Box 118, Wellington. 04 384 4324.
- 2 WWLA has a membership of approximately 200 women lawyers who work throughout the Wellington region in both private practice and the public service. One of the objects of the WWLA is to work for the reform of the law and its administration, and for the advancement of social policy, in order to promote and protect the interests of women.
- 3 Please note that these submissions do not necessarily reflect the views of all members of WWLA or its committee.

Support for Repeal of the Provocation Defence

- 4 We support repeal of section 169 of the Crimes Act 1961, the partial defence of provocation against a charge of murder.
- 5 The provision was originally intended to reduce murder to manslaughter because the sentence of murder carried the death penalty. With the abolishment of the death penalty in New Zealand, we believe the defence remains without purpose.
- 6 The defence has, however, been used in New Zealand to reduce culpability in domestic violence homicides, lessening the defendant's responsibility as a "crime of passion" and it is also the basis for the "homosexual panic defence" when non-homosexual perpetrators perceive gay advances or the perceptions of advances as justifying violence.
- 7 In these circumstances, the threat the defendant perceives is not physical, supporting a valid self-defence argument, but of the sort of which the perpetrator's self-esteem or sense of entitlement is challenged.
- 8 We support the analysis by the Law Commission report recommending repeal that focuses squarely on the issue underlying the provocation defence:

“It seems to us that the fundamental problem in principle with the framing and indeed the existence, of the provocation defence is its assumption, in this day and age, that the ordinary person would ever be entitled to lose self-control, homicidally, in anger, and be called other than a murderer.”

The argument for abolition can ultimately be very simply stated: the infliction of such brutal violence on another person, in circumstances that do not found a defence of self-defence, is an extraordinary and inexcusable act, which an ordinary person would not commit.”

- 9 In recognition of this reasoning, WWLA supports the proposed repeal of the partial defence of provocation.

“The Battered Woman Defence”

- 10 Our specific focus has been on the implications of the proposal for victims of domestic violence. Our analysis of many of the comments we have read or listened to about the proposed repeal reveals the confusion which frequently occurs between self-defence and the provocation defence in domestic violence prosecutions.
- 11 Many advocates for battered women apparently mis-understand the “battered women’s defence” and believe that it is a separate defence in itself that will be eliminated should the provocation defence be repealed. The motivations and perceptions of a battered woman who is threatened with violence and uses violence to defend herself can be made more understandable to the jury through expert testimony on “battered woman syndrome” because her actions may be counter-intuitive to jurors who have not experienced domestic violence. Her failure to leave the abusive partner, the heightened awareness of benign events which are known to her to be actual threats, and even her flat narrative of horrific violence when testifying are all made more understandable through introduction of expert witness evidence. In addition, evidence specific to the facts of each case such as the failure of past attempts to achieve safety, lack of viable alternatives, or specific knowledge of the perpetrator’s actual propensity for violence may serve to explain her need or perception of need to use violence.
- 12 While we firmly believe that victims of domestic violence may be legally justified in the use of force to defend themselves (or others) to prevent harm, we are equally clear that these cases are entirely different from those acts of violence which seek protection under the currently available defence of provocation. We see this distinction as one between the perceived need to protect one’s sense of oneself or one’s identify against those who are forced to use violence to ensure their safety. This distinction, we believe, has lead some advocates for the rights of victims of domestic violence to oppose the repeal of the provocation defence.

- 13 The Law Commission Report's very considered analysis of the purpose and application of the law demonstrates that evidence of provocation would not be relevant to a case in which a battered woman alleged that she was forced to defend herself from further harm. This distinction, and the common confusion of the two concepts, is very important since the provocation defence, when successful, reduces the murder charge to one of manslaughter, while self defence is total because, when proven, leads to an acquittal on the grounds of self-defence.
- 14 We believe that victims of domestic violence will not be harmed, and in fact will benefit from, the repeal of the provocation defence. The experience in other nations, notably the United States, has shown that defendants charged with domestic violence crimes have claimed- sometimes successfully - that their partner's or wife's actions provoked them into using violence. These "provoking" actions included adultery, insulting their sexual abilities, or even simply by "nagging" the defendant.
- 15 We therefore respectfully offer our support for the repeal of the partial defence of provocation.