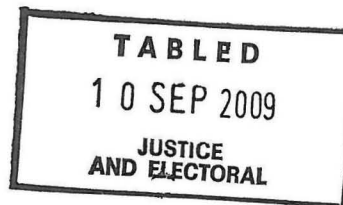
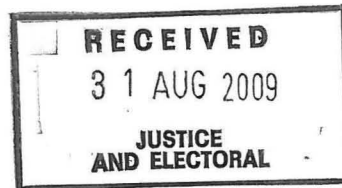


Human Rights
Commission
Te Kāhui Tika Tangata

31 August 2009

The Committee Secretariat
Justice and Electoral Committee
Parliament Buildings
WELLINGTON



Dear Chairperson

CRIMES (PROVOCATION REPEAL) AMENDMENT BILL

1. The New Zealand Human Rights Commission (Commission) welcomes the opportunity to comment on the Crimes (Provocation Repeal) Amendment Bill (Bill) which proposes to abolish the partial defence of provocation in the Crimes Act 1964 (Act).
2. The Commission supports the Bill and considers that the partial defence of provocation is flawed both in its design and in its application.

The design of the partial defence of provocation

3. The Commission acknowledges that at the heart of the defence of provocation is balancing conflicting sets of human rights: the right to life and the rights to justice and the right to a fair trial. The Commission further considers that the interests of victims' families are of particular relevance and endorses the consideration of these interests in the Bill.

4. International human rights treaties and domestic law recognise and affirm the right to life.¹ The United Nations Human Rights Committee has stated that the right to life is the supreme right of human beings; without it all other rights are without meaning.²
5. Correspondingly, international human rights treaties and domestic New Zealand law confer responsibilities on duty bearers such as the Government to protect the right to life. The State has a duty to protect human life against unwarranted actions. The duty of the State to protect this right includes securing the right to life by making effective provisions in criminal law to deter commission of offences against the person, and to establish law-enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law.³
6. Effective penalisation of breaches of criminal law necessarily includes the application of appropriate levels of culpability for killing with intent.
7. The State's duty to protect the right to life by providing and applying appropriate levels of culpability for killing with intent may only be diminished where it is demonstrably justifiable in a fair and democratic society.⁴
8. The assessment as to whether a prima facie limit on a right in the New Zealand Bill of Rights Act 1990 (BORA) is demonstrably justifiable in a fair and democratic society involves the identification of a legitimate government

¹ Article 6 of the International Covenant on Civil and Political Rights; s8 of the New Zealand Bill of Rights Act 1990.

² Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

³ European Court in various decisions, including *inter alia*, *McCann v. United Kingdom* (1995) 21 EHRR 97 and *Tanrikulu v. Turkey* (1999) 30 EHRR 950.

⁴ s5 New Zealand Bill of Rights Act 1990.

objective and an analysis of the reasonableness and proportionality of the Government's actions in seeking to attain that objective.⁵

9. The Commission recognises that appropriately punishing offenders taking into account the circumstances of the offending is an important objective for the fair and just operation of the criminal justice system.
10. As noted by the Law Commission in its report *The Partial Defence of Provocation*, 'historically, the rationale for this [partial defence] was to avoid the mandatory sentence for murder (formerly capital punishment, and subsequently life imprisonment) in cases with mitigating circumstances'. This rationale no longer applies as under the Sentencing Act 2002, a sentence of life imprisonment is no longer mandatory⁶.
11. The Commission agrees with the Law Commission that 'Provocation can be considered on sentencing in a broad, non-technical way that avoids the difficulties posed by the technicalities of the legal defence'.⁷
12. The regulatory impact statement to the Bill notes that 'concerns have been raised that the proposal to abolish the partial defence of provocation may unduly disadvantage particular groups such as battered defendants, or defendants who are mentally ill or impaired.'
13. However, in the Commission's view the partial defence of provocation is not appropriate for these types of cases. In the case of battered defendants' use of force, for example, the plain application of the self defence provisions in the Act would be more appropriate.

⁵ *R v Hansen* [2007] 3 NZLR

⁶ Where a sentence of life is imposed, a minimum period of 10 years imprisonment must be imposed (s104 Sentencing Act 2002).

⁷ Law Commission, *Some Criminal Defences with Particular reference to Battered Defendants*, 2001.

14. On this basis the Commission contends that the partial defence of provocation is not a justifiable limit on the State's duty to protect the right to life, and should be repealed. Principled human rights based sentencing which takes into account the circumstances of offending can be better achieved using other existing provisions in the Act and the Sentencing Act 2002, and appropriate sentencing guidelines .

The recent application of the partial defence of provocation

15. The partial defence of provocation does not provide for the equal protection of all New Zealanders under the law. Recently the defence has been capable of partially excusing killings arising from 'homophobic violence and institutionalised bigotry'.⁸ A hetero-normative masculinity interpretation has generally been a central component of the 'ordinary person' standard of the provocation defence. This has resulted in homosexual, bisexual and trans-gender individuals being discriminated against and having their right to equal protection under the law denied or compromised.
16. The Commission also notes that the partial defence of provocation is inconsistent with section 9(1)(h) of the Sentencing Act 2002, which provides:

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

⁸ *R v Ali & Nadan* (21 July 2004) HC AK CRI 2003-292-1224 Williams J; *R v Edwards* (16 September 2004) HC AK T2003-004-025591 Frater J.

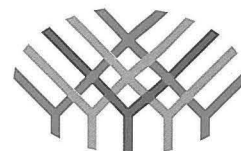
- (i) *the hostility is because of the common characteristic; and*
- (ii) *the offender believed that the victim has that characteristic*

- 17. If a killing based on an unwanted homosexual advance is the result of homophobia, then the defence of provocation should not be available and section 9(1)(h) should be relied on during the sentencing process.
- 18. Should you wish to discuss this further please do not hesitate to contact Michael White, Legal & Policy Analyst at the Commission (DDI 04 471 6752).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Joy Liddicoat', with a long horizontal flourish extending to the right.

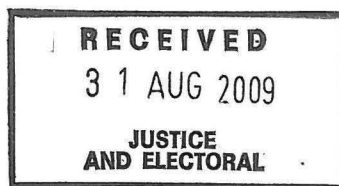
Joy Liddicoat
COMMISSIONER
Kaihautū



Human Rights
Commission
Te Kāhui Tika Tangata

31 August 2009

Justice and Electoral Committee
Parliament House
Wellington



Dear Committee Secretariat

CRIMES (PROVOCATION REPEAL) AMENDMENT BILL

Please find enclosed two copies of the Human Rights Commission's submission on the above Bill.

Yours sincerely

Michael White
POLICY AND LEGAL ANALYST

Encl.