



THE PARTIAL DEFENCE OF PROVOCATION

January 2010

The debate over whether the partial defence of provocation should be abolished has gained significant attention since the Clayton Weatherston trial with many commenting that the defence should be abolished.

The partial defence of provocation is predominantly set out in the Crimes Act 1961 and effectively reduces a charge of murder to manslaughter. For an accused to successfully argue provocation they must prove:

- that the provocation was sufficient to deprive a reasonable person of the power of self-control, and
- that the provocation did in fact deprive the accused of the power of self-control, thereby inducing them to commit the act of homicide.

Ultimately, provocation is a high test to satisfy and although it is often raised, few offenders are successful. Critics of the partial defence argue that it is an archaic and outdated notion about violence, effectively rewarding a lack of self-control in offenders who intentionally take another's life. Historically the rationale for the defence of provocation was to avoid a mandatory sentence for murder (originally capital punishment and later life imprisonment) in cases where the circumstances of the case may reduce the offender's sentence. However, life imprisonment for murder is no longer mandatory by virtue of the Sentencing Act 2002, which begs the question, is the defence of provocation still necessary?

Many argue that accusations of provocation can be dealt with by a judge during sentencing and have no place in the actual trial which determines guilt or innocence. Once an offender has been convicted, a sentencing hearing is held where any mitigating factors (such as provocation) can be submitted to the judge.

As was evident from the Weatherston trial, the defence provides the offender with an opportunity to attack and tarnish their victim's character, a traumatic experience for the victim's family and friends.

Parliament has already taken steps to remove the partial defence of provocation from the statute book. The Crimes (Provocation Repeal) Amendment Bill 2009, was introduced to Parliament in August and has passed its first reading. The Bill will effectively abolish the defence of provocation in New Zealand. There is no indication when or if the Bill will be passed into law, but it is clear that there is a lot of support from both Parliament and the general public for the change.

For more information, please contact one of our offices.

This article is provided for general information purposes only and not as legal advice.

