CRIMES AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Crimes Act 1961.

Clause 1 relates to the Short Title and commencement. The Bill is to come into force on 1 January 1981.

Clause 2 implements the report of the Criminal Law Reform Committee (in this note referred to as the Committee) on Self Defence, presented to the Minister of Justice in November 1979.

The present provisions are sections 48 to 51 of the principal Act. Section 48 sets out the circumstances in which a person is justified in using force to resist an unprovoked assault on himself; section 49 does the same in respect of provoked assaults; section 50 defines "provocation" for the purposes of the 2 preceding sections; and section 51 deals with the use of force in defence of a person under the user's protection.

The following criticisms of the present provisions are advanced in the Committee's report:

(a) They are complex, and involve trial judges in considerable difficulty in properly directing juries where a defence of self-defence is raised:

(b) They are particularly unsatisfactory, for the reasons stated in paragraph (a), in respect of provoked assaults, because of the difficulty that commonly arises in deciding who started the particular incident:

(c) They can lead to injustice in some cases of provoked assault where the provocation is slight, because force will not be justified under section 49 unless and until the user fears death or grievous bodily harm:

(d) They do not make it entirely clear whether the various "intentions" and "beliefs" of the accused are to be judged on an objective or a subjective basis:

(e) They do not justify force in the defence of other persons besides those under the user's protection (although section 41 of the principal Act does justify the use of force in the prevention of an offence likely to cause immediate and serious injury).

Accordingly, the Committee recommends the repeal of sections 48 to 51 of the principal Act, and their replacement by the provision set out in *subclause (1)* of this clause.

The Committee states its case for this proposal in this way (paragraph 20 of its report):

"Briefly, such a provision will require no abstruse legal thought and no set words or formula to explain it; and only commonsense is needed in the its understanding. The jury will decide the question of reasonableness in the

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light of the Judge's summing up of the evidence. In summing up, the Judge will no longer be faced with varying statutory tests and distinctions that are extremely difficult, if not impossible, to explain simply to a jury."

The principal features of the new provision may be summarised thus:

(a) It does not distinguish between provoked and unprovoked assault:

(b) It is not limited to self-defence and the defence of persons under protection, but extends to the defence of any other person:

(c) A subjective test is required to be applied in determining what the accused believed the circumstances to be, but an objective test is to be applied in assessing the reasonableness of the accused's response to the circumstances as he believed them to be.

The Committee suggested that, consequent upon the implementation of this amendment, it may be appropriate to consider the need to retain references to provocation in sections 52 to 54, and 56 to 58, relating to the defence of property, and peaceable entry.

Subclause (2) removes these references.

Subclause (3) provides that this clause does not apply in respect of acts committed before the commencement of this Bill.

Clause 3 provides for voir dire proceedings on questions of admissibility of evidence to be held at any time after an accused has been committed for trial but before the trial commences. At present, such matters can only be dealt with once the trial has commenced.

The proposed new *section 344A* of the principal Act is closely modelled on *clause 11A* of the Evidence Amendment Bill (presently before Parliament), as recommended by the Statutes Revision Committee.

Any Judge of the Court to which the accused is committed for trial may, after hearing the parties, make an order to the effect that the evidence is admissible.

The proposed *subsection (4)* preserves the right of the parties to seek the admission of any evidence during the trial, and the trial Judge's usual discretion to exclude evidence in appropriate cases.

Subclause (2) provides for appeals against the making of an order, or the refusal to make an order, under the new provision.

Subclauses (3) and (4) are consequential provisions.

Subclause (5) provides that the clause applies whether the person was committed for trial before or after the commencement of this Bill.

Clause 4 relates to cases where the consent of the Attorney-General is required to the bringing of criminal proceedings under section 400 of the principal Act.

The proper interpretation of subsection (1) is open to some doubt. The body of the subsection clearly contemplates the consent of the Attorney-General to the institution of proceedings. However, the proviso prescribes certain things that may be done, without the Attorney-General's consent, where a person has been "charged". The question, therefore, arises, how is a person "charged" before proceedings are "instituted"?

The amendments are designed to answer this question in 2 ways. First, the reference to the institution of proceedings is replaced by a reference to the laying of an information. Secondly, the word "alleged" is preferred to the word "charged". The effect is to make it clear that the Attorney-General's consent is required before the information is laid. This confirms the rule laid down in *R* v *Ostler and Christie* [1941] N.Z.L.R. 318.

Hon. Mr McLay

CRIMES AMENDMENT

ANALYSIS

A BILL INTITULED

An Act to amend the Crimes Act 1961

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Crimes Amendment Act 1980, and shall be read together with and deemed part of the Crimes Act 1961* (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the 1st day of January 1981.

2. Self-defence and defence of another—(1) The principal Act is hereby amended by repealing sections 48 to 51, and substituting the following section:

"48. Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

*R.S. Vol. 1, p. 635

(2) Sections 52 (2), 53 (2), 54 (2), 56 (2), 57 (2), and 57 (3) of the principal Act are hereby repealed.

(3) This section does not apply to any act done before the 1st day of January 1981.

3. New subheading and section inserted in principal Act— (1) The principal Act is hereby amended by inserting, after section 344, the following subheading and section:

"*Evidence*

"344A. **Interlocutory order relating to admissibility of evidence**—(1) Where any person is committed for trial and—

"(a) The prosecutor or the accused wishes to adduce any particular evidence at the trial; and

"(b) He believes that the admissibility of that evidence may be challenged,—

he may at any time before the trial apply to a Judge of the Court by or before which the indictment is to be tried for an order to the effect that the evidence is admissible.

"(2) The Judge shall give each party an opportunity to be heard in respect of the application before deciding whether or not to make the order.

"(3) The Judge may make an order under this section on such terms and subject to such conditions as he thinks fit.

"(4) Nothing in this section shall affect the right of the prosecutor or the accused to seek to adduce evidence that he claims is admissible during the trial, nor the discretion of the trial Judge to exclude the evidence in accordance with any rule of law."

(2) Section 379A of the principal Act (as inserted by section 8 (1) of the Crimes Amendment Act 1966) is hereby amended by inserting in subsection (1), after paragraph (a), the following paragraph:

"(aa) Against the making of an order under section 344A of this Act, or against the refusal of a Judge to make such an order:".

(3) Section 11A of the Evidence Amendment Act 1980 is hereby repealed.

(4) Section 16 of the Evidence Amendment Act 1980 is hereby amended by omitting the words "or any order made under section 11A of this Act".

(5) This section applies whether the person was committed for trial before or after the 1st day of January 1981.

4. Consent of Attorney-General to certain prosecutions—(1) Section 400 (1) of the principal Act is hereby amended—

(a) By omitting the words "Proceedings for the trial and punishment of", and substituting the words "No information shall, by virtue only of the provisions of this Act, be laid against":

(b) By omitting from paragraph (a), and also from paragraph (b), the words "charged with having", and substituting in each case the words "alleged to have":

(c) By omitting the words "shall not, by virtue only of the provisions of this Act, be instituted in any Court":

(d) By omitting from the proviso the words "charged with", and substituting the words "alleged to have committed":

(e) By omitting from the proviso the words "institution of a prosecution", and substituting the words "laying of an information".

(2) Section 314 of the principal Act is hereby amended by omitting the words "taking of the prosecution", and substituting the words "laying of an information".

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