

**CRIMES AMENDMENT (PROVOCATION) BILL 2014**

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**Second Reading**

**Mr BRAD HAZZARD** (Wakehurst—Attorney General, and Minister for Justice) [4.17 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Amendment (Provocation) Bill 2014. The Government adopts the private member's bill that was introduced by Reverend the Hon. Fred Nile in the other place on 5 March 2014. The bill makes significant amendments to the law of provocation, which is the partial defence to homicide set out in section 23 of the Crimes Act 1900. The bill represents the Government's response to the recommendations made by the Legislative Council's Select Committee on the Partial Defence of Provocation. The select committee was established in June 2012 following community concern at the result in the matter of Singh. The select committee consulted extensively with stakeholders during its inquiry and noted significant problems with the partial defence. In particular, the select committee was concerned by the use of the defence when a victim left, or attempted to leave, a domestic relationship, or otherwise changed the nature of the relationship. However, the select committee was unable to reach consensus on abolishing the partial defence so instead it made 11 recommendations, significantly limiting use of the partial defence, to which the Government gave in-principle support.

The Government was assisted in formulating the bill by a working group comprising the most senior criminal law experts in the State. The bill also takes into account stakeholder submissions received in response to an exposure draft bill. The Government consulted with the select committee on the final form of the bill and is satisfied that this bill constitutes the only workable means of achieving the intent of its central recommendations. The case to which the select committee was responding was that of Singh. In that case Mr Singh stood trial for murder after cutting his wife's throat several times with a box cutter. At trial Mr Singh claimed that his wife, Manpreet Kaur, provoked him by telling him, before threatening him with deportation, she had never loved him and was in love with someone else. Mr Singh claimed that as a result of this conduct, he lost self-control and should not be found guilty of murder but of the less serious offence of manslaughter. The jury agreed and Mr Singh was sentenced to a minimum term of six years imprisonment with a total term of eight years.

In order to acquit Mr Singh of murder, under the current test for provocation the jury needed to be satisfied there was a reasonable possibility that the conduct of Manpreet Kaur had caused Mr Singh to lose self-control and that her conduct was such that an ordinary person, in the position of Mr Singh, also could have so far lost self-control as to form the intention to either kill or seriously injure her. The rationale for the doctrine of provocation is that a person's moral culpability is reduced where they kill in these circumstances, such that a conviction for manslaughter rather than murder is warranted. The doctrine of provocation has been controversial, not least because of its perceived complexity.

The select committee consulted extensively. It received 52 written submissions and heard evidence from stakeholders, including the NSW Bar Association, the Law Society of New South Wales, the Women's Domestic Violence Court Advocacy Service, the Public Defender's Office, the Office of the Director of Public Prosecutions, Legal Aid NSW, the Victims of Crime Assistance League and several community legal centres. A slight majority of inquiry participants supported abolishing the partial defence. Critics noted cases in which the partial defence has been used by men who kill women in the context of intimate relationships. They argued the doctrine blames the victim and is biased against women because it privileges male reactions to conflict and insult. Those who supported retaining the partial defence argued that it remains important in allowing the law to distinguish between the moral culpability of people who kill in response to provocation and people who kill in other circumstances.

The select committee noted significant problems, particularly in the use of the defence where a victim left, or attempted to leave, a domestic relationship, or otherwise changed the nature of the relationship. The select committee considered the partial defence should generally not be available for provocation of this sort, which merely involves the victim exercising his or her right to personal autonomy. After careful consideration of the arguments in favour of abolition, the select committee unanimously recommended retaining, but significantly restricting, the partial defence. The select committee felt that the partial defence remained necessary, particularly for female victims of long-term domestic violence where the complete defence of self-defence might be difficult to establish. The select committee was concerned however to "raise the bar" on the level of provocation required and also to ensure that it could not be used in cases where the provocation claimed was infidelity, leaving a relationship or a non-violent sexual advance.

The report of the select committee was tabled in Parliament in April 2013. It contained 11 recommendations to which the Government gave in-principle support. The Government was assisted in its formulation of the bill by a working group, including the Director of Public Prosecutions, the Public Defender and the Department of Attorney General and Justice. The Department of Premier and Cabinet, Ministry for Police and Emergency Services, NSW Police and Women NSW were also represented. These members represented a range of views and experience and their input has been invaluable. An exposure draft bill was released for public consultation and submissions were received from stakeholders including the Law Society, the Bar Association, the Women's Legal Service, the Women's Electoral Lobby, Legal Aid, the Gay and Lesbian Rights Lobby, community legal centres and the Police Association of NSW. Many of the issues raised had previously been considered and the current bill takes the same form as the exposure draft. I thank all those people who contributed their time to such a complex and important issue.

After consultation with the select committee, the Government is satisfied that this bill constitutes the only workable means of achieving the intent of its central recommendations. Some stakeholders raised concerns that the bill goes too far in restricting the partial defence,

potentially making it difficult for women who kill their partners after long-term abuse to rely on provocation. However, the Government is satisfied that the bill strikes a careful and appropriate balance between restricting the defence and leaving it available for victims of extreme provocation, including victims of long-term abuse who kill their abuser.

I now turn to the main detail of the bill. Schedule 1 of the bill repeals section 23 in its entirety and replaces it with a new section 23. The bill renames the partial defence of provocation "the partial defence of extreme provocation". Proposed section 23 (2) then sets out the elements of the test for successfully raising the partial defence. Currently when considering the test in section 23 the jury enter into a two-stage test. The jury must first consider the gravity of the provocation to the accused personally, taking into account all of his or her personal characteristics. If the jury are satisfied that the accused in fact lost self-control, they must then consider whether it is possible that an "ordinary person", of the accused's age only, provoked to that level might have lost self-control so far as to have formed an intention to kill or inflict grievous bodily harm.

The select committee was concerned to tighten and reduce the complexity of this test. They suggested the use of words such as "gross", "justifiable", "seriously wronged" or "most extreme and exceptional" to describe certain aspects of the defence. The experts in the field were concerned that this terminology would be difficult to define and apply. The bill instead achieves the select committee's aims by setting out a four-stage test through which "extreme provocation" is established. The first threshold is set out in proposed section 23 (2) (a), which requires that the act causing death was in response to conduct towards or affecting the accused. Proposed section 23 (2) (b) requires that the "conduct" relied upon must amount to a serious indictable offence. A serious indictable offence is any offence which, when dealt with on indictment, carries a maximum penalty of five years or more imprisonment. The word "conduct" is not otherwise defined. This threshold ensures that the jury must be satisfied there is a reasonable possibility that the conduct of the deceased was behaviour that the community and Parliament have already determined is so serious that it attracts a significant criminal penalty. This reflects the view that, in contemporary society, there is an expectation that people otherwise faced with offensive, insulting or upsetting conduct should not contemplate homicide or inflicting really serious injury.

The requirement that the behaviour of the deceased amount to a serious indictable offence will also ensure that members of the community who are lawfully going about their business do not inadvertently "provoke" another person to form an intention to kill or seriously injure them. What this threshold also provides of course is that merely leaving a relationship or infidelity will never provide a foundation for the partial defence because every member of the community has the right to exercise his or her personal autonomy in this way. As a select committee member, the Hon. Trevor Khan, stated in the other place previously the problem with a list of excluded behaviour was that if the excluded conduct took place in the context of other provocative behaviour it would be highly artificial and difficult to exclude, for example, allegations of infidelity.

Despite this restriction, victims of domestic violence will be able to rely upon the partial defence in appropriate cases. Domestic violence, particularly long-term abuse, will generally involve conduct involving serious indictable offences, such as the range of assaults in the Crimes Act 1900. Even where abuse is not physical, but psychological, it may amount to the serious indictable offence of stalking or intimidation set out in section 13 of the Crimes (Domestic and Personal Violence) Act 2007. These offences are committed where the perpetrator's conduct is intended to cause the victim to fear physical or mental harm to themselves or another person with whom they have a domestic relationship. These offences are further defined in sections 7 and 8 of that Act to encompass a broad range of behaviours. As sections 7 and 8 make clear, they also envisage the introduction of evidence of past violent conduct, particularly where it involves a domestic violence offence. The concerns of stakeholders that victims of domestic violence may be prejudiced is also addressed by the continued recognition in proposed section 23 (4) that the conduct relied upon need not necessarily have occurred immediately before the act causing death.

Proposed section 23 (2) (c) sets out the third step in establishing provocation, namely that the conduct of the deceased caused the accused to lose self-control. The bill retains a loss of self-control as the partial defence's central element. Replacing this with the requirement that the accused felt a "justifiable sense of being seriously wronged", as recommended by the select committee, could significantly expand the use of the law of provocation, contrary to the committee's policy intent. In particular, if there was no requirement for loss of self-control, this could open up the use of the partial defence to situations involving a premeditated plan to kill. The partial defence should not be available in that situation. If satisfied the accused did lose self-control then the jury moves on to the final limb of the test in proposed section 23 (2) (d).

Proposed section 23 (2) (d) further tightens the test by requiring the jury to apply a purely objective test. They must consider whether the provocative conduct was so extreme that an ordinary person could have lost self-control to the extent of forming an intention to kill or inflict grievous bodily harm. The removal of the words in the existing section "in the position of the accused" will have the effect of removing the need for the jury to assume that the ordinary person has been provoked to the level that the accused was, because they will be determining whether an ordinary person could have been so far provoked as to have lost self-control and formed the requisite intent when faced with that conduct. This will simplify the jury's task and provide for a greater focus on ordinary community standards. Although the select committee did not propose this change, it is consistent with its intention to restrict the use of the partial defence, reduce its complexity and bring it into line with community standards. It is hoped that this focus will ensure that cases such as that of Singh, which caused justifiable outrage in the community, will be a thing of the past.

**By consent, discussion on a petition signed by 10,000 persons or more postponed to permit the conclusion of the Minister's second reading speech.**

**Mr BRAD HAZZARD:** Proposed section 23 (3) makes specific provision for conduct that

can never provide for the partial defence. Proposed section 23 (3) (a) specifically provides that a mere "non-violent sexual" advance may never amount to sufficient provocation. The term "non-violent sexual advance" is not a legal term and is not defined in the bill. It will be a matter of common sense for the jury whether they consider that the conduct complained of amounted to no more than that. In his dissenting judgement in the High Court case of Green, Justice Kirby, as he then was, used the term "non-violent sexual advance" and described such conduct as gentle and non-aggressive, even if they were persistent, sexual advances. On one view this exception will have little work to do. It will be a rare occasion when a non-violent sexual advance also constitutes a serious indictable offence. The bill reflects the select committee's clear intention that "advances", such as those in Green, should not give rise to the partial defence. Proposed section 23 (3) (b) would not, on the other hand, exclude, for example, sexual intercourse with a child. Although these offences do not require proof of lack of consent and may, in some instances, not be considered "violent", they are clearly more than advances.

I stress that the use of the partial defence requires, first, that the provocative conduct amount to a serious indictable offence; secondly that the accused lost self-control in response to it and; thirdly, that the behaviour constituting the serious indictable offence was so extreme that an ordinary person could also have lost self-control and formed the requisite intent. It is difficult to see how any non-violent sexual advance could satisfy these tests. However it is consistent with the select committee's policy intent that the bill clearly states that this alone is not sufficiently provocative. The exception is included for abundant caution and, as recommended by the select committee, sends a clear message that the partial defence does not extend so far.

New section 23 (3) (b) also excludes the use of the defence in situations where the accused has incited the provocative conduct in order to use violence in response. New section 23 (4) provides that conduct of the deceased may constitute extreme provocation even if it did not occur immediately before the act causing death. As mentioned previously, this will provide protection for victims of long-term abuse in slow burn situations and is consistent with the current section 23 (2) (b). New section 23 (5) ensures that the jury may no longer take into account self-induced intoxication. While self-induced intoxication is currently relevant only to the jury's consideration of whether the accused lost self-control, not whether an ordinary person would have, it is now completely irrelevant in all stages of the test.

The provisions of the bill address the select committee's policy concerns and intent. It is intended to deliver a limited and targeted partial defence. Some of the select committee's legislative recommendations were not adopted in the bill because the working group considered that they were not necessary and ran the risk of introducing new complications into the operation of the defence. A major criticism of the existing provision has been its complexity. It is the Government's intention to avoid that complexity. The select committee recommended that the Government introduce legislation in similar terms to Victoria's provisions providing that "social framework" evidence may be relevant in homicide cases involving domestic violence.

The select committee also recommended that the Government review evidentiary provisions that may enable evidence serving only to denigrate the deceased to be admitted. Relevant social framework evidence is already generally admissible under the Evidence Act and any provision of this sort would only confuse matters appropriately dealt with under that Act. Similarly, evidence serving only to denigrate the deceased would generally be irrelevant and inadmissible under the same Act so that, again, an explicit provision is unnecessary and undesirable.

The select committee also recommended that section 23 explicitly require that trial judges leave the partial defence to a jury only where there is reasonable evidence of it. Under common law only where there is reasonable evidence of partial and full defences must the trial judge explain the relevant law and direct the jury to consider it in reaching its verdict. To legislate this in relation to the partial defence of provocation alone would again serve only to complicate and confuse matters. I commend the bill to the House.

**Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.**