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Bill introduced, and read a first time and ordered to be printed on motion by Reverend the Hon. Fred Nile.

Second Reading

Reverend the Hon. FRED NILE [12.52 p.m.]: I move:

That this bill be now read a second time.

I am pleased to introduce the Crimes Amendment (Provocation) Bill 2014. The bill makes significant amendments to the law of provocation, the partial defence to homicide set out in section 23 of the Crimes Act 1900. The bill represents the Government response to the legislative 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. 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 she had never loved him and was in fact in love with someone else, before threatening him with deportation. Mr Singh claimed that as a result of this conduct he lost self-control and so 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, could also 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 with stakeholders in its inquiry. It received 52 written submissions and heard evidence from stakeholders, including the NSW Bar Association, Law Society of New South Wales, Women's Domestic Violence Court Advocacy Service, Public Defender's Office, 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 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 with the partial defence. In particular, the select committee was concerned by 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. However the select committee was unable to reach a consensus on abolishing the partial defence. After careful consideration of the opposing arguments, 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. However, the select committee was concerned 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 a non-violent sexual advance, infidelity or leaving a relationship.

The report of the select committee was tabled in Parliament in April 2013. The select committee made 11 recommendations to which the Government gave in-principle support. I am advised that the Government was assisted in its formulation of the bill by a working group made up of the most senior criminal law experts in the State, 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 Force and Women NSW were also represented. These members represented a range of views and experience and their input has been invaluable.

The bill also takes into account stakeholder submissions received in response to an exposure draft bill. The exposure draft was released for public consultation and submissions were received from stakeholders, including the Law Society, New South Wales Bar Association, Women's Legal Service NSW, Women's Electoral Lobby, Legal Aid NSW, Gay and Lesbian Rights Lobby, community legal centres and 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 take this opportunity to thank all those people who contributed their time to such a complex and important issue.

The Government consulted with the select committee on the final form of the bill. I am advised the Government considers 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 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 to 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", which reflects the select committee's intention that the partial defence should only be available in the most extreme circumstances. New section 23 (2) sets out the elements of the test for successfully raising the partial defence. Currently, the jury applies a two-stage test when considering section 23. First, the jury must consider the gravity of the provocation to the accused personally, taking into account all of his or her personal characteristics such as age, sex, race, ethnic or cultural background, personal attributes, intoxication or past history. If the jury is satisfied that the accused lost self-control, it must then consider whether it is possible that an ordinary person of the accused's age only who is provoked to that level might have lost self-control so 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. We suggested the use of words such as "gross", "justifiable", "seriously wronged" or "most extreme and exceptional" to describe certain aspects of the defence. However, the experts in the field were concerned that this terminology would be difficult to define and apply. There may have been unintended consequences which would undermine what the select committee was trying to achieve. 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 new section 23 (2) (a), which requires that the act causing death was in response to conduct towards or affecting the accused.

New section 23 (2) (b) requires that the conduct relied upon must amount to a serious indictable offence. A serious indictable offence is any offence that, when dealt with on indictment, carries a maximum penalty of five years imprisonment or more. The word "conduct" is not otherwise defined. This threshold ensures that the jury must be satisfied there was 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 a contemporary society, there is an expectation that people who are faced with offensive, insulting or offending conduct should not contemplate homicide or inflicting serious injury.

The requirement that the behaviour of the deceased must amount to a serious indictable offence would also ensure that law-abiding members of the community do not inadvertently provoke another person to an extent that they form an intention to kill or seriously injure them. What this threshold also provides 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. As select committee member the Hon. Trevor Khan stated previously, a list of excluded behaviour creates a problem that if the excluded conduct took place in the context of other provocative behaviour it would be highly artificial and difficult to exclude, such as allegations of infidelity. Despite this restriction, victims of domestic violence would be able to rely upon the partial defence in appropriate cases. Domestic violence, particularly long-term abuse, generally includes conduct involving serious indictable offences such as the range of assaults in the Crimes Act 1900.

Even where abuse is 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. In making out the defence, the focus is on the intent or knowledge of the perpetrator, rather than whether he or she generated fear in the victim. 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 in circumstances of a domestic violence offence. The concerns of stakeholders that victims of domestic violence may be prejudiced is addressed by the continued recognition in new section 23 (4) that the conduct relied upon need not necessarily have occurred immediately before the act causing death.

New 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 select committee raised concerns that loss of self-control is a required element of provocation. The committee was concerned that the concept is unclear and may tend to favour the typical male reaction to conflict, thereby disadvantaging women who kill their partners after long-term abuse. These are now referred to as slow-burn situations. The select committee recommended replacing the requirement for a loss of self-control with a requirement for a justifiable sense of being seriously wronged. The bill retains a loss of self-control as the central element of provocation. Replacing this with the requirement that the accused felt a justifiable sense of being seriously wronged could significantly expand the use of the law of provocation, which is contrary to the select committee's policy intent. In particular, if there was no requirement for a loss of self-control, this could open the use of partial defence to situations involving a premeditated plan to kill. The partial defence should not be available in that situation. As previously noted, the slow-burn situation is addressed by the fact that the conduct relied upon need not occur immediately before a loss of control in the act causing death.

When considering whether the accused did in fact lose self-control, the jury may consider the personal attributes of the accused. If satisfied that the accused lost self-control, then the jury will move on to the final limb of the test in new section 23 (2) (d). New section 23 (2) (d) further tightens the test by requiring the jury to apply a purely objective test. It 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. Removal of the words in the existing section "in the position of the accused" will effectively remove the need for the jury to assume that the ordinary person was provoked to the level that the accused was, because the jury will determine whether an ordinary person could have lost self-control and therefore formed the requisite intent when faced with that provocative 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 the select committee's intention to restrict the use of partial defence, reduce its complexity and bring it in 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 situation of the past. New section 23 (3) makes specific provision for conduct that can never provide for the partial defence. New section 23 (3) (a) specifically provides that a mere non-violent sexual offence may never amount to a 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 to consider that the conduct complained of amounted to no more than that. In his dissenting judgement of 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. Justice Kirby stated:

In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or inflict grievous bodily harm.

He further stated:

If every woman who was the subject of a "gentle", "non-aggressive" although persistent sexual advance ... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation will be sorely tested and undesirably extended ... this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent...

I respectfully agree with those comments. 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. New 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 finally, 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 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 into the bill as 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. The bill aims 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 which may enable evidence serving only to denigrate the deceased to be admitted. The admission of evidence in New South Wales is governed by the Evidence Act, uniform legislation adopted by the Australian Capital Territory, Tasmania, the Commonwealth and, recently, Victoria.

I am advised that relevant social framework evidence is already generally admissible under the New South Wales Evidence Act. It appears that 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. I note that Victoria is currently reviewing the operation of the offence of defensive homicide to which social framework evidence relates.

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 their verdict. To legislate this in relation to the partial defence of provocation alone would again serve only to complicate and confuse matters. The select committee also made a number of recommendations which were not legislative and I am advised that the Government will meet, or has already met, the policy intent of those reforms.

I understand the Attorney General will address these aspects of the committee's work in more detail in the other place. I note that the Government has agreed in principle that the law of homicide, including the law of provocation, should be reviewed comprehensively by the New South Wales Law Reform Commission in five years time. Given the complexity of the law in this area, it is important that the advances made in this bill, as well as in other related areas of law, be evaluated after a period of operation. I commend the bill to the House. I thank the House for allowing me to complete my second reading speech.

Debate adjourned on motion by the Hon. Adam Searle and set down as an order of the day for a future day.