

**Legislative Council—No 79A**

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 17 November 2020

South Australia

**Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Bill 2020**

A BILL FOR

An Act to amend the *Bail Act 1985*, the *Criminal Law Consolidation Act 1935*, the *Evidence Act 1929* and the *Sentencing Act 2017*.

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## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

This Act may be cited as the *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020*.

## 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

## 3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

## Part 2—Amendment of *Bail Act 1985*

### 4—Amendment of section 10A—Presumption against bail in certain cases

Section 10A(2), definition of *prescribed applicant*, (d)—before subparagraph (i) insert:

(ai) section 11;

## Part 3—Amendment of *Criminal Law Consolidation Act 1935*

### 5—Amendment of heading to Part 3 Division 2

Heading to Part 3 Division 2—delete the heading and substitute:

#### Division 2—Defences

### 6—Insertion of section 14B

Before section 15 insert:

#### 14B—Abolition of certain common law defences

(1) The following common law defences are abolished:

- (a) provocation;
- (b) necessity;
- (c) duress;
- (d) marital coercion.

(2) To avoid doubt, the common law defences abolished by subsection (1) remain available in respect of offences allegedly committed before the commencement of that subsection.

### 7—Amendment of section 15B—Reasonableness etc where offence committed in circumstances of family violence

Section 15B—after its present contents (now to be designated as subsection (1)) insert:

- (2) In a trial for an offence in which the defendant raises a defence under this Division, the question of whether—
  - (a) the defendant genuinely believed that particular conduct was necessary and reasonable (either for a defensive purpose or for the purposes referred to in section 15A(1)(a)); or

- (b) particular conduct was reasonably proportionate to a particular threat; or
- (c) the defendant reasonably believed that a particular threat would be carried out; or
- (d) the defendant reasonably believed that particular conduct was the only reasonable way a particular threat could be avoided; or
- (e) particular conduct was a reasonable response to a particular threat,

is, if the defendant asserts that the offence occurred in circumstances of family violence, to be determined having regard to any evidence of family violence admitted in the course of the trial.

- (3) In this section—

*circumstances of family violence* has the same meaning as in section 34V of the *Evidence Act 1929*;

*evidence of family violence* has the same meaning as in section 34W of the *Evidence Act 1929*.

## 8—Insertion of sections 15D, 15E and 15F

After section 15C insert:

### 15D—Duress

- (1) It is a defence to a charge of an offence (other than a prescribed offence) if—
  - (a) at the time of carrying out the conduct constituting the offence, the defendant reasonably believed that—
    - (i) a threat had been made that would be carried out unless the person engaged in the conduct; and
    - (ii) carrying out the conduct was the only reasonable way that the threat could be avoided; and
  - (b) the conduct was a reasonable response to the threat.
- (2) However, this section does not apply if the threat referred to paragraph (a) was made by or on behalf of a person with whom the defendant was voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.
- (3) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.
- (4) In this section—

*prescribed offence* means—

  - (a) murder; or
  - (b) attempted murder; or

- (c) conspiring or soliciting to commit murder; or
- (d) aiding, abetting, counselling or procuring the commission of murder; or
- (e) any other offence prescribed by the regulations for the purposes of this definition.

### 15E—Sudden or extraordinary emergency

- (1) It is a defence to a charge of an offence (other than a prescribed offence) if—
  - (a) the defendant carried out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency; and
  - (b) at the time of carrying out the conduct, the defendant reasonably believed that—
    - (i) circumstances of sudden or extraordinary emergency existed; and
    - (ii) carrying out the conduct constituting the offence charged was the only reasonable way to deal with the emergency; and
  - (c) the conduct was a reasonable response to the emergency.
- (2) To avoid doubt, an emergency need not involve a risk of death or serious harm.
- (3) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

- (4) In this section—

*prescribed offence* means—

- (a) murder; or
- (b) attempted murder; or
- (c) conspiring or soliciting to commit murder; or
- (d) aiding, abetting, counselling or procuring the commission of murder; or
- (e) any other offence prescribed by the regulations for the purposes of this definition.

### 15F—Review of Division

- (1) The Minister must cause a review of the operation of this Division (as amended by the *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020*) to be conducted and a report on the review to be prepared and submitted to the Minister.

- (2) The review and report must include—
- (a) consideration of the effect (if any) of the abolition of the common law defences specified in section 14B; and
  - (b) consideration of the effect (if any) that section 15B(2) has had generally on the operation of sections 15 and 15A; and
  - (c) consideration of the operation of the defences set out in sections 15D and 15E; and
  - (d) a recommendation as to whether further modification to the Act is necessary or desirable for the purpose of recognising and addressing the role family violence plays in relation to certain offending,
- and may include any other matter the Minister thinks fit.
- (3) The review and the report must be completed after the fifth, but before the sixth, anniversary of the commencement of this section.
- (4) A report under this section may be combined with a report under section 34Z of the *Evidence Act 1929*.
- (5) The Minister must cause a copy of the report submitted under subsection (1) to be laid before both Houses of Parliament within 6 sitting days after receiving the report.

## 9—Repeal of Part 9 Division 13

Part 9 Division 13—delete Division 13

## Part 4—Amendment of *Evidence Act 1929*

### 10—Insertion of Part 3 Division 4

After section 34T insert:

#### **Division 4—Evidence in proceedings where circumstances of family violence**

##### **34U—Interpretation**

- (1) In this Division—
- abuse* has the same meaning as in the *Intervention Orders (Prevention of Abuse) Act 2009* and, for the purposes of this definition—
- (a) a single act may amount to abuse; and
  - (b) a number of acts that form part of a pattern of behaviour may amount to abuse, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial; and

- (c) a person may commit an act of abuse by causing or allowing another person to commit the act or to take part in the commission of the act;

*family violence*, in relation to a person, means an act or acts of abuse committed against the person by a member of the person's family;

*member of a person's family*—the following persons are members of a person's family:

- (a) a person who is, or was, a spouse of the person;
- (b) a person who is, or was, a domestic partner of the person;
- (c) a person who is, or was, in an intimate personal relationship with the person (not being a marriage or domestic partnership);
- (d) a person who is, or was, a parent, grandparent or step-parent of the person;
- (e) a sibling or step-sibling of the person;
- (f) a child, grandchild or step-child of the person;
- (g) a person who, according to Aboriginal or Torres Strait Islander kinship rules, is a member of a culturally recognised family group of the person;
- (h) a guardian of the person;
- (i) a carer of the person (within the meaning of the *Carers Recognition Act 2005*);
- (j) a person (not being a person referred to in a preceding paragraph) who is, or was, a member of the household of the person;
- (k) any other person prescribed by the regulations for the purposes of this paragraph,

and *family member* has a corresponding meaning.

- (2) For the purposes of this Division, a reference to proceedings related to the offence includes a reference to any committal or interlocutory proceedings related to the offence.

### **34V—Circumstances of family violence**

- (1) For the purposes of this Act and any other Act, an offence is committed in, or an event occurs in, *circumstances of family violence* if—

- (a) the offence or event consists of, or includes, the commission of family violence; or
- (b) the offence is committed, or the event occurs—
- (i) during the commission of family violence; or

(ii) as a response to the commission of family violence, or a threat of the commission of family violence in the future (whether implied or express and whether the commission of the family violence is imminent or otherwise); or

(c) the offence is committed, or the event occurs, in any other circumstances resulting from or related to the commission of family violence.

(2) A court sentencing a person for an offence committed in circumstances of family violence—

(a) will, if the trial court made a finding of fact relating to circumstances or evidence of family violence, be bound by that finding; and

(b) may, if the trial court has not made such a finding, determine any question relating to circumstances of family violence—

(i) by reference to any evidence of family violence adduced during proceedings related to the offence (whether by the defendant or the prosecution); or

(ii) by reference to any evidence of family violence provided to the sentencing court during sentencing proceedings (whether by the defendant or the prosecution); or

(iii) by reference to any statement of agreed facts provided to the court during proceedings related to the offence or the sentencing proceedings; or

(iv) by otherwise informing itself in relation to the circumstances of family violence in accordance with any rules of court.

### 34W—Evidence of family violence

Except where the contrary intention appears, a reference in this or any other Act to *evidence of family violence*, in relation to a person, will be taken to include a reference to evidence of the following kinds:

(a) evidence of the history of the relationship between the person and a family member, including family violence by the family member towards the person or a family member, or by the family member or the person in relation to any other family member;

(b) evidence of the effect, including the cumulative effect, of family violence on the person or a family member;

(c) evidence of any social, cultural or economic effects of the family violence on the person or a family member;



(d) evidence of the general nature and dynamics of the person's relationship, including the possible consequences of separation from the person who committed the family violence;

5 (e) evidence of the psychological effect of family violence on the person or a family member,

and includes, to avoid doubt, social framework evidence within the meaning of section 34X.

10 **34X—Certain expert evidence relating to nature and effect of family violence to be admissible**

(1) Despite any other provision of this Act, or any other Act or law, a court may, in prescribed proceedings before the court, receive expert evidence consisting of social framework evidence about family violence.

15 (2) To avoid doubt, nothing in subsection (1) limits the ability of a defendant or any other person to adduce evidence relating to the nature and effect of family violence.

(3) To avoid doubt, social framework evidence may include evidence relating to a particular person or to particular circumstances.

20 (4) In this section—

*prescribed proceedings* means proceedings for an offence that the defendant asserts occurred in circumstances of family violence and in which 1 or more of the following defences are raised:

(a) self defence;

25 (b) duress;

(c) sudden or extraordinary emergency;

*social framework evidence* means evidence of the nature and effect of family violence that provides context to the experiences of victims of family violence, including—

30 (a) evidence relating to the general nature and dynamics of relationships affected by family violence and the cumulative effect on the person or a family member of family violence; and

35 (b) evidence of the experiences of victims of family violence generally, to the extent that the evidence assists in understanding family violence generally; and

(c) such other evidence as may be necessary or appropriate to ensure a jury has an adequate understanding of family violence.

### 34Y—Trial directions relating to evidence of family violence

If evidence of family violence is admitted in the course of a trial for an offence that the defendant asserts occurred in circumstances of family violence, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.

### 34Z—Review of Division and section 69A

- (1) The Minister must cause a review of the operation of this Division and section 69A (as enacted or amended by the *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020*) to be conducted and a report on the review to be prepared and submitted to the Minister.
- (2) The review and report must include—
  - (a) consideration of the effect (if any) that this Division has had generally in relation to offences committed in circumstances of family violence; and
  - (b) consideration of whether the circumstances of family violence set out in section 34V should be modified; and
  - (c) details of any appeals relating to directions given under section 34Y; and
  - (d) details of any suppression orders made under section 69A(1a); and
  - (e) a recommendation as to whether further modification to the Act is necessary or desirable for the purpose of recognising and addressing the role family violence plays in relation to certain offending,and may include any other matter the Minister thinks fit.
- (3) The review and the report must be completed after the fifth, but before the sixth, anniversary of the commencement of this section.
- (4) A report under this section may be combined with a report under section 15F of the *Criminal Law Consolidation Act 1935*.
- (5) The Minister must cause a copy of the report submitted under subsection (1) to be laid before both Houses of Parliament within 6 sitting days after receiving the report.

### 11—Amendment of section 69A—Suppression orders

Section 69A—after subsection (1) insert:

- (1a) Without limiting subsection (1), a court may, subject to this section, make a suppression order in relation to evidence given by, or relating to, a defendant if—
  - (a) the defendant asserts that an offence with which the defendant is charged occurred in circumstances of family violence; and

- (b) the evidence relates to those circumstances of family violence; and
- (c) the evidence is of a humiliating or degrading nature (whether to the defendant or another person).

5 **Part 5—Amendment of *Sentencing Act 2017***

**12—Amendment of section 48—Mandatory minimum non-parole periods and proportionality**

- (1) Section 48(1)—delete subsection (1)
- (2) Section 48(2)(b)—delete paragraph (b) and substitute:
  - 10 (b) in the circumstances (if any) prescribed by the regulations for the purposes of this paragraph, or otherwise in exceptional circumstances, fix a non-parole period that is shorter than the prescribed period.
- (3) Section 48(3)—delete "In deciding whether special reasons exist for the purposes of subsection (2)(b), the court must have regard to the following matters and only those matters" and substitute:

15 Without limiting subsection (2)(b), exceptional circumstances may include the following:

- (4) Section 48(3)—after paragraph (a) insert:
  - 20 (ab) the offence was committed in circumstances of family violence (being circumstances in which the offender, or a member of the offender's family, was a victim of family violence committed by the victim of the offence);
- (5) Section 48—after subsection (3) insert:
  - 25 (3a) In deciding whether exceptional circumstances exist for the purposes of subsection (2)(b) in relation to an offence committed in circumstances of family violence, the court must have regard to any evidence of family violence admitted in the course of the trial for the relevant offence or otherwise before the court.
- (6) Section 48—after subsection (4) insert:

- (5) In this section—

*circumstances of family violence* has the same meaning as in section 34V of the *Evidence Act 1929*;

*evidence of family violence* has the same meaning as in section 34W of the *Evidence Act 1929*.

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## Schedule 1—Transitional provisions

### 1—Transitional provision—amendments to *Criminal Law Consolidation Act 1935*

5 Section 15B(2) of the *Criminal Law Consolidation Act 1935* (as enacted by this Act) will be taken not to apply in relation to a trial that commenced before the commencement of this clause.

### 2—Transitional provisions—amendments to *Evidence Act 1929*

10 (1) Subject to subclause (2), Part 3 Division 4 of the *Evidence Act 1929* (as enacted by this Act) applies in relation to—

- 10 (a) proceedings for an offence commenced but not determined before the commencement of this clause; and
- (b) proceedings for an offence commenced after the commencement of this clause (whether the offence was committed before or after that commencement).

15 (2) Section 34Y of the *Evidence Act 1929* (as enacted by this Act) will be taken not to apply in relation to a trial that commenced before the commencement of this clause.

### 3—Transitional provision—amendments to *Sentencing Act 2017*

Section 48 of the *Sentencing Act 2017* (as amended by this Act) applies in relation to a non-parole period in respect of an offence where—

- 20 (a) proceedings for the offence were commenced but not determined before the commencement of this clause; and
- (b) proceedings for an offence commenced after the commencement of this clause (whether the offence was committed before or after that commencement).