Queensland Human Rights Commission

Review of particular criminal defences

Submission to Queensland Law Reform Commission

30 May 2025

Queensland Human Rights Commission

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Executive Summary

1 This submission responds to select proposals and questions in the Queensland Law Reform Commission's *Review of particular criminal defences*.[1]

2 The Commission welcomes the QLRC's commitment to using human rights to guide its approach to the Inquiry and in making its recommendations.[2] The *Human Rights Act 2019* (Qld) (**Human Rights Act**) provides helpful guidance for managing intersecting rights, interests and policy objectives in this complex area of criminal law reform.

3 In summary, the Commission:

- **Supports, with one qualification, proposals in relation to reform of self-defence (P1, P2, P4):** The Commission supports a move to a single self-defence provision, and considers that the proposals appropriately reflect the circumstances in which killing will not be considered arbitrary and therefore contrary to the right to life (P1 and P4).

  However, there is a risk that structural discrimination, including structural racism, homophobia or transphobia, may inform a person's subjective belief as to the circumstances justifying lethal violence in a way that operates contrary to the right to equality and right to life of the person killed. The QLRC may consider introducing a degree of objectivity into the assessment of the relevant circumstance, while being sensitive to what is 'reasonable' in the context (for example, reasonable in the context of domestic violence). This may also provide a more nuanced way of dealing with the issue of self-induced intoxication (P3).

  More, generally the Commission supports specific guidance being provided to judges and juries as to what may be 'reasonable' in cases of domestic violence as necessary to promote equal protection of the law without discrimination (P2).

- **Supports repealing the partial defence of killing on provocation (P5)**: The Commission supports repeal of s 304 as part of the overall package of reforms, as such killings constitute arbitrary deprivation of life and the defence operates in gendered ways, contrary to the right to equality.

- **Supports reforming the defence of provocation to assault, and if staged reform is considered necessary, suggests a different way to conceptualise conduct that should always be excluded from the defence (P6):** While the defence of

[1] Queensland Law Reform Commission, *Review of particular criminal defences* (Consultation paper, Equality and integrity: Reforming criminal defences in Queensland, February 2025) (**QLRC *Consultation Paper***).
[2] Queensland Law Reform Commission, *Review of particular criminal defences* (Background paper 2: Our guiding principles for reform, July 2024) [7]-[9], [50]-[53] ('**QLRC *Guiding Principles Paper***').

provocation is incompatible with obligations to protect personal security and equality, concerns about disproportionate impact of complete repeal on First Nations peoples may justify staged reform. The absolute prohibition on torture and cruel, inhuman or degrading treatment or punishment ('other ill-treatment') provides a helpful lens through which to conceptualise conduct that should never be subject to the defence – this would include crimes committed by a person using family violence or conduct by police or prison officers that would constitute inhuman or degrading treatment.

- **Supports removing the mandatory life sentence for murder (Q11)**: Mandatory life imprisonment for murder unjustifiably limits multiple rights including children's rights, liberty, fair trial guarantees, and equality. It operates arbitrarily by applying uniform penalties regardless of moral culpability, distorts the framing of the criminal law and trial processes through inappropriate plea incentives, and magnifies existing discrimination affecting First Nations peoples and domestic violence survivors.

- **Supports complete repeal of the defence of domestic discipline (Q21)** Extensive research demonstrates that the use of force to correct or discipline children causes long-term harm without benefit, and this is consistent across different countries and cultures. It also exposes children to the risk of escalating violence. The defence directly discriminates against children, and is incompatible with children's right to protection needed as a child and in their best interests, the right to access education, and the right to protection from torture and other ill-treatment.

  Experiences in other jurisdictions show that public opinion in this area tends to quickly catch up to legal reform, demonstrating the normative power of the law in either condoning or prohibiting the conduct. Concerns about discriminatory outcomes and enforcement must, however, be taken seriously as they also have the potential to severely limit multiple rights, including the rights of the child. These concerns should be addressed through public education, culturally responsive community engagement, family support, and a strong emphasis on diversion from a criminal justice response, informed by successful domestic and international experiences.

Human rights as a framework for reform

4 The QLRC has a legal obligation under the Human Rights Act to give proper consideration to human rights in making its recommendations, and to make recommendations that are compatible with human rights.[3] Beyond this, human rights law provides an essential and well-developed framework for considering how to best promote and accommodate the different rights, aims, and interests being considered by the Inquiry.

Human rights are central to the Inquiry

5 Human rights law recognises that the State has **obligations to protect individuals from threats to their life and bodily integrity by other private individuals**. Part of this involves the State putting in place a legal framework criminalising arbitrary deprivations of life and violence to the person, and appropriately responding to such violence when it occurs to deter such violence in the future.[4] Specific, stringent, obligations apply to **violence against children**.[5]

6 At the same time, the international human rights framework, reflected in the Human Rights Act, also recognises the fundamental nature of the right to liberty and the importance of privacy and reputation to individuals. For this reason, any person subject to criminal proceedings has **long-established and detailed fair trial rights**, including (as reflected in the Human Rights Act), the right to a fair hearing, the right to be presumed innocent until proven guilty, to have witnesses examined, and not to be compelled to testify against themselves.[6]

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[3] *Human Rights Act 2019* (Qld) s 58(1). See QLRC *Guiding Principles Paper* [50].

[4] See Human Rights Bill 2018, *Explanatory Note* 19. UN Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev.1/Add. 13, 26 May 2004), [8]; UN Human Rights Committee, *General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36 (30 October 2016) [18]-[19] **(HRC *General Comment No 36)***; UN Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc HRI/GEN/1/Rev.1 at 30 (10 March 1992) [2] (**HRC *General Comment No 20)***; Committee Against Torture, *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2 (24 January 2008) [18] (**CAT *General Comment No 2***); Committee on the Elimination of Discrimination Against Women, *General recommendation 19: Violence against women*, UN Doc HRI\GEN\1\Rev.1 (1994) [9]. See further *Opuz v Turkey* (2009) (ECtHR, 3rd section), App No 33401/02 (9 June 2009); *Smith v Chief Constable of Sussex Police and Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50; *González et al ('Cotton Field') v Mexico*, Inter-American Court of Human Rights (IACtHR), 16 November 2009.

[5] *Convention on the Rights of the Child*, UN Doc A/RES/44/25 (20 November 1989, entered into force generally on 2 September 1990) art 19; *Human Rights Act 2019* (Qld) s 26(2).

[6] *International Covenant on Civil and Political Rights*, UN Doc A/RES/2200(XXI) (16 December 1966) art 14 (**ICCPR**); *Human Rights Act 2019* (Qld), ss 31, 32.

7 Overlaying all of this, equality and non-discrimination lie at the heart of the international human rights system and are similarly placed at the centre of the Human Rights Act.[7] As recognised in the QLRC's background paper, enjoyment of rights without discrimination, equal protection of the law without discrimination, and the right to equal and effective protection from discrimination require **substantive equality**, not just formal equality.[8] This 'may require differential treatment of persons whose situations are significantly different' to ensure they are treated equally.[9]

8 Specific attention must therefore be paid to the **dynamics of gender-based violence** – including by ensuring that victims of domestic and family violence are protected from harm and experience justice processes that are informed by and responsive to the reality of domestic and family violence.[10] As part of this, a gender perspective must be applied to the analysis of evidence.[11]

9 Substantive equality also requires that States must ensure that their justice system does not operate in a way that indirectly discriminates against particular populations, for example, on the **grounds of race, gender or disability**. In considering the operation of the justice system, **cultural rights, including the cultural rights of First Nations peoples**, are also important considerations.[12]

Maximising rights in complex policy areas

10 Consideration of each of these rights in isolation would likely lead to different conclusions about the appropriate way to address the Terms of Reference. However, the Human Rights Act provides a framework, informed by international human rights law and practice, to maximise each of these rights to the extent possible and in a way that is consistent with human dignity and equality.

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[7] *Universal Declaration of Human Rights*, UN Doc A/RES/217(III) (10 December 1948), art 1; *Human Rights Act 2019* (Qld) s 15.
[8] *Human Rights Act 2019* (Qld) s 15(2)–(4). See *Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286 [107], [137]–[141], [287]–[288].
[9] Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (Thomson Reuters, 2022) 107, 114; *Victoria Police Toll Enforcement v Taha* (2013) VR 1 [210].
[10] Committee on the Elimination of Discrimination Against Women, *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (26 July 2017) [24]-[26] (**CEDAW *General Comment No 35***); Human Rights Committee, *General Comment No 28: Article 3 (The equality of rights between men and women)*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (29 March 2000) [11], [23]. See further Committee on the Elimination of Discrimination Against Women, *Views in X v Timor Leste*, UN Doc CEDAW/C/69/D/88/2015 (28 April 2018) [6.1]-[6.9].
[11] See Inter-American Court of Human Rights. I/A Court H.R., I/A Court H.R., *Case of González et al. ("Cotton Field") v Mexico* (*Preliminary Objection, Merits, Reparations and Costs)*, Judgment of November 16, 2009. Series C No. 205.
[12] ICCPR, art 27; UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, UN Doc A/RES/61/295 (2 October 2007), arts 8, 25, 29 and 31; *Human Rights Act 2019* (Qld) ss 27–28.

11 For this reason, most rights can be limited as necessary to achieve legitimate objectives and to accommodate other rights. This is recognised in section 13 of the Human Rights Act, which provides that a human right may be subject under law only to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

12 Some rights, such as the right not to be subjected to torture other ill-treatment, can never be justifiably limited as torture and other ill-treatment are antithetical to human dignity.[13] Others, such as the right to life, can be subject to limits that are expressed in the right – so the taking of life may be justified if it is not unlawful or arbitrary.[14] For other rights, limits on the right may be justified by the need to accommodate legitimate aims, such as public safety, or the rights of others – but the impact on rights should be reasonably adapted to achieving the aim,[15] and proportionate to it.[16] Where there are less-rights limiting courses of action that can reasonably be achieved, they should be pursued.[17]

13 In complex policy areas there may be various courses of action open that fulfil these criteria. However human rights, distilled and explored over decades of international and national practice, provide the guard rails and guidance to ensure individuals who are most affected are at the centre of any reform, and the incentive to look for ways to ensure that all of their rights are upheld to the greatest extent possible.

14 The remainder of this submission considers the human rights aspects of select areas explored in the Consultation Paper. It does not aim to be comprehensive. Absence of comment on a particular question or proposal should not be taken as indicating either lack of support or endorsement.

[13] *Human Rights Act 2019* (Qld) s 13(a). See *HRC General Comment No 20* [1], [5]; CAT *General Comment No 2* [1].
[14] *Human Rights Act 2019* (Qld) s 13(b). See HRC *General Comment No 36*.
[15] *Human Rights Act 2019* (Qld) s 13(c).
[16] *Human Rights Act 2019* (Qld) s 13(e)–(g).
[17] *Human Rights Act 2019* (Qld) s 13(d).

Reforms to self-defence (P1, P2, P3, P4)

15 The Commission supports the proposal to move to a single self-defence provision and the intention to promote simplicity and consistency with other Australian jurisdictions. It considers that the model proposed is generally compatible with states' obligations to protect private individuals from arbitrary deprivation of life and of equal protection of the law, with one caveat. It supports specific guidance being provided to judges and juries as to what may be 'reasonable' in cases of domestic violence.

Killing in self-defence

P1 is generally compatible with the rights to life and equality (P1/Q1)

16 Section 16 of the Human Rights Act provides that 'Every person has the right to life and has the right not to be arbitrarily deprived of life'. The right 'concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity'.[18]

17 Part of states' obligations under the right to life includes putting in place measures, including an appropriate criminal law framework, to protect the lives of individuals against deprivations of life by other private actors.[19] In particular, states must take 'special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence', including victims of domestic and gender-based violence.[20]

18 Within this framework, the use of lethal force in self-defence, under strict conditions of necessity and proportionality, is not arbitrary.[21] Laws appropriately providing such a defence to murder or manslaughter charges are therefore not in breach of the right to life and are necessary to protect the right to life of those subjected to life-threatening violence.

19 The criteria set out by the Human Rights Committee for lawful self-defence is that:

- it is strictly necessary in view of the threat posed by the attacker;
- it is a method of last resort after other alternatives have been exhausted or deemed inadequate;
- the amount of force applied does not exceed the amount strictly needed for responding to the threat;
- the force applied must be carefully directed only against the attacker; and

[18] HRC *General Comment No 36* [3].
[19] *HRC General Comment No 36* [20]; *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7 [93], *citing Osman v UK* (2000) 29 EHRR 245 [90].
[20] *HRC General Comment No 36* [23].
[21] *HRC General Comment No 36* [10].

- the threat responded to must involve imminent death or serious injury.[22]

20 Proposal 1 applies these criteria in a way that is sensitive to the circumstances as the defendant perceived them, and the extent to which their actions were reasonable in those circumstances. The European Court of Human Rights has held that this mixed subjective and objective approach (which also applies in the United Kingdom) is compatible with the right to life.[23]

21 A purely objective and incident-focussed approach – which would look at force used by a trained police officer using firearms in the same way as use of force by a person subjected to a pattern of coercive control – would be inconsistent with the right to life of the person subjected to violence of threat of it, and the right to equality.[24] Failing to take a person's circumstances (such as a history of domestic violence) and the impact on their perceptions into account would not allow for equal protection under the law.[25]

A purely subjective approach to necessity may limit equality (P1/Q1/P3/Q4)

22 On the other hand, there is a risk that structural discrimination, including structural racism, homophobia or transphobia, may inform a person's subjective belief in a way that operates contrary to the right to equality and right to life of the person killed. Further, in relation to lethal force used by state officials, states' obligations under the right to life mean that the 'substantive criminal law should ensure protection against gross negligence in the preparation and carrying out of police operations in which force is used'.[26]

23 Critics have argued that the absence of a 'reasonableness' requirement for belief as to the nature of the threat has blocked accountability for deadly police violence in England and Wales – including in relation to the police shootings of a man holding a lighter,[27] a man carrying a table leg in a bag,[28] and of unarmed Brazilian man Jean Charles de Menezes in the London Underground.[29] In the United States, so-called 'gay and trans panic' defences have been used to claim that lethal force was used in self-defence to an

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[22] *HRC General Comment No 36* [12].
[23] *McCann v United Kingdom* (1995) 21 ECtHR 97 [55]-[56]; *Armani Da Silva v United Kingdom*, ECtHR, Grand Chamber, App No 5878/08 (30 March 2016) [248].
[24] CEDAW *General Comment No 35*, [29](c)(ii). See also *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin) [62].
[25] CEDAW *General Comment No 35*, [29](c)(ii). See, eg, Vanessa Bettinson and Nicola Wake 'A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response' (2024) 87 *Modern Law Review* 141-171.
[26] *Armani Da Silva v United Kingdom*, ECtHR, Grand Chamber, App No 5878/08 (30 March 2016) *Joint Dissenting Opinion of Judges Karakas, Wojtyczek and Dedov* [5].
[27] *R (on the application of Bennett) v HM Coroner for Inner South London* [2007] EWCA (Civ) 617 [35]-[36]; [2007] Inquest L.R. 163 (Eng).
[28] *R (on the application of Sharman) v HM Coroner for Inner North London* [2005] EWCA (Civ) 967 [1]-[9]; [2005] Inquest L.R. 168 (Eng).
[29] See further Clemency Wang, 'The police are innocent as long as they honestly believe: The human rights problems with English self-defense law' (2018) 49 *Columbia Human Rights Law Review* 373, 391.

attempted sexual assault.[30] There is also the potential for interplay in other areas between public fear and panic, where media reports or public sentiment lead to a perceived threat from a particular cohort, including due to age, ethnicity, or gender.

24 In light of this, the QLRC should consider whether a degree of objectivity should be introduced into the first element (belief as to necessity) – leading to a mixed test for the first element. In many other jurisdictions self-defence is available where there is an honest *and* reasonable belief as to the nature of the threat and therefore necessity to respond.[31]

25 In a case concerning the shooting of Jean Charles de Menezes by police officers, the Grand Chamber of the European Court of Human Rights rejected an argument made by the UK Equality and Human Rights Commission (as intervener) that the reasonableness of a belief in the necessity of lethal force should be assessed against an objective standard (albeit with a strong dissent).[32] However, even the majority left room for some evaluation of reasonableness, from the perspective of the defendant:

> The principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was *subjectively reasonable*, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, it was not based on subjective good reasons) it is likely that the Court would have difficulty accepting that it was honestly and genuinely held.[33]

26 Arguably, the right to equality demands more: an understanding that an honest belief grounded in discrimination is not 'subjectively reasonable'.

27 One proposal is that a reasonableness standard should focus on whether or not the way in which the belief was formed was reasonable, rather than whether the belief itself was reasonable. It is suggested that this would minimize hindsight bias, allow judges to instruct the jury as to what kinds of bases should or should not be considered 'reasonable', and allow for trained police officers 'to be held to a higher standard of reasonable belief' than, for example, a person who encounters an intruder in their home or a victim/survivor of domestic violence.

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[30] W Carsten Andresen, 'Research Note: Comparing the Gay and Trans Panic Defenses' (2022) 32 *Women & Criminal Justice* 219-241. Note that most US jurisdictions, where the cases discussed in this article originate, in any event require that the belief be 'reasonable' and honest.

[31] Clemency Wang, 'The police are innocent as long as they honestly believe: The human rights problems with English self-defense law' (2018) 49 *Columbia Human Rights Law Review* 373, 387-8. As to the approach of the Inter-American Commission of Human Rights see *Corumbiara, Brazil (Merits)* Case 11.556, Report No 32/04 (11 March 2004) [180]. For the African Commission on Human and Peoples' Rights see: *Kazingachire & Ors v Zimbabwe* (2012) Comm No 295/04 (2 May 2012) [115]-[116].

[32] *Armani Da Silva v United Kingdom*, ECtHR, Grand Chamber, App No 5878/08 (30 March 2016) [245]; cf. *Joint Dissenting Opinion of Judges Karakas, Wojtyczek and Dedov* [5]. For a summary of the intervener's argument see [224]-[228] of the judgment.

[33] *Armani Da Silva v United Kingdom*, ECtHR, Grand Chamber, App No 5878/08 (30 March 2016) [248]. See further *Koomen v Netherlands* ECtHR, Fourth Section, App No 298/15 (20 May 2025) [87]-[90].

28 This appears to be closer to the approach currently adopted in Western Australia.[34] In the Commission's view it is also more consistent than a purely subjective approach with the High Court's statement in *Zecevic v Director of Public Prosecutions (Victoria)* that:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did.[35]

29 If there are concerns that this may operate to the detriment of victim/survivors of domestic violence this could be addressed by additional wording in Proposal 2 (see below [32]-[363535]). This may also allow more flexibility to address concerns in relation to voluntary intoxication than excluding the defence entirely, as contemplated by Proposal 3.

A tailored approach for domestic violence is appropriate (P2/Q3)

30 The United Nations (**UN**) Human Rights Committee has emphasised that the duty to protect the right to life requires States to 'take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence'.[36] The UN Committee on the Elimination of Discrimination Against Women has recommended that States repeal all legislative provisions that are discriminatory against women, including 'judicial practices that disregard a history of gender-based violence to the detriment of women defendants'.[37]

31 In line with this, in 2011 the UN General Assembly adopted the Updated Model Strategies and Practical Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice. These urge states to ensure that

> Claims of self-defence by women who have been victims of violence … are taken into account in investigations, prosecutions and sentences against them.[38]

32 In 2018 the Committee on the Elimination of Discrimination Against Women found a state responsible for multiple violations of the Convention on the Elimination of Discrimination Against Women in its treatment of a woman who killed her husband in self-defence in the context of ongoing domestic violence.[39] Among the multiple failures of state authorities, the Committee criticised the fact that 'judges, despite a retrial being granted on the basis

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[34] Consultation Paper 23.
[35] At 661 (Wilson, Dawson and Toohey JJ) (emphasis added).
[36] *HRC General Comment No 36* [23].
[37] CEDAW *General Comment No 35* [29](c)(ii).
[38] *Strengthening crime prevention and criminal justice responses to violence against women*, UN Doc A/RES/65/228 (31 March 2011) Annex 'Updated Model Strategies and Practical Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice' [15](k)].
[39] Committee on the Elimination of Discrimination Against Women, *Views in X v Timor Leste*, UN Doc CEDAW/C/69/D/88/2015 (28 April 2018).

that self-defence had not been duly considered in the first trial, allowed gender stereotypes and bias to affect the weighing of evidence in the second trial'.[40]

33 Recognising the importance of detailed guidance in this area, specific guidance has been developed for States on integrating a gender perspective on self-defence and gender-based violence under the *Inter-American Convention to Prevent, Punish and Eradicate Violence Against Women* (the *Belém do Pará Convention*).[41]

34 As outlined in the Consultation Paper, a history of coercive control and the social entrapment that it engenders will shape the extent to which force is perceived as necessary to respond to a threat, whether there appear to be any alternatives, the amount of force that is considered necessary to respond to the threat, and the extent to which the threat of harm is considered inevitable, if not necessarily imminent.[42] The 'sheer danger in confronting a physically larger and stronger abuser while an assault is occurring' means that victims of domestic violence may use lethal force in non-confrontational circumstances. Informed by an understanding of the dynamics of domestic violence, such killings fall within the criteria for lawful use of self-defence outlined by the UN Human Rights Committee set out above. Understanding and accommodating the dynamics of domestic violence in such cases is necessary to uphold the right to equality.

35 It is therefore consistent with the right to equality and the right to life to ensure that trials of victim/survivors who kill are informed by evidence as to a history of domestic violence, and that judges and juries are given guidance as to the relevance of that history in understanding what is 'reasonable' in the circumstances.

The partial defence of killing for preservation should be repealed (P4/Q7)

36 If Proposals 1, 2 are implemented and the mandatory life sentence for murder is removed, the Commission supports the repeal of s 304B of the Criminal Code (partial defence of killing for preservation). Such killings, which do not amount to arbitrary deprivation of life, will fall within the complete defence, and removal of the partial defence will (in the absence of mandatory sentencing) reduce the incentive to plead or options for a compromise jury verdict where a full defence is available, promoting equal protection of the law.

[40] At [6.5].
[41] Inter-American Commission of Women, Follow-up Mechanism to the Belém do Pará Convention (MESECVI), *General Recommendation of the Committee of Experts of the MESECVI No 1: Self-defense and Gender-based violence*, OEA/Ser.L/II.6.23 (2018).
[42] See further Vanessa Bettinson & Nicola Wake, 'A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response' (2024) 87 *Modern Law Review* 141–171. On the potential to incorporate a requirement for 'inevitability of harm' in place of 'imminence of harm' see Fiona Leverick, 'Imminence of Harm' in *Killing in Self-Defence* (2006) 87-108.

Reforms to provocation (P5, P6, P7)

Killing on provocation (Q8)

37 The Commission supports the repeal of s 304 of the Criminal Code. Such killings do not meet the criteria for justified use of lethal force,[43] making them arbitrary, and incompatible with the right to life. They also operate in a gendered way,[44] making them incompatible with the right to equality.[45]

38 The Commission agrees that where real questions of moral culpability arise, they are better considered through (properly informed) sentencing discretion, rather than a partial defence.[46]

Provocation to assault (Q14) & repetition of insult (Q15)

39 The defence of provocation is incompatible with the state's positive obligation to protect the security of the person, right to privacy, freedom from torture and other ill-treatment and equality. However, significant concerns about improper and disproportionate impacts of repeal on First Nations peoples may justify a staged or limited approach to reform. In this context, the absolute nature of the prohibition of torture and other ill-treatment can provide a guide as to the types of conduct that should never be subject to a defence of provocation.

Reform engages multiple rights

40 Any violence against a person engages an individual's security of person (HRA s 29) and privacy (HRA s 25). Certain types of violence are always prohibited and can never be justified – that is, where it amounts to torture or cruel, inhuman or degrading treatment (HRA s 17).

41 States therefore have positive obligations to enact criminal laws prohibiting and responding to violence by one private individual against another and to enforce those laws.[47] This is subject to clearly defined exceptions where force does have legitimate justification, such as self-defence, or protecting the individual from harm. Provocation is not a legitimate justification for the use of violence. As noted in the Consultation Paper,

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[43] *HRC General Comment No 36* [10].
[44] QLRC *Consultation Paper* [195]. See further Radhika Coomaraswamy*, Report of the Special Rapporteur on violence against women, its causes and consequences,* UN Doc E/CN.4/1996/53 (5 February 1996) [130].
[45] See further *Strengthening crime prevention and criminal justice responses to violence against women*, UN Doc A/RES/65/228 (31 March 2011) Annex 'Updated Model Strategies and Practical Measures for the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice' [15](d).
[46] See also Model Criminal Code Officers Committee- Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Fatal Offences Against the Person: Discussion Paper* (1998) 107.
[47] UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person),* UN Doc CCPR/C/GC/35 (16 December 2014) [9].

there is no principled reason to recognise anger as removing culpability in cases of assault. Further, the defence operates in a gendered way. Complete repeal of the defence is consistent with rights to personal integrity, privacy and protection from torture and other ill-treatment of private individuals at risk of being subjected to violence, and equal protection of the law as it relates to gender.

42 However, the QLRC is right to take seriously the risk of disproportionate impact of the repeal of this defence on Aboriginal and Torres Strait Islander people in the context of over surveillance, overincarceration and historically imbalanced relationships with police. Positive obligations to take effective measures to prevent violence by private actors 'must be interpreted and complied with … without discrimination of any kind'.[48] As other stakeholders have noted, limiting the defence so that it does not apply to domestic violence offences may also disproportionately impact First Nations people due to the extended nature of family relationships in First Nations communities. This may limit the right to equality before the law (HRA s 15(3)).

Limited or staged reform may be justified

43 The incompatibility of the defence of provocation with the state's obligation to protect citizens from violence must therefore be considered in light of the reality of the criminal justice system for First Nations people and the potential of any reform to further limit the right to equal treatment under law. Using section 13 of the Human Rights Act as a guide, it is appropriate to consider:

- the nature of the human rights involved – for example if the defence of provocation excused conduct that amounts to torture or other ill-treatment it could not be justified;
- the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- the relationship between the limitation and its purpose – whether retaining the defence, in full or in part, would actually better protect Aboriginal and Torres Strait Islander people from discriminatory over-incarceration and other violations of their rights to personal integrity, family, cultural rights, privacy and freedom from torture and other-ill-treatment. In this respect it may be important to look at experiences in other jurisdictions without the defence;
- whether there are any less restrictive and reasonably available ways to achieve the purpose – for example, could clear guidance as to police and prosecutorial discretion, training of those responsible for enforcement, specific provision for diversion, and community-based responses, address the concerns about the negative impact for First Nations peoples;

[48] Nils Melzer, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence: Interim report of the Special Rapporteur on torture* and other cruel, inhuman or degrading treatment or punishment, UN Doc A/74/148 (12 July 2019) [23], referring to Article 26 of the ICCPR.

- the importance of the purpose of the limitation – equal treatment under the law of First Nations peoples being a fundamental right central to the protection of human rights generally;
- the importance of preserving the human rights that are limited taking into account the nature and extent of the limitation on the human right by providing a defence in relation to violence falling short of grievous bodily harm, wounding or manslaughter;
- whether the limitation is proportionate to the aim sought to be achieved.

Strong justification for removing defence for torture or other ill-treatment

44 Statements of United Nations bodies provide particularly strong human rights justification for removing the defence of provocation in the context of domestic violence. The Special Rapporteur on Torture has emphasised that 'domestic violence degrades, humiliates, coerces, brutalizes and otherwise violates the physical, mental and emotional integrity of persons who are often subjected to controlling and disempowering situations or environments'.[49] Because of these features, domestic violence has been characterised by a range of international and regional human rights bodies as amounting to, or capable of amounting to, torture or other ill-treatment, which the state has an obligation to prevent through appropriate criminalisation and enforcement.[50]

45 However, other stakeholders have raised concerns that the legislative definition of a "domestic violence offence" is so broad that it may capture conduct that does not fall within this framework, such as where there is misidentification of the person using violence, or in one-off violence between members of an extended family network. This may operate to the detriment of both victim/survivors of domestic violence and First Nations peoples more generally in a way that limits the right to equality.

46 Reframing conduct that should never come within the defence by reference to concepts of torture or other-ill treatment may assist in refining the category of conduct that is excluded if s 269 is not repealed entirely.

47 This reconceptualization may also point to other areas where consideration should be given to removal of the defence. For example, use of force by a police or prison officer in circumstances where the defence of provocation is potentially relevant would amount to at least degrading treatment.[51] The Grand Chamber of the European Court of Human Rights recognised this in the case of *Bouyid v Belgium* (concerning a slap to the face by a police officer during questioning of a suspect):

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[49] Nils Melzer, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence: Interim report of the Special Rapporteur on torture* and other cruel, inhuman or degrading treatment or punishment, UN Doc A/74/148 (12 July 2019).
[50] See, eg, CAT *General Comment No 2* [20]; CEDAW *General Comment No 35* [16]-[17]. In the context of the European Convention on Human rights see, eg, *Tunikova v Russia* (2021) ECtHR App nos. 55974/16, 53118/17, 27484/18, and 28011/19) (14 December 2021).
[51] See *Bouyid v Belgium* [2015] ECHR 819 [90]; Manfred Nowak, Special Rapporteur, *Report of the Special Rapporteur Torture and Other Cruel, Inhuman or Degrading Punishment,* UN Doc E/CN.4/2006/6 (23 December 2005) [38]-[40].

> The fact that the slap may have been administered thoughtlessly by an officer who was exasperated by the victim's disrespectful or provocative conduct is irrelevant here. …As the Court has previously pointed out, even under the most difficult circumstances, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (see paragraph 81 above). In a democratic society ill-treatment is never an appropriate response to problems facing the authorities.[52]

Such conduct should also be clearly excluded from the operation of the defence.

48 The same human rights considerations apply to the defence of prevention of repetition of insult (*Criminal Code* s 27).

Mandatory life sentence for murder (Q11)

49 The Commission supports removal of the mandatory penalty of life imprisonment for murder, as its continuation amounts to an unjustified limitation of a number of rights under the HRA.

Mandatory life imprisonment limits multiple rights

50 In relation to children, the Committee on the Rights of the Child has clarified that mandatory sentences are never compatible with the rights of the child.[53] The application of mandatory life sentences for murder to children under recent legislative amendments unjustifiably limits sections 26(2) and 29(1) of the Human Rights Act, as acknowledged by the Government in its statements of compatibility for the Bills.[54]

51 In relation to adults, the Human Rights Committee has clarified that the ICCPR is 'consistent with a variety of schemes for sentencing in criminal cases'.[55] Other jurisdictions, including those in Canada and the United Kingdom, have mandatory life imprisonment for certain categories of murder.[56]

52 However, detention of a person may be lawful but nevertheless 'arbitrary', limiting the right to liberty (s 29). The Human Rights Committee has explained that:

> The notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness,

[52] *Bouyid v Belgium* [2015] ECHR 819 [108].
[53] UN Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) [78].
[54] Making Queensland Safer Bill 2024, *Statement of Compatibility* 4-5; Making Queensland Safer (Adult Crime, Adult Time) Amendment Bill 2025, *Statement of Compatibility* 3-4.
[55] *HRC General Comment No 36* [20].
[56] Though not all of the categories of murder covered by the mandatory sentence of life imprisonment in Queensland.

injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[57]

53 As explored in the Consultation Paper, the mandatory life sentence for murder as imposed under the *Criminal Code* can operate in a disproportionate way that does not reflect moral culpability, indicating arbitrariness. It applies without distinction to those convicted of intentional murder, but also to those convicted of murder through reckless indifference or through acts done for an unlawful purpose.[58] It can distort the trial process, limiting the fair trial rights protected under section 32 of the Human Rights Act. This may include interference with the presumption of innocence for defendants who may be able to avail themselves of a complete defence but enter a plea deal, concerned about the consequences if that defence does not succeed.

54 The mandatory life sentence for murder also magnifies existing discrimination in the criminal justice system – in the way offences and defences are framed, in how evidence is admitted and evaluated, and in relation to lack of access to high quality representation. This means that certain groups, including First Nations peoples and victim/survivors of domestic violence, can be disproportionately impacted by the mandatory sentencing regime, limiting the right to equality (HRA s 15).[59]

55 By distorting the criminal justice process, mandatory life sentences may also impose more trauma on victims' families, who are forced to go through a trial that might not otherwise have proceeded.[60] This can limit their right to security of the person (HRA s 30(1)) due to the impact on their mental and physical health, and to privacy (HRA s 25).

The limits cannot be justified

56 In light of the:

- fundamental nature of the rights of the child, right to liberty, fair trial rights, and the rights to equality of the accused
- potential limits on the rights of victims' families caused by unnecessary trials
- deep limitations on the rights of persons accused and convicted of murder caused by mandatory sentencing
- ready availability of less rights-restrictive alternatives, such as those canvassed in the Consultation Paper, which still achieve the purposes of criminal punishment in line with the approach adopted for other crimes
- research showing that community attitudes do not support removing judicial discretion in sentencing

continuation of the mandatory life sentence for murder cannot be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

[57] *HRC General Comment No 36* [12].
[58] *Criminal Code Act 1899* (Qld) sch 1 'The Criminal Code' s 302.
[59] QLRC *Consultation Paper* [256].
[60] Ibid.

Defence of domestic discipline (Q21)

57 The Commission strongly supports repeal of the defence of domestic discipline in its entirety (Option 1) as the only recommendation compatible with the Human Rights Act. This defence unjustifiably limits the right to equality (HRA s 15), security of the person (HRA s 29(1)), children's rights (HRA s 26(2)), and the right to access education (HRA s 36(1)) and is inconsistent with states' obligations to protect children from torture and other ill-treatment (HRA s 17).

58 The use of physical force against children as a form of discipline is particularly concerning, as it constitutes a form of treatment that would be unacceptable if applied to adults. Allowing such conduct toward children reinforces the idea that their bodily integrity and dignity are less worthy of protection, and risks breaching fundamental protections under both international and domestic human rights law.

59 In this area the normative force of the law plays an important role in shaping attitudes and behaviour in the community to protect its most vulnerable from established harms. Concerns about unintended and discriminatory outcomes from reform should be taken seriously and substantial measures put in place to address them, using experience in other jurisdictions as a guide.

Rights engaged by the defence

Equality rights (HRA s 15)

60 The defence provided by section 280 of the *Criminal Code* treats children differently to adults, allowing force to be used against children in circumstances where it would be criminal if used against adults. This differential treatment on the basis of age limits the right of children to enjoy their rights (including security of the person) without discrimination (HRA s 15(2)) and their right to equal protection of the law without discrimination (HRA s 15(3)).

Protection needed by the child, and in their best interests (HRA s 26(2))

61 The right to protection of families and children affirms that children have the same rights as adults, alongside additional protections that reflect their vulnerability and evolving capacity.

62 Other stakeholder submissions to the Review outline in significant detail the research establishing that use of force to correct or discipline a child is associated with long-term negative outcomes for the child and no long-term benefits. This is established in relation to even low levels of force that do not escalate to more serious forms of abuse.[61] The

[61] Elizabeth T Gershoff and Andrew Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) 30(4) *Journal of Family Psychology* 453.

evidence as to long-term harm and lack of long-term benefit is also consistent across different countries and cultures.[62]

63 The Consultation Paper and stakeholder submissions also outline how availability of a defence for the use of 'reasonable' force against children leaves children vulnerable to escalation in the use of force and to violence going well beyond this threshold.[63]

64 A recent narrative review summarising the findings of 69 prospective longitudinal studies concluded that

> The evidence is consistent and robust: physical punishment does not predict improvements in child behaviour and instead predicts deterioration in child behaviour and increased risk for maltreatment. There is thus no empirical reason for parents to continue to use physical punishment.[64]

65 In the view of the Committee on the Rights of the Child, no violence against children is ever justifiable.[65] In its General Comment 13, the CRC clarified that 'frequency, severity of harm, and intent to harm are not prerequisites for the definitions of violence'.[66]

66 For these reasons retaining the defence of domestic discipline, giving sanction to the use of such force, limits the rights of children to the protection they need and which is in the child's best interests (HRA s 26(2)). It is also contrary to Australia's specific obligation under the Convention on the Rights of the Child to

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence … while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[67]

67 In addition, corporal punishment in schools undermines this right by permitting the use of physical force in an institutional setting where children should feel safe and supported. Authorising such practices in the school context diminishes the legal and social protections afforded to children and conflicts with the obligation to treat their best interests as a primary consideration.

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[62] Anja Heilmann et al 'Physical punishment and child outcomes: a narrative review of prospective studies' (2021) 398 *Lancet* 355 (summarising the findings of 69 prospective longitudinal studies). See also Joan E Durrant 'Physical Punishment, Culture, and Rights: Current Issues for Professionals' (2008) 29 *Journal of Developmental and Behavioural Pediatrics* 55, 57-58.
[63] QLRC *Consultation Paper* [399], [401]-[402].
[64] Anja Heilmann et al 'Physical punishment and child outcomes: a narrative review of prospective studies' (2021) 398 *Lancet* 355.
[65] CRC General Comment No 13 [2].
[66] UN Committee on the Rights of the Child, *General Comment No 13: The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [17]. See also UN Committee on the Rights of the Child, *General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment,* UN Doc CRCV/C/GC/8 (2 March 2007).
[67] *Convention on the Rights of the Child*, UN Doc A/RES/44/25 (20 November 1989, entered into force generally on 2 September 1990) art 19(1).

Right to education (HRA s 26)

68 Corporal punishment in in schools, which is permitted by the defence of domestic discipline, is also incompatible with the right to access education, particularly the requirement that education be accessible to all. Subjecting children to the lawful threat of physical violence simply by entering a school environment creates a barrier to access, especially for students who may already face challenges in engaging with the education system. This includes children with disabilities, or those from particular cultural or social backgrounds, who may find school environments more difficult to navigate and who may be disproportionately exposed to corporal punishment. As a result, corporal punishment undermines not only physical safety but also the approachability, inclusiveness, and usability of the learning environment.

Protection from torture and other ill-treatment (HRA s 17)

69 Retention of the defence also engages and limits the right to protection from torture and other cruel, inhuman or degrading treatment (HRA s 17). In the view of the UN Committee on the Rights of the Child, the use of any kind of corporal punishment, however light, is inherently degrading treatment because of the harm caused and the power dynamics involved.[68]

70 The United Nations Human Rights Committee and Committee Against Torture, along with regional human rights courts, have also recognised that corporal punishment can amount to cruel, inhuman or degrading treatment, or even torture.[69] The Committee Against Torture regularly raises a failure to prohibit such conduct as a concern in reviews of States Parties, including Australia.[70]

71 On this view, which has been supported by the UN Special Rapporteur on Torture, criminal provisions that allow any use of force that would not be allowed under ordinary criminal law principles are contrary to a state's obligations to protect children from at least degrading ill-treatment.[71] Even if is not accepted that all use of force against children for correction or discipline amounts to degrading treatment, by leaving children vulnerable to more serious levels of violence, the continuation of such a defence is not consistent with a state's obligations to put in place measures to protect children from torture and other ill-treatment.

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[68] UN Committee on the Rights of the Child, *General Comment No 13: The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [24].
[69] HRC *General Comment No 20* [5]. *Tyrer v The United Kingdom* [1978] ECHR 2; *Campbell and Cosans v The United Kingdom* [1982] ECHR 1; *Costello-Roberts v The United Kingdom* [1993] ECHR 16; *A v The United Kingdom* [1998] ECHR 85.
[70] Committee Against Torture, *Concluding observations on the sixth periodic report of Australia*, UN Doc CAT/C/AUS/CO/6 (5 December 2022) [47]-[48].
[71] Nils Melzer, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence: Interim report of the Special Rapporteur on torture* and other cruel, inhuman or degrading treatment or punishment, UN Doc A/74/148 (12 July 2019).

Distinguishing justified use of force

72 The Committee on the Rights of the Child has recognised that force may need to be used to protect children or others (to protect their rights to life, security of the person, and privacy), but that these actions should already be accommodated by the general law:

> The Committee recognises that parenting and caring for children, especially babies and young children, demand frequent physical actions and interventions to protect them. This is quite distinct from the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation. As adults, we know for ourselves the difference between a protective physical action and a punitive assault; it is no more difficult to make a distinction in relation to actions involving children. The law in all States, explicitly or implicitly, allows for the use of non-punitive and necessary force to protect people.
>
> The Committee recognizes that there are exceptional circumstances in which teachers and others, e.g. those working with children in institutions and with children in conflict with the law, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it. Here too there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish. The principle of the minimum necessary use of force for the shortest necessary period of time must always apply. Detailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control.[72]

Rights potentially limited by repeal of the defence

Rights relevant to criminalisation of parents and guardians

73 As explored in the Consultation Paper, repeal of the defence without effective supporting measures could lead to negative consequences engaging the following rights:

- the rights of the family and of the child (HRA s 26) that may be limited if a parent or carer is subjected to criminal prosecution and punishment;
- flow on effects to other rights such as cultural rights (HRA ss 27-28) and access to education (HRA s 36(1)) if the relationship with a parent or carer is disrupted by criminalisation;

[72] UN Committee on the Rights of the Child, *General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment,* UN Doc CRCV/C/GC/8 (2 March 2007) [14]-[15].

- the right to equal protection of the law, given the risk that repeal of the defence will disproportionately impact First Nations peoples, similar to concerns addressed above at [42].

74 Experiences in other jurisdictions have shown that these consequences and their impact on rights are not inevitable. Instead, they can be managed by careful implementation with a strong public education campaign, culturally informed community engagement strategies and training for those responsible for enforcement, targeted support for families, diversionary schemes such as those involving referral to parenting support as an alternative to prosecution, and clear guidance that discretion in relation to charging and prosecutions is to be exercised in the best interests of the child.

The relevance of religion and culture

75 It has also been argued that that prohibiting the use of corporal punishment may limit freedom to manifest religious belief (HRA s 20), or the ability to enjoy and practice culture protected by cultural rights (HRA ss 27-28). Tending against this, however, nearly 70 countries across different cultures and faiths have prohibited all physical punishment of children, protecting children and adults equally. These include more than 10 countries in Africa, 10 in Central and South America, six in the Asia-Pacific, 35 in Europe and one in the Middle East.[73]

76 In relation to the potential for interference with cultural rights of First Nations peoples, the Commission refers to the observations of the Queensland Aboriginal and Torres Strait Islander Child Protection Peak, that

> it is essential to recognise that traditional Aboriginal and Torres Strait Islander parenting approaches do not rely on physical discipline. Instead, disciplining methods foster positive behaviour through guidance, role-modelling, and connection. The continuation of a legal defence that permits physical punishment risks undermining culturally safe approaches and may contribute to further mistrust between Aboriginal and Torres Strait Islander families and the child protection system.[74]

77 Even if religious or cultural rights were limited in some cases, which is far from clear – the Committee on the Rights of the Child, and Committee on the Elimination of Discrimination Against Women have emphasised that cultural and religious grounds cannot provide justification for permitting harmful practices.[75] Both rights can be limited and must be

[73] See 'Progress', *End Corporal Punishment* (Web Page), https://endcorporalpunishment.org/countdown/.
[74] Queensland Aboriginal and Torres Strait Islander Child Protection Peak, *Submission: Review of particular criminal defences* (April 2025) 5.
[75] Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child, *Joint general recommendation No 31 of the Committee on the Elimination of Discrimination against Women/general comment No 18 of the Committee on the Rights of the Child (2019) on harmful practices*, UN Doc CEDAW/C/GC/31/REV.1 - CRC/C/GC/18/Rev.1 [31], [55](b). As to the categorisation of corporal punishment as a 'harmful practice' see [9].

exercised in a way that is 'consistent with respect for others' human dignity and physical integrity'.[76]

Repeal of the defence is justified

78 There is increasing global consensus that corporal punishment is inherently harmful and can never be justified in a way that is compatible with human rights.[77] Australia has received specific criticism from the UN Committee on the Rights of the Child, the UN Committee Against Torture, and the UN Committee on Persons with Disabilities for not only failing to prohibit it, but providing specific legislative sanction for it.[78]

79 The Committee on the Rights of the Child has stressed that the Convention on the Rights of the Child

> requires the removal of any provisions (in statute or common - case law) that allow some degree of violence against children (e.g. 'reasonable' or 'moderate' chastisement or correction), in their homes/families or in any other setting.[79]

80 Analysing the limits on rights relevant to the question of repeal in line with section 13 of the Human Rights Act leads to the same conclusion. Continuation of the defence limits fundamental rights of some of the most vulnerable individuals in our society, including their rights to equality, to security of the person, to promotion of their best interests as children, and to protection from torture and cruel, inhuman or degrading treatment. Even where such rights can be subject to justifiable limitations, continuation of the defence is not appropriate to achieve its stated purpose in light of the evidence that even low levels of corporal punishment cause long-term harm and do not result in any long-term benefit, and that this is consistent across cultures. The less rights-restrictive alternative is clear – to abolish the defence, and if the general criminal law is considered insufficient to cover situations where use of force is justified (such as self-defence or protection of the child or another), to insert a generally applicable provision to that effect.

81 Concerns that repeal of the defence will limit rights through negative impacts on families and communities must be taken seriously and should influence the way reform is carried

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[76] UN Committee on the Rights of the Child, *General Comment No 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment,* UN Doc CRCV/C/GC/8 (2 March 2007) [29].
[77] UN Secretary General's Report (2006); Joint Statement on the prohibition of corporal punishment against children, 58th session of the Rights Council, Interactive Dialogue with the Special Representative of the Secretary General on Violence against children (12 March 2025).
[78] United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia,* UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) [28(b)]; United Nations Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Reports of Australia*, CRPD/C/AUS/CO/2-3 (23 September 2019) [30(a)]; Committee Against Torture, *Concluding observations on the sixth periodic report of Australia*, UN Doc CAT/C/AUS/CO/6 (5 December 2022) [47]-[48].
[79] CRC *General Comment No 8* [31].

out. This can be informed by the experience of other jurisdictions that have abolished similar defences, including those measures set out in the Consultation Paper.[80] It must also involve a careful approach to prioritising the best interests of the child and culturally responsive support to families instead of traditional criminal justice system responses. The QLRC has received helpful contributions from other stakeholders about how this may be best achieved in the Queensland context.[81]

82 As noted in a recent wide-ranging study 'in almost all countries with prohibitions, these laws serve an educational rather than punitive function, aiming to increase awareness, shift attitudes, and clarify the responsibilities of parents in their caregiving role'.[82] Experience in other countries also shows that the greatest change in community attitudes to physical punishment occurs when public education and law are consistent.[83]

Other questions and recommendations

83 The Commission does not specifically address the other questions and recommendations in the Consultation Paper, but notes that positive measures to improve access to justice and remove discrimination within the law are required to uphold substantive equality as required under HRA ss 15(2)-(4). The Commission welcomes the QLRC's careful consideration of how discrimination in the operation of the justice system in relation to victim/survivors of domestic violence and First Nations peoples may be mitigated or corrected.

Rights in criminal proceedings

84 When crafting such measures, interactions with the defendant's rights in criminal proceedings are particularly important. Each of the fair trial rights guaranteed in s 32 of the Human Rights Act are expressed to be 'without discrimination'. The rights guaranteed under s 32 of the Human Rights Act apply to the whole criminal process.[84]

85 Measures to promote substantive equality may strengthen such rights (such as the right to be tried without unreasonable delay (HRA s 32(2)(c)) and the right to adequate time and facilities to prepare the person's defence (HRA s 32(2)(b)).

86 On the other hand, some measures may limit fair trial guarantees, including the fundamental the right to be presumed innocent until proved guilty by law (HRA s 32(1)).

87 However these rights are not absolute. Statutory provisions imposing either an evidential or legal burden of proof on an accused person, which limit the presumption of innocence

[80] QLRC *Consultation Paper* 76-82.
[81] See, eg, Queensland Aboriginal and Torres Strait Islander Child Protection Peak, *Submission: Review of particular criminal defences* (April 2025).
[82] Anja Heilmann et al 'Physical punishment and child outcomes: a narrative review of prospective studies' (2021) 398 *Lancet* 355.
[83] Ibid.
[84] *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61 [81]–[98]; *DPP v Smith*.

(HRA s 32(1)) and may limit the privilege against self-incrimination (HRA s 32(2)(k)), are not necessarily incompatible with it.[85] In each case, the justification for limiting the fair trial right must be considered in line with section 13 of the Human Rights Act – that is, whether it is a reasonable limit that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Factors which may be relevant include:

- the seriousness of the offence and the punishment that may flow from a conviction,
- whether the provision places an evidential or legal burden on the accused,
- the nature and extent of the factual matters required to be proved by the accused, including whether they are matters within the accused's own knowledge or to which he or she has access, and
- the significance of those matters relative to the matters required to be provided by the prosecution.[86]

[85] *R v DA* (2016) 263 A Crim R 429; [2016] VSCA 325 at [45]–[48], cf. *R v Momcilovic* (2010) 25 VR 436; [2010] VSCA 50.
[86] Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (Thomson Reuters, 2022) 297. See, eg, *Lambert, Ali and Jordan* [2002] QB 1112.