QUEENSLAND LAW REFORM COMMISSION

Review of particular criminal defences

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The Attorney-General of Queensland has asked the Queensland Law Reform Commission (Commission) to conduct a review of particular defences and excuses in the Queensland Criminal Code. Along with other considerations, the terms of reference direct the Commission to have regard to 'recent developments, legislative reform, and research in other Australian and international jurisdictions'.[2]

The focus of this paper is an interjurisdictional analysis of the penalty for murder and the defences of self-defence, killing on provocation and domestic discipline.

Background to the review of particular criminal defences

The Women's Safety and Justice Taskforce (Taskforce) was established in 2021 and operated for 16 months, examining coercive control and the experiences of women and girls across the criminal justice system. The Taskforce stated that the defences in the Criminal Code required review to:[3]

- ensure they align with the current knowledge about the effects of domestic and family violence
- evolve beyond outdated, gendered notions
- ensure they reflect the impact of domestic and family violence on victims and do not reinforce stereotypes that impact perpetrator culpability.

The Taskforce recognised that such a review would have implications beyond domestic and family violence and so in its first report in 2021, the Taskforce recommended a review of criminal defences. [4]

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1 Paper prepared with the assistance of Jodie O'Leary, Principal Legal Officer, and other staff of the Queensland Law Reform Commission Secretariat.

2 See Terms of Reference para 7(h).

3 Women's Safety and Justice Taskforce, Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland, 2021, vol 1, p xl.

4 Women's Safety and Justice Taskforce, Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland, 2021, vol 3, p 718.

Queensland Women's Safety and Justice Taskforce, Hear Her Voice – Report One
Recommendation 71
The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence refer for independent review the defences and excuses in the Criminal Code, including their operation in relation to homicide. Consideration should be given to making a reference to the Queensland Law Reform Commission.

The review's scope and considerations

The Terms of Reference ask the Commission to review the following defences in the Criminal Code:

- the complete defence of self-defence in sections 271 and 272;
- the complete defence of provocation as a defence to assault in sections 268 and 269;
- provocation as a partial defence to murder in section 304;
- the partial defence of killing for preservation in an abusive domestic relationship in section 304B; and
- the complete defence of domestic discipline in section 280.

The Commission is also asked to consider the mandatory penalty of life imprisonment for the offence of murder.

Penalty for murder in Queensland

When the Criminal Code came into force in 1901, the punishment for murder (and wilful murder) was death.[5] The punishment for manslaughter in the Criminal Code as passed was imprisonment 'with hard labour' for life.[6] In 1916, the Queensland Government introduced a policy that all sentences of death would be commuted to life imprisonment.[7] In 1922 the death penalty was abolished and the penalty for murder

5 See Criminal Code Act 1899 (Qld) sch 1 ss 19, 305, 651–652, 664–665, sch 3 (as passed). Previously see Offences Against the Person Act 1865, 29 Vic No 11, ss 1–2, repealed by Criminal Code Act 1899 (Qld) sch 3.

6 See Criminal Code Act 1899 (Qld) sch 1 s 310 (as passed).

7 Queensland State Archives, 'Ernest Austin: the last man hanged in Queensland', Stories from the Archives, 20 September 2021 https://blogs.archives.qld.gov.au/2021/09/20/ernest-austin-the-last-man-hanged-in-queensland/

(and wilful murder) in the Code was changed to mandatory life imprisonment with hard labour.[8]

At the second reading speech for the legislation that substituted mandatory life imprisonment for the death penalty in Queensland, the Attorney-General recounted the following justifications for the abolition of the death penalty:[9]

- No-one should have the right to take the life of an individual.
- The death penalty was not as effective as a deterrent as life imprisonment.
- A penalty of life imprisonment minimises the risk that juries will acquit those who are a menace to society (rather than convict of an offence that attracts the death penalty.)

Since 1992, in addition to mandatory life imprisonment, the penalty for murder in Queensland has included the potential of an indefinite sentence.

Usually, each person convicted of murder is given the same head sentence of life imprisonment – regardless of the individual circumstances of the offender or the offending. In its review of community-based sentencing orders, imprisonment and parole, the Queensland Sentencing Advisory Council recognised this issue. It expressed a view, based on the available evidence, that:[10]

> mandatory sentencing does not work in achieving the purposes of sentencing in the Act, or in reducing recidivism. This is because, as a matter of principle, it assumes that every offence and every offender are the same, which is patently not the case.

For example, in Queensland, murder now encompasses killing:[11]

- with intent to cause death or grievous bodily harm,
- by acts done or omissions made with reckless indifference to human life,
- by acts likely to endanger human life that are done in the course of an unlawful purpose, and

8 See also the 'Timeline of legislative reforms and proposals in Queensland' on our website https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences.

9 Queensland, Parliamentary Debates, 20 July 1922, 393 (J Mullan, Attorney-General).

10 Queensland Sentencing Advisory Council, Community-based Sentencing Orders, Imprisonment and Parole Options, Final report, July 2019, p 101.

11 Criminal Code (Qld) s 302.

- in particular circumstances, for the purpose of facilitating the commission of certain crimes or the flight of a person who has committed such crimes.

Regardless of these different bases for liability to murder, the same head sentence applies, life imprisonment. Further, Queensland's minimum non-parole periods for a person sentenced to life imprisonment for murder are currently:[12]

- at least 20 years, or
- at least 25 years, if the person is sentenced for the murder of a police officer in certain circumstances, or
- at least 30 years, if the person is sentenced for the murder of more than one person or has committed or previously been sentenced to another offence of murder.

Judges may increase, but not decrease, a non-parole period for murder[13]; but this is rarely done.[14] The cases where the non-parole period has been increased are often particularly heinous, have gone to trial and involve other serious offending. From our preliminary research it appears that the Office of the Director of Public Prosecutions often agrees not to ask for any extension where the offender has pleaded guilty. An example is the case of *R v Johnston*,[15] which was sentenced by Applegarth J earlier this year. The defendant was sentenced for the murder of his estranged wife. In breach of a temporary protection order, he packed a bag with supplies, including duct tape, zip ties, and a sedative and armed with knives and a jerry can of petrol went to her house and stabbed her numerous times and set her on fire, while their children watched. The non-parole period was not extended.

Penalty for murder in Victoria

Capital punishment was abolished in Victoria in 1975.[16] At that time, the penalty for murder became mandatory imprisonment for the term of the offender's natural life.[17] This shift to mandatory life imprisonment was a compromise to ensure the passage of the legislation abolishing the death penalty.[18] It was said:[19]

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12 Corrective Services Act 2006 (Qld) s 181(1)–(2)(a)–(c); Criminal Code (Qld) s 305(2)–(4).
13 See *R v Bafico* [1996] 2 Qd R 274.
14 *R v Appleton* [2017] QCA 290 at [38].
15 *R v Johnston* [2024] QSC 36.
16 Crimes (Capital Offences) Act 1975 (Vic) s 3.
17 Crimes Act 1958 (Vic) s 3.
18 Victorian Law Reform Commission, Law of Homicide in Victoria: Sentence for murder, 1985, p 5.
19 Victorian Law Reform Commission, Law of Homicide in Victoria: Sentence for murder, 1985, p 5 citing D Thomas, 'Developments in Sentencing 1964-1973', Criminal Law Review, 1974, p 687.

> The mandatory life sentence, part of the political price of the abolition of the death penalty, cannot be defended on any rational grounds in a system where every other offender is subject to the extensive discretion of the sentencing judge, and the difference between a verdict of murder and one of attempted murder or manslaughter may be the skill of the casualty officer or the sympathy of the jury.

In 1985 the Law Reform Commission of Victoria published it first ever review, about the *Law of Homicide in Victoria*. That review recommended amendment to the punishment for murder, so that it be a maximum of life imprisonment, and that judges have the ability to fix a non-parole period.[20] The law was changed and since 1986 the maximum sentence for murder has been life imprisonment.[21]

In 2017, the Sentencing Act 1991 was amended to stipulate standard sentences for murder (and other indictable offences) in Victoria.[22] In sentencing, the Court takes the standard sentence into account as one of the relevant sentencing factors; sometimes it is called a guidepost. The standard sentence for murder is generally 25 years imprisonment, or 30 years if the victim was a custodial officer or emergency worker.[23]

An example of a Victorian case decided around the same time as Johnston's case in Queensland was the *DPP v Sako* [2024] VSC 77 where an offender pleaded guilty and was sentenced to 36 years imprisonment with a non-parole period of 30 years for murder in circumstances where he broke into the house of a previous co-worker he was obsessed with and stabbed her multiple times until she died.

Penalty for murder in New South Wales

In New South Wales the death penalty was replaced with mandatory life imprisonment in 1955.[24]

In 1982 an exception to mandatory life was introduced if the court believed the offender's culpability was significantly reduced because of mitigating circumstances, shifting this to a presumptive life penalty.[25] Arguments posited for retaining mandatory life at the time included that it emphasised the gravity of murder, had an arguably greater deterrent effect than any determinate sentence and protected the

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20 Victorian Law Reform Commission, Law of Homicide in Victoria: Sentence for murder, 1985, p 3.
21 Crimes (Amendment) Act 1986 (Vic) s 8.
22 Sentencing Amendment (Sentencing Standards) Act 2017 (Vic).
23 Crimes Act 1958 (Vic) s 3(2).
24 Crimes (Amendment) Act 1955 (NSW) s 5(b).
25 Crimes (Homicide) Amendment Act 1982 (NSW) sch 1, cl 1.

public to a greater extent.[26] Arguments against included the inability to reflect different levels of culpability and that it removed any incentive to plead guilty.[27]

It has been suggested that since the change judges have taken into account evidence of self-defence, provocation, and diminished responsibility (even where it does not satisfy defence requirements) as mitigation in sentencing.[28]

In 1990 the current law was enacted, which stipulates maximum life imprisonment for murder.[29] Subsequently mandatory periods of life imprisonment became available in certain circumstances. Firstly, where the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only through the imposition of a life sentence[30] and secondly, for the murder of a police officer.[31]

New South Wales provides for those sentenced to life to serve imprisonment for their natural life, with no possibility for parole. It is now the only Australian jurisdiction where parole is not available for life sentences.[32] These reforms were introduced partly to respond to 'concerns that many offenders sentenced to life imprisonment were being released on licence and thus were not serving a "true" life sentence'.[33] Reviews by the New South Wales Law Reform Commission (in 1995 and 2013) and the New South Wales Sentencing Council (in 2012) have subsequently recommended the court should be able to order non-parole periods for life imprisonment, but the government has not adopted those recommendations.[34]

In November 2018, the New South Wales Sentencing Council received terms of reference to review sentencing for the offences of murder and manslaughter. The Council found that 'the sentences that are imposed for homicide are, generally,

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26 H Donnelly, S Cumines, A Wilczynski, Sentenced Homicides in New South Wales 1990–1990: A legal and sociological study, Judicial Commission of New South Wales,1995, p 73.
27 H Donnelly, S Cumines, A Wilczynski, Sentenced Homicides in New South Wales 1990–1990: A legal and sociological study, Judicial Commission of New South Wales,1995, p 73.
28 Report of the Taskforce on Women and the Criminal Code, February 2000, p 205 citing H Donnelly, S Cumines, A Wilczynski, Sentenced Homicides in New South Wales 1990–1990: A legal and sociological study, Judicial Commission of New South Wales,1995.
29 Crimes Act 1900 (NSW) s 19A, inserted by Crimes (Life Sentences) Amendment Act 1989 (NSW) sch 1 cl 3–4.
30 Crimes (Sentencing Procedure) Act 1999 (NSW) s 61.
31 See Crimes Act 1900 (NSW) s 19B, inserted by the Crimes Amendment (Murder of Police Officers) Act 2011 cl 3.
32 New South Wales Sentencing Council, Homicide, Consultation paper, October 2019, p 92
33 New South Wales Sentencing Council, Homicide, Consultation paper, October 2019, p 15.
34 New South Wales Sentencing Council, Homicide, Consultation paper, October 2019, p 92.

appropriate' and there had been an upward trend in the length of prison sentences over the years.[35]

A majority of the Council determined that it was appropriate to retain the maximum penalty of life imprisonment for murder, with the inability of the court to set a non-parole period when imposing life.[36] The Council was concerned that allowing parole for life sentences 'could undermine public confidence in the administration of justice' and could create further distress for victim's families and retraumatize them when parole applications are made.[37]

Recently in New South Wales in the case of *R v Stein* [2024] NSWSC 1080, Wilson J considered whether a life sentence should be made for the offender who was found guilty of executing his partner's 9-year-old daughter. Wilson J noted that the 'statistics show the imposition of a life term is uncommon'[38] but that case 'was a shockingly callous crime of very great heinousness; it was gravely reprehensible and extremely wicked' with no mitigating factors.[39] As such Wilson J ordered life imprisonment and Mr Stein is liable to serve the term of his natural life.

Penalty for murder in Western Australia

In 1961 the death penalty in Western Australia applied only to wilful murder; the penalty for murder was changed to mandatory life imprisonment.[40] Western Australia was the last Australian jurisdiction to abolish the death penalty for homicide.[41] Western Australia has had a mandatory sentence of life imprisonment for wilful murder and murder since 1980.[42]

In 2007 the Law Reform Commission of Western Australia recommended that the mandatory life sentence be replaced with a presumptive life sentence.[43] The Law Reform Commission of Western Australia, following New Zealand's lead, favoured

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35 New South Wales Sentencing Council, Homicide, Report, May 2021, p 11. Note that there are questions as to whether this trend has continued. BOCSAR data from NSW Higher Courts from January 2019 to December 2023 shows that the mean custodial sentence for murder in 2019 was 200.9 months, in 2020 was 191.2 months, peaked in 2021 at 201.4 months (16.783 years), then was 195 months in 2022 and 170.3 months in 2023.

36 New South Wales Sentencing Council, Homicide, Report, May 2021, pp 67–8, 72.

37 New South Wales Sentencing Council, Homicide, Report, May 2021, pp 73–4.

38 *R v Stein* [2024] NSWSC 1080, [118].

39 *R v Stein* [2024] NSWSC 1080, [119].

40 Criminal Code Amendment Act 1961 (WA) s 3 abolished the death penalty for murder.

41 It did so by the Acts Amendment (Abolition of Capital Punishment) Act 1984 (WA).

42 Criminal Code (WA) s 282(a) and (b). Wilful murder was murder that involved an intention to cause death: s 278. Murder involved an intention to cause the person killed (or some other person) grievous bodily harm, where the death is done in prosecution of an unlawful purpose (and other circumstances listed) in s 279.

43 Law Reform Commission of Western Australia, Review of the Law of Homicide, Final report 97, September 2007, p 304, recommendation 44.

presumptive life sentences for murder as it thought that 'for most cases of murder the penalty of life imprisonment is appropriate'.[44] It also thought this as other offences attracted a penalty of maximum life, and it wanted to differentiate murder from those offences.[45] The Commission noted that, dependent on individual circumstances, life imprisonment for murder might be clearly unjust:[46]

> In cases involving mercy killings or failed suicide pacts; cases that would previously have constituted infanticide; killings mitigated by significant provocation; killings mitigated (but not excused) by mental impairment; and cases where victims of serious and prolonged domestic violence have killed their abusers but where self-defence and excessive self-defence are not applicable.

In June 2008, Western Australia abolished wilful murder and mandatory life imprisonment and set the minimum non-parole period for life imprisonment for murder as 10 years.[47] Now, if a person is sentenced for murder, they are required to be sentenced to life imprisonment, unless that sentence would be 'clearly unjust given the circumstances of the offence and the person' and the 'the person is unlikely to be a threat to the safety of the community when released from imprisonment'.[48] If those exceptions apply, a maximum penalty applies of 20 years imprisonment.

In a recent Western Australian Court of Appeal decision of *Doohan v The State of WA* [2024] WASCA 80 a mother, who was 18-years-old at the time of killing her 4-month-old baby by violent shaking, unsuccessfully appealed her life sentence.[49] While she pleaded guilty initially, had no prior offending and had been exposed to significant domestic and family violence and subjected to verbal and physical abuse by her father, the Court did not disturb the lower courts finding that a life sentence was not clearly unjust. In that case, the court noted that cases in which the presumption is displaced are factually rare. In this regard, the court noted there have only been 2 such cases since the 2008 amendments and they are subject to suppression orders.

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44 Law Reform Commission of Western Australia, Review of the Law of Homicide, Final report 97, September 2007, p 311.

45 Law Reform Commission of Western Australia, Review of the Law of Homicide, Final report 97, September 2007, p 311.

46 Law Reform Commission of Western Australia, Review of the Law of Homicide, Final report 97, September 2007, p 314–5.

47 Criminal Law Amendment (Homicide) Act 2008 (WA).

48 Criminal Code (WA) s 279(4).

49 Note that the non-parole period was 13 years.

Penalty for murder in New Zealand

Prior to 1961, in New Zealand, the mandatory penalty for murder was death.[50] Following amendments, the penalty became mandatory life imprisonment, with a parole period of at least 10 years.[51] In 1976, the Criminal Law Reform Committee recommended abolishing mandatory life (and the partial defences, apart from infanticide),[52] but these recommendations were not enacted.

In 2001, the New Zealand Law Commission recommended that mandatory life be replaced by a sentencing discretion but thought that the discretion should be limited, partly because complete discretion would be less acceptable to the public.[53] In 2002, the penalty for murder was changed to incorporate the presumptive life sentence.[54] That is, the court must order life imprisonment, 'unless, given the circumstances of the offence and the offender', it would be 'manifestly unjust.'[55]

The threshold of manifestly unjust is described as a high one that is likely to be met in exceptional cases.[56] It has been held that the term "manifestly" means in this context that the injustice in imposing life imprisonment must be clear.[57] Both the circumstances of the offence and the offender must be considered and manifest injustice is to be found from an overall weighting of those two considerations. The assessment of the circumstances of the offence and the offender must be made against the purposes and principles of sentencing identified in the Sentencing Act 2002 (NZ).

In addition, in New Zealand, life imprisonment for murder requires the court to order the offender serve a minimum period of 10 years imprisonment,[58] or if certain circumstances apply, a minimum period of 17 years (unless it would be manifestly unjust).[59]

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[50] New Zealand Law Commission, Battered Defendants: Victims of domestic violence who offend, Preliminary paper 41, August 2000, p 43.
[51] New Zealand Law Commission, Battered Defendants: Victims of domestic violence who offend, Preliminary paper 41, August 2000, p 43.
[52] New Zealand Criminal Law Reform Committee, Report on Culpable Homicide, 1976 cited in New Zealand Law Commission, Battered Defendants: Victims of domestic violence who offend, Preliminary paper 41, August 2000, p 43.
[53] New Zealand Law Commission, Some Criminal Defences with Particular Reference to Battered Defendants, Report 73, May 2001, p 53.
[54] Sentencing Act 2002 (NZ) s 165.
[55] Sentencing Act 2002 (NZ) s 102.
[56] *R v Rapira* [2003] NZLR 794.
[57] *Van Hemert v R* [2023] NZSC 116.
[58] Sentencing Act 2002 (NZ) s 103.
[59] Sentencing Act 2002 (NZ) s 104.

Unlike Western Australia, our initial research has identified a number of cases in which the New Zealand courts have departed from the presumption of life imprisonment. For example, this year they have done so in the case of *R v Dickason* [2024] NZHC 1704 where a mother's mental illness impacted on the killing of her 3 daughters. In that case, the Court thought the presumption was displaced and instead a finite sentence of 18 years concurrent for each murder was made. They have also done so in a case of *R v Huntley* [2024] NZHC 182 where a 19-year-old was charged with a murder committed when he was 17 and had an upbringing marred by violence, profound social and cultural deprivation and neglect and received 16 years instead of life. And in a mercy killing in *R v Salter* [2024] NZHC 381 where an 80-year-old murdered his wife who had Alzheimer's and had earlier agreed to a suicide pact. He received a sentence of 4 years.

Summary of approaches to penalty for murder

Since abolishing the death penalty for murder, different jurisdictions have formulated different penalties for murder. Some, like the Northern Territory, South Australia, Canada and the UK have maintained the mandatory penalty like Queensland, with difference as to the minimum time that must be served before any release. Others, like Victoria and New South Wales, have stipulated a maximum penalty of life and have similar mean/median penalties and non-parole periods: that is, in Victoria a median head sentence of 23 years and a median non-parole period of 18 years, and in New South Wales a mean of 25.6 years head sentence and 18.9 years non-parole period.[60] Still others, like Western Australia and New Zealand, have made the life penalty presumptive but in practice the decision as to when that presumption is displaced appears to be more often made in New Zealand.

Self-defence in Queensland

In Queensland, with certain limitations, self-defence allows a person to use force that is reasonably necessary to defend themselves.[61] The Queensland self-defence provisions have attracted criticisms, for example that:

- they are complex, difficult to understand and difficult for judges to direct juries on;[62]

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[60] Sentencing Advisory Council, Sentencing Snapshot: Murder, No. 273, June 2023, pp 3, 5; New South Wales Sentencing Council, Homicide, Report, May 2021, p 11.

[61] See generally, Queensland Law Reform Commission, 'Self-defence information sheet', November 2023 https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences.

[62] *R v Dayney* [2023] QCA 62 at [76] (Dalton JA); R v Gray (1998) 98 A Crim R 589 at 592 (and generally at 591– 5); *R v Messent* [2011] QCA 125 at [29].

- some requirements have been given conflicting interpretations in case law;[63] and
- in some circumstances they may be difficult to run as a defence for a victim-survivor of domestic and family violence who uses force against their abuser.[64]

In a recent Queensland Court of Appeal decision, Dalton JA found that section 272 is ambiguous and observed that the self-defence provisions need reform.[65]

The Commission is asked to recommend if:[66]

- self-defence should be made simpler and clearer;
- self-defence should be expanded to cover circumstances when a victim-survivor of domestic or family violence acts reasonably to protect themselves from a perpetrator;
- self-defence should continue to distinguish between provoked and unprovoked assaults and whether it should be limited to circumstances of assault against a person.

Queensland is the only Australian jurisdiction to distinguish between self-defence against unprovoked and provoked assaults. Many places have simplified their self-defence provisions, focusing on the use of force that is reasonable in the circumstances.

Self-defence and excessive self-defence in New South Wales

In 2001, self-defence was codified in legislation in New South Wales, which was based largely on the Model Criminal Code. Prior to this, the defence was defined by the common law. The defence applies if:[67]

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63 *R v Dayney* [2020] QCA 264 at [41]–[51] (Sofronoff P), [112]–[114] (Fraser and McMurdo JJA), discussing Criminal Code (Qld) s 272(2).

64 Women's Safety and Justice Taskforce, Options for Legislating against Coercive Control and the Creation of a Standalone Domestic Violence Offence, Discussion paper 1, 2021, p 24; G Mackenzie & E Colvin, Victims who Kill their Abusers, Discussion paper, April 2009, pp 21–2; Report of the Taskforce on Women and the Criminal Code, February 2000, p 148.

65 *R v Dayney* [2023] QCA 62 at [39], [54], [76] (Dalton JA).

66 See Terms of Reference para 2.

67 Crimes Act 1900 (NSW) s 418.

- a person believed that their conduct was necessary to defend themself or another person; and
- the person's conduct was a reasonable response in the circumstances as they perceived them.

The prosecution bears the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.[68]

In *R v Katarzynski* [2002] NSWSC 613, Howie J commented on the differences between the common law and the new codified self-defence provision:[69]

> The issue as to the reasonableness of the accused's response is objective in so far as the jury is not concerned with what the accused believed was necessary to respond to the circumstances as he or she perceived them to be. The current provision is not concerned with whether the accused's belief as to what was the necessary response was a reasonable one or whether he or she had reasonable grounds for that belief. This is where the current provisions are in contrast to the position at common law: the accused need not have reasonable grounds for his or her belief that it was necessary to act in the way he or she did in order to defend himself or herself. It is sufficient if the accused genuinely holds that belief.

A notable feature of the jurisdictions, such as New South Wales, based on the Model Criminal Code is that a single provision covers the range of defensive force varieties, including defence of self, defence of another, defence of personal and real property. This contrasts with Queensland law as the defensive force provisions are spread across a number of provisions.[70]

In 2001, the partial defence of excessive self-defence was reintroduced in NSW, to reduce murder to manslaughter.[71] It was the government's view that 'a person who honestly believes he is acting in self-defence but who uses more force than is reasonable in the circumstances should not be liable for murder but be liable for the lesser offence of manslaughter'.[72] The partial defence of excessive self-defence applies if a person believed that their conduct was necessary to defend themself but this conduct was not a reasonable response in the circumstances as they perceived them.

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68 Crimes Act 1900 (NSW) s 419.

69 *R v Katarzynski* [2002] NSWSC 613 at [24].

70 Criminal Code (Qld) ss 267, 271-278.

71 Crimes Amendment (Self-Defence) Act 2001 (NSW), which commenced in February 2002.

72 New South Wales, Parliamentary Debates, Legislative Assembly, 28 November 2001, 19094, (B Debus, Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts).

In 2012 the NSW Parliamentary Research Service released a Briefing Paper noting concerns previously raised by the Victorian Law Reform Commission that the availability of this defence:[73]

> may prevent women from being acquitted on the basis of self-defence, due to the existence of an 'easy' middle option. Many women who kill in response to family violence use a weapon, often against their unarmed partner. A jury, presented with the option of returning a verdict of manslaughter on the basis of excessive self-defence, may therefore simply accept that such a killing was unreasonable and disproportionate, instead of properly considering the reasonableness of her actions in the circumstances.

More recent analysis has indicated that New South Wales, which has retained several partial defences to homicide such as excessive self-defence, had the highest acquittal rate of women prosecuted for killing their abusive male partners in self-defence.[74]

Self-defence in New Zealand

New Zealand's self-defence provisions[75] were previously similar to Queensland.[76] They distinguished between provoked and unprovoked assaults. The New Zealand Court of Appeal criticised them as being incomprehensible for juries to understand the varying tests and distinctions provided by the provisions.[77]

Self-defence was subsequently amended[78] combining self-defence and defence of another within a single sentence imposing a subjective test of belief and objective test of reasonableness. The section states: 'anyone is justified in using, in the defence of [themselves] or another, such force as, in the circumstances as [they] believe them to be, it is reasonable to use.'[79]

This section is not limited to homicide or assault matters. The reasonableness of force depends on the necessity and whether the harm caused was proportionate to the

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73 Provocation and self-defence in intimate partner and sexual advance homicides Briefing paper No 5/2012 (New South Wales. Parliamentary Library Research Service) citing Victorian Law Reform Commission, Defences to Homicide, Final Report, October 2004 p 94.

74 R Dioso-Villa & C Nash, 'Identifying Evidentiary Checkpoints and Strategies to Support Successful Acquittals for Women who Kill an Abusive Partner During a Violent Confrontation', International Journal for Crime, Justice and Social Democracy, 2024, doi: https://doi.org/10.5204/ijcjsd.3538

75 Crimes Act 1961 (NZ) ss 48 & 49.

76 Criminal Code (Qld) ss 271 & 272.

77 *R v Kerr* [1976] 1 NZLR 335, 344 cited in *R v Dayney* [2023] QCA 62 at [76] (Dalton JA) at [76].

78 Crimes Amendment Act 1980 (NZ) s 2.

79 Crimes Act 1961 (NZ) s 48.

harm sought to be prevented.[80] The ability to retreat is relevant as to whether the response was necessary but there is no legal duty to retreat.[81] It may be necessary to pre-empt an attack.[82] Threat alone is enough to amount to self-defence. For example, a person facing a knife does not need to wait for the knife to be used.

Unlike the Queensland self-defence provisions, [83] New Zealand's self-defence does not contain limbs focused on whether there was any provocation, the reasonable apprehension of death or grievous bodily harm or the ability to retreat.

Summary of approaches to self-defence

In general, jurisdictions have been simplifying their self-defence provisions. Some jurisdictions also provide partial defences to account for situations in which the complete defence of self-defence may not apply, such as excessive self-defence in New South Wales. In Queensland the defence of killing for preservation in an abusive domestic relationship was introduced in 2010[84] in response to the perceived limitations of provocation and self-defence for people who kill their abusers. The defence, unique to Queensland, was intended to give special consideration to victims of seriously abusive relationships.[85] Our initial research has identified that, since its creation, the killing for preservation in an abusive domestic relationship defence has been used twice, once at trial and at least once as the basis for a plea to manslaughter.[86]

Killing on provocation in Queensland

Provocation is a partial defence to murder if the person was provoked by the other person to such an extent that they lost and acted without self-control, killing the other person 'in the heat of passion'. In section 304 of the Queensland Criminal Code this defence reduces murder to manslaughter.[87]

In 2008, the Queensland Law Reform Commission was asked to review the defence of provocation. The Commission noted that the partial defence of provocation had

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80 F Wright, 'The circumstances as she believed them to be: A reappraisal of section 48 of the Crimes Act 1961', Waikato Law Review, vol 6, 1998, p 109.

81 *R v Terewi* (1985) 1 CRNZ 623, 625.

82 *R v Terewi* (1985) 1 CRNZ 623, 625, also *R v Wang* [1989] 3 NZLR 529, 539.

83 Criminal Code (Qld) ss 271 & 272.

84 Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld).

85 Queensland, Parliamentary Debates, 26 November 2009, 3669 (C Dick, Attorney-General and Minister for Industrial Relations).

86 *R v Cooktown,* Supreme Court of Queensland, Henry J, 25 February 2020 and *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015.

87 See generally, Queensland Law Reform Commission, 'Killing on provocation', November 2023 https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences.

emerged in 16th and 17th century England when, if people, particularly men, were insulted or attacked, it was accepted that they would respond angrily to protect their honour.[88] Assessing the statistical information provided to it, the Commission suggested that there were predominately two groups who used the partial defence of provocation:[89]

- First, men who kill a partner (or former partner or rival) at or after separation. There the central dynamic was the exercise by the partner (or former partner) of their right to personal autonomy and the man's denial of her right to autonomy.

- Second, men who kill other men in situations involving significant violence or the threat of significant violence. The killing was an act of immediate retaliation, or carried out when significant violence is occurring, or when there is a potential for significant violence. Effectively, provocation was used as a fall-back position from self-defence.

The Commission found that the defence of provocation was gender-biased in its operation and recommended change.[90] Changes to the law were made in 2011 and 2017 to exclude the partial defence of provocation, other than in exceptional circumstances, where the alleged provocative behaviour was based on:[91]

- words alone;

- an unwanted sexual advance; or

- anything done, or believed to be done, by the deceased to end or change the nature of their domestic relationship with the person.

Despite these changes, the partial defence of provocation has continued to attract criticism. Following the 2020 case of *Peniamina v The Queen*,[92] community members expressed concern that the provocation defence was outdated and should be abolished.[93]

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88 Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, pp 209-210.

89 Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008 p 216-217.

90 Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, p 472.

91 See Criminal Code s 304(2)-(8), by virtue of Criminal Code and Other Legislation Amendment Act 2011 (Qld) s 5 and Criminal Law Amendment Act 2017 (Qld) s 10.

92 (2020) 271 CLR 568.

93 See discussion in The Hon Justice Peter Davis, Provocation: Where to now? The implications of the Peniamina case, Paper delivered to the Queensland Bar Association Annual Conference, 27 March 2022, p 24.

In its current review, the Queensland Law Reform Commission has been asked to examine whether the partial defence of provocation should be amended or repealed.[94] Previous reviews in Queensland have not recommended removing the defence of killing on provocation.[95] One concern was that the mandatory penalty of life imprisonment for murder may operate unfairly for victim-survivors of domestic and family violence who killed their abusers.[96] Our preliminary research has identified at least one case since the amendments where it appears provocation has been successfully relied on as a defence by a victim-survivor of domestic and family violence who killed their abuser.

Abolition of killing on provocation in Victoria, Tasmania, South Australia, Western Australia and New Zealand

Provocation has been reviewed and abolished in several places, such as Western Australia, Victoria, Tasmania, South Australia and New Zealand.[97] The Victorian Law Reform Commission recommended abolition as:[98]

- it was concerned that reforming the defence would risk creating new problems; and
- it thought the defence was inconsistent with contemporary community values and views on what is excusable behaviour.

Speaking on the second reading speech for legislation abolishing the killing on provocation defence, the Victorian Attorney-General stated:[99]

> The courts developed the partial defence of provocation at a time when murder carried a mandatory death penalty. The partial defence is outdated now that provocation can simply be taken into account, if relevant, alongside a range of other factors in the sentencing process.
>
> The [Victorian Law Reform] commission found that the law of provocation has failed to evolve sufficiently to keep pace with a changing society. By reducing murder to

94 See Terms of Reference para 2(b).

95 See e.g. Report of the Taskforce on Women and the Criminal Code, February 2000, ch 6 pt 5; Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008.

96 Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, p 474.

97 See Criminal Code (WA) s 281, repealed by the Criminal Law Amendment (Homicide) Act 2008 (WA) s 12; Crimes Act 1958 (Vic) s 3B; Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas) s 4(b); Criminal Law Consolidation Act 1935 (SA) s 14B; Crimes (Provocation Repeal) Amendment Act 2009 (NZ).

98 Victorian Law Reform Commission, Defences to Homicide (Final report, 2004), p 56.

99 Victoria, Parliamentary Debates, Legislative Assembly, 6 October 2005, 1349 (R Hulls, Attorney-General).

> manslaughter, the partial defence condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.

Following the abolition of the killing on provocation defence in Victoria, there was evidence that judges were not accepting as mitigation on sentence claims by men to have ‘snapped’ or ‘lost control’ when faced with a sexual rejection or with the partner’s infidelity.[100] For example, the sentencing judge in *R v Neacsu* [2012] VSC 388 stated: ‘Your wife was entitled to leave you. You may not have liked that, but she had the right to do so.’[101]

In New Zealand though it has been determined that ‘provocation could be a factor in assessing culpability and therefore whether a life sentence is manifestly unjust and as to the imposition of the [stipulated non-parole period]’.[102] The presumption of life imprisonment was not displaced in that case but the intense emotional pressure caused by the offender’s discovery of his wife and best friend’s sexual relationship combined with other factors for the judge to order departure from the 17 year non-parole period.[103]

Killing on provocation in New South Wales

In the 2012 case of *R v Singh*,[104] Singh successfully used provocation to reduce the charge of murder of his wife to manslaughter. Singh’s defence argued that he was provoked to kill his wife (by strangling her and then cutting her throat with a box cutter blade – at least 8 times) by suspicions of her infidelity, disparaging comments made by his wife (and her brother-in-law), his belief that she was near to separating from him and his fear that such a separation would lead to his deportation. On conviction of manslaughter, Singh was sentenced to eight years imprisonment with a non-parole period of six years.

Following the verdict, the NSW Office of the Director of Public Prosecutions stated:[105]

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100 Naylor B & Tyson D, ‘Reforming defences to homicide in Victoria: Another attempt to address the gender question’, International Journal for Crime, Justice and Social Democracy, vol 6(3) p 72-87. DOI: 10.5204/ijcjsd.v6i3.414 citing Freiberg A, Gelb K and Stewart F (2015) Homicide law reform, provocation and sentencing. In Fitz-Gibbon K and Freiberg A (eds) Homicide Law Reform in Victoria: Retrospect and Prospects: 57-75. Sydney, New South Wales: Federation Press.

101 *R v Neacsu* [2012] VSC 388 at [43].

102 *Hamidzadeh v The Queen* [2013] NZSC 33, [6].

103 *R v Hamidzadeh* HC Auckland [2011] NZHC 138, [26]-[29].

104 (2012) NSWSC 637.

105 NSW Office of the Director of Public Prosecutions, Submission to the NSW Legislative Council Select Committee on the Partial Defence of Provocation, August 2012, p 1.

> The community rightly expects that men in the same circumstance should not resort to violence, and certainly not the level of violence perpetrated by this accused on the deceased. In other words, the rationale of the defence of provocation is inconsistent with contemporary community values and views on what is acceptable behaviour.

In 2012, following *Singh*, a New South Wales Legislative Council Select Committee was tasked with inquiring into and reporting on the partial defence of provocation, as well as (if provocation was abolished) the adequacy of the defence of self-defence for domestic and sexual violence victim-survivors.[106] The Committee did not reach consensus about the abolition of the partial defence of provocation, as it said:[107]

> there are some defendants, particularly women who have been victims of long-term domestic abuse, for whom the partial defence of provocation may appropriately reflect their legal and moral responsibility in circumstances where self-defence would be difficult to established.

However, the Committee did suggest reforms to increase the gravity of circumstances that would apply to a provocation defence (to gross provocation – which would be words or conduct or a combination of those that caused the defendant to have a justifiable sense of being seriously wronged) and to exclude certain circumstances.[108]

The Committee did consider the option of reversing the onus of proof (as Queensland had done in 2011). It noted that the argument advanced for reversal was generally that 'the defendant is usually the only witness to the killing [and so] shifting the onus to establish the partial defence ... would require the person with the most knowledge of the incident to put those facts before the Court'.[109] It also considered the arguments against reversing the onus, which largely involved the fundamental principle that the prosecution should establish criminal liability and that it may operate detrimentally for defendants, especially battered women. The Committee ultimately was unable to come to a conclusion and did not make a recommendation.[110]

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106 Select Committee on the Partial Defence of Provocation, The Partial Defence of Provocation, Report, April 2013, pp 1-2.

107 Select Committee on the Partial Defence of Provocation, The Partial Defence of Provocation, Report, April 2013. p x.

108 T Crofts & A Loughnan, 'Provocation, NSW style: reform of the defence of provocation in NSW', Legal Studies Research Paper No. 14/19, February 2014, at p 1–2 state that the proposal for reform is closely modelled on the Law Commission for England and Wales' proposals.

109 Select Committee on the Partial Defence of Provocation, The Partial Defence of Provocation, Report, April 2013, p 168.

110 Select Committee on the Partial Defence of Provocation, The Partial Defence of Provocation, Report, April 2013, p 178.

In response to the recommendations, New South Wales reformed their killing on provocation defence by:[111]

- Requiring provocation to now be extreme and to involve the commission of a serious indictable offence (that is, an offence punishable by imprisonment for life or for 5 years or more)
- Simplifying the loss of control test to be purely objective
- Excluding certain circumstances from being able to constitute provocation, specifically conduct which constitutes a non-violent sexual advance directed only to the defendant and conduct which the defendant incited to provide an excuse to use violence.

Following the reforms, an analysis of homicide cases indicated that the new partial defence of extreme provocation did not apply to the majority of cases that gave rise to a conviction for provocation in the 10 years prior to the reforms.[112] However, it has been suggested that New South Wales should have gone further by abolishing the partial defence of provocation altogether and introducing a sentencing guideline framework to support its consideration at sentencing.[113]

New defence of loss of control in England, Wales and Northern Ireland

The defence of provocation to murder was originally part of the common law in the United Kingdom. It was then provided for in the Homicide Act 1957:[114]

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

[111] Crimes Amendment (Provocation) Act 2014 (NSW)

[112] K Fitz-Gibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence Of 'Extreme' Provocation', Melbourne University Law Review, Vol 40(3), 2017.

[113] K Fitz-Gibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence Of 'Extreme' Provocation', Melbourne University Law Review, Vol 40(3), 2017, p 814.

[114] Homicide Act 1957 (Imp) c 11, s 3.

Following the Law Commission's *Murder, Manslaughter and Infanticide* report in 2006, legislative reform occurred with the abolition of the defence of provocation and creation of the loss of control defence.[115]

In October 2010 provocation was abolished and replaced with a similar defence of loss of control. It removed the requirement for the loss of self-control to be sudden and temporary. It also narrowed the conduct that could amount to what was previously called provocation and now is a qualifying trigger.

The new defence does not have a proportionality requirement, but the qualifying trigger has a threshold test, that is the defendant has to fear serious violence or be subject to things done or said of an extremely grave character that cause them to be justifiably seriously wronged. Further, it replaced the reasonable man test, instead requiring that a 'person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or similar way'.

The retention of loss of control in the new defence has been criticised for allowing the utilisation of descriptors often heard in cases of common law provocation such as 'snapped', 'went berserk', 'lost the plot', and 'the straw that broke the camel's back'.[116]

Summary of approaches to killing on provocation

In recent years, jurisdictions have been moving towards abolishing, narrowing or replacing the defence of killing on provocation.

Provocation to assault in Queensland and Western Australia

The defence of provocation to assault is a complete defence. It has some similarities with the partial defence of killing on provocation but is a separate defence with its own requirements. The complete defence of provocation in Queensland applies only to offences involving the legal element of assault.[117] Queensland and Western Australia are the only Australian jurisdictions with a complete defence of provocation to assault.

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115 Coroners and Justice Act 2009 (UK) ss 54–56.

116 H Douglas and A Reed, 'The role of loss of self-control in defences to homicide: a critical analysis of Anglo-Australian developments' (2021) 72(2) NILQ271–323, p 274.

117 *R v Williams* [1971] Qd R 414; *Kaporonovski v The Queen* (1973) 133 CLR 209.

Domestic discipline in Queensland

The defence of domestic discipline, also known as 'lawful correction' or 'reasonable chastisement', exists in each Australian state and territory.[118] In Queensland, the domestic discipline defence allows parents, persons in their place, schoolteachers and masters to use force that is 'reasonable under the circumstances' to correct, discipline, manage or control a child in their care.[119] The defence of domestic discipline was based on earlier common law and has been in the Queensland Criminal Code since it came into force in 1901.

The defence has been criticised due to different views on what is 'reasonable'.[120] There is also a growing body of research showing that the use of physical punishment on children is ineffective and can be harmful.[121] The Commission's review will consider whether the defence remains fit for purpose and should be changed or removed.

Common Law defence of lawful correction in Australia

In Victoria, the common law defence of lawful correction potentially excuses what would be an assault of a child and even more serious offences, such as intentionally causing injury and child homicide.[122] In the 1954 case of *R v Terry*,[123] the defendant was charged with the murder of a 19-month-old child. Sholl J directed the jury that a parent has 'a lawful right to inflict reasonable and moderate corporal punishment on a child for the purpose of correcting the child in wrong behaviour'.[124] His Honour pointed out, however, that there are 'exceedingly strict limits on that right'.[125] Those limits include:[126]

- The punishment must be moderate and reasonable;

118 It is part of the common law of the Australian Capital Territory, Victoria and South Australia and is legislated in Crimes Act 1900 (NSW) s 61AA; Criminal Code (NT) ss 11, 27(p); Criminal Law Consolidation Act 1935 (SA) s 20; Criminal Code (Tas) s 50; Criminal Code (WA) s 257.

119 See generally, Queensland Law Reform Commission, 'Domestic discipline information sheet', November 2023 https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences.

120 See e.g. S McInnes-Smith, 'The inconsistency of the "lawful correction" of children defence with Queensland's new Human Rights Act 2019 (Qld)', University of Queensland Law Journal, vol 41(3), 2022, pp 327–62, doi:10.38127/uqlj.v41i3.6439; Tasmania Law Reform Institute, Physical Punishment of Children, Final report 4, October 2003, pp 22–6, 29–30, 32–6.

121 See e.g. SS Havinghurst et al, 'Corporal punishment of children in Australia: The evidence-based case for legislative reform', Australian and New Zealand Journal of Public Health, vol 47(3), 2023, doi:10.1016/j.anzjph.2023.100044.

122 *R v Hughes* [2015] VSC 312, p 19 (98).

123 [1955] VLR 114.

124 *R v Terry* [1955] VLR 114 at 116.

125 *R v Terry* [1955] VLR 114 at 116.

126 *R v Terry* [1955] VLR 114 at 116.

- It must have a proper relation to the age, physique and mentality of the child; and
- It must be carried out with a reasonable means or instrument.

In the 2015 case of *R v Hughes*,[127] Croucher J reflected on how the lawful correction defence may have evolved since *R v Terry*:[128]

> It might be thought at least anomalous that what would not be a defence to an allegation of assaulting or killing an adult could be a defence to an allegation of assaulting or killing a child who, after all, usually will be more vulnerable than an adult. Presumably, thoughts of this kind are among the reasons why several countries have removed lawful correction as a defence to assaults and related offences against children [footnote omitted]. Mine is not to reason why the same should or should not be so in this State. Again, that is a matter for the legislature to determine.
>
> That said, I suspect that the contours of the defence of lawful correction might not be regarded the same today as they were over 60 years ago, when Sholl J's directions were given. For example, I doubt whether many, if any, 14-year-old boys today would tolerate a caning from their parents. Further, my guess is that many in the community would regard that as the wrong thing to do.

Modified lawful correction defence in New South Wales

In 2001, New South Wales inserted the defence of lawful correction, section 61AA, into the Crimes Act to codify and amend the common law.[129] In his second reading speech on the Bill, the Attorney-General the Hon Bob Debus identified the three policy considerations underpinning the Bill, to:[130]

- ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner;
- ensure that sensible parents have a defence, but child abusers do not; and
- codify the Government's belief that excessive force is never reasonable, irrespective of whether the person administering the force uses an implement.

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127 [2015] VSC 312.

128 *R v Hughes* [2015] VSC 312, [100]–[101] (Croucher J).

129 Crimes Amendment (Child Protection – Physical Mistreatment Act 2001 (NSW).

130 New South Wales Department of Justice and Attorney General, Statutory Review: Section 61AA, Crimes Act 1900 (NSW), February 2010, pp 10-11.

A person is not criminally responsible for an offence arising from applying physical force to a child if:[131]

- the person is the child's parent or was acting for the child's parent,
- force was applied to punish the child, and
- the force was reasonable.

To determine whether the force was 'reasonable', regard is to be had to the child's age, health, maturity and other characteristics, the nature of the alleged misbehaviour, and any other relevant circumstances.[132]

Physical force that is more than trivial or negligible is not reasonable when applied to the child's head or neck or any other part of the child where the harm is likely to last more than a short period of time.[133]

A statutory review was conducted by the New South Wales Department of Justice and Attorney-General[134] and tabled on 25 February 2010. The main findings of the review were:[135]

- There is little case law regarding the use of the defence in practice;
- The majority of respondents felt that section 61AA has been successful in meeting its policy objectives; and
- Several submissions indicated that section 61AA reflects community attitudes and provides guidance on the issue of discipline of children.

In short, the review recommended that section 61AA continue to operate. Some submissions expressed that the provision was practically useful. For example, the Ministry for Police 'note that there was anecdotal evidence suggesting that operational police were considering section 61AA when determining whether there is sufficient evidence to justify commencement of proceedings.'[136] Other submissions noted that the 'fact that the defence has not been litigated since its inclusion in the Act suggests

131 Crimes Act 61AA 1900 (NSW) s 61AA(1).
132 Crimes Act 61AA 1900 (NSW) s 61AA(1)(b).
133 Crimes Act 61AA 1900 (NSW) s 61AA(2).
134 Crimes Act 61AA 1900 (NSW) s 61AA(8).
135 New South Wales Department of Justice and Attorney General, Statutory Review: Section 61AA, Crimes Act 1900 (NSW), February 2010, p 3.
136 New South Wales Department of Justice and Attorney General, Statutory Review: Section 61AA, Crimes Act 1900 (NSW), February 2010, p 13.

that it is meeting its policy objectives and supports the assertion that the section reflects community attitudes.'[137]

Section 61AA has been criticised as there is no clear indication of the term 'a short period'. As the law is unclear, it cannot offer a guide on what society views as acceptable and appropriate physical punishment.[138]

Parental control defence in New Zealand

In New Zealand, section 59 (Domestic Discipline) of the Crimes Act 1961 previously provided a legal defence for parents, or persons in the place of a parent, prosecuted for offences against their children. They could use force towards a child by way of correction if the force was reasonable in the circumstances.

The Crimes (Substituted Section 59) Amendment Act 2007 came into force on 21 June 2007.

The new section 59 authorised force to be applied to a child for the purposes of:[139]

- preventing or minimising harm to the child or another person; or
- preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- performing the normal daily tasks that are incidental to good care and parenting.

Force could not be used for correction of children.[140] To allay concerns that there may have been a substantial increase in the prosecution of parents, the following subsection was included in the amendment:[141]

> To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in

[137] New South Wales Department of Justice and Attorney General, Statutory Review: Section 61AA, Crimes Act 1900 (NSW), February 2010, p 13.
[138] L Greef, 'Corporal punishment in New South Wales: A call for repeal of section 61AA', Alternative Law Journal, vol 47(1), 2022, p 33.
[139] Crimes Act 1961 (NZ) s 59(1).
[140] Crimes Act 1961 (NZ) s 59(2).
[141] Crimes Act 1961 (NZ) s 59(4).

relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

Following the change, New Zealand Police published reviews each six months. For the 11th and final review, for the period six-month period from December 2011 to June 2012 there were 12 events identified as involving smacking and 31 involved 'minor acts of physical discipline'. Of the 12 smacking events, none resulted in prosecution, 9 warnings were given and 3 required no further action being taken. Of the 31 'minor acts of physical discipline' events, 9 resulted in prosecution.[142]

Lawful correction in England

In *A v The United Kingdom*,[143] the European Commission of Human Rights referred a complaint to the European Court of Human Rights. The applicant's stepfather was charged with assault occasioning actual bodily harm and tried a year later in February 1994. He did not dispute that he caned the applicant on a number of occasions. However, he argued that it had been necessary and reasonable since the applicant was a difficult boy who did not respond to parental or school discipline.

The trial judge directed the jury on the defence of 'lawful correction'.[144] The jury found, by majority verdict, the stepfather not guilty of assault occasioning actual body harm. The European Commission of Human Rights expressed the opinion that there had been a violation of Article 3 of the European Convention on Human Rights being a prohibition of torture. In the Court's view, the common law defence of 'reasonable chastisement' contravened Article 3. It did not provide adequate protection from inhuman or degrading treatment or punishment.[145]

In England and Wales, the Children Act 2004 section 58 removed the defence of reasonable chastisement for offences of assault occasioning actual bodily harm, unlawfully inflicting grievous bodily harm, causing grievous bodily harm with intent, or cruelty to a child. The defence would still be available for offences such as common assault. It also prevented the defence from being relied upon in any civil proceedings where harm caused amounted to actual bodily harm.

The Explanatory Notes acknowledged it had 'long been recognised by the law that a parent or person with parental authority may use reasonable punishment to correct a

[142] New Zealand Police, 'Eleventh review of Crimes (Substituted Section 59) Amendment Act 2007' Media Release, 19 April 2013.
[143] *A v The United Kingdom* (1999) 27 EHRR 611.
[144] *A v The United Kingdom* (1999) 27 EHRR 611 at 4 [10].
[145] *A v The United Kingdom* (1999) 27 EHRR 611 at 7 [23]-[24].

child'.[146] That use of reasonable punishment or reasonable chastisement had been a defence to battery or assault of a child. Later, the defence of reasonable chastisement was also removed for the offence of strangulation or suffocation.[147]

The Crown Prosecution Service's prosecution guidance states: 'If a prosecutor determines that the correct charge is common assault or battery, then the next determination is whether the punishment inflicted was moderate and reasonable.'[148] The following factors will assist in determining whether the punishment in question was reasonable and moderate:

- the nature and context of the defendant's behaviour
- the duration of that behaviour
- the physical and mental consequences in respect of the child
- the age and personal characteristics of the child
- the reasons given by the defendant for administering the punishment.

Abolition of reasonable punishment defence in Wales

The Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020 received Royal Assent on 20 March 2020. It created a divergence between the law in England and Wales. The Act abolished the common law defence of reasonable punishment in Wales and amends section 58 of the Children Act 2004 so that it only applied to England. The Act came into force on 21 March 2022. The 2-year delay allowed for a public awareness campaign of the changes to the law.[149]

Summary of approaches to domestic discipline

Jurisdictions have reformed their equivalent domestic discipline defences by way of abolition, restricting the purposes for which force can be employed against a child, limiting the offences to which the defence can apply and outlining considerations for reasonableness.

146 Explanatory Notes, Children Act 2004 (UK) 30-31 [236-240].
147 Domestic Abuse Act 2021 (UK) sch 2 para 9.
148 The Crown Prosecution Service, Offences against the Person, incorporating the Charging Standard, 27 June 2022.
149 Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020 s 2.

Going forward

As explained in the paper, there has been divergence in approaches to the defences across different jurisdictions and the penalty for murder. Examination of these approaches will assist the Commission in developing recommendations. Five principles will guide the Commission in developing our recommendations for reform. These are:

1. **Justice** – to promote just outcomes and protect fundamental human rights including rights in criminal proceedings.
2. **Fitness for purpose** – to reflect contemporary community standards and be fit for purpose.
3. **Clarity** – to be clear and easy to understand.
4. **Domestic and Family Violence** – to better reflect circumstances involving domestic and family violence, including coercive control.
5. **Evidence-informed** – to be informed by evidence including expert knowledge and lived experience.

The Commission will shortly publish a background paper with contextual information about domestic and family violence. We have been undertaking preliminary consultation in different locations throughout the State.

We are currently conducting a number of research projects, including case analysis and we have engaged external researchers to investigate the views of the Queensland community about the defences and the mandatory penalty.

We propose to release several consultation papers late this year to early next year, calling for formal submissions. They will include questions for consultation and allow time for submissions to be made.

The Commission is required to report to the Attorney-General by 1 December 2025.

The Commission welcomes your interest, input and involvement in the review and any observations, experiences or comments you would like to share. Please get in touch and send comments or feedback to qlrc-criminaldefence@justice.qld.gov.au. The Queensland Law Reform Commission website (http://www.qlrc.qld.gov.au) has an area to register interest in the review and contains all the publications and updates on the review.