30 May 2025

President Fleur Kingham
Chair
Queensland Law Reform Commission
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Dear Chair

Review of Particular Criminal Defences | Equality and integrity: Reforming criminal defences in Queensland

The Bar Association of Queensland (**the Association**) welcomes the opportunity to make submissions to the Queensland Law Reform Commission's Consultation Paper "*Equality and integrity: Reforming criminal defences in Queensland*" (**the Consultation Paper**).

The Consultation Paper has been considered, and this response prepared, with the assistance of the Association's Criminal Law Committee.

For convenient reference, this submission repeats the consultation proposals and questions in the order in which they are presented within the Appendix to the Consultation Paper.

Proposal 1. Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

(a) the person believes that the conduct was necessary –

i. in self-defence or in defence of another or

ii. to prevent or terminate the unlawful deprivation of liberty of themselves or another and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

The provision should also provide:

(c) Self-defence should only be available as a defence to murder where the person believes their conduct is necessary to defend themselves or another from death or serious injury.

(d) Self-defence does not apply if –

i. the person is responding to lawful conduct and

ii. the person knew the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

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Question 1. *What are your views on proposal 1?*

The Association is broadly supportive of proposal 1 as the proposed amendment simplifies the current provision and is consistent with the approach taken in other jurisdictions, nationally.

Question 2. *For the purposes of proposal 1:*

(a) how should 'serious injury' be defined?

While the Association is supportive of including serious sexual assault in any definition of 'serious injury', for the reasons expressed below, it prefers the team 'serious harm'. Victorian legislation defines the term 'serious injury' to include a serious sexual assault. This reflects the notion that potential victims of a serious sexual assault ought not be criminally liable for appropriately defending themselves. It would not be unusual for a potential victim, in order to protect themself, to need to use force intended to cause grievous bodily harm, or where they are aware there is a probability their actions could cause death.

However, the Association has concerns with use of the term 'serious injury', particularly given such term ought to include sexual assault. In particular, the Association has concerns as to whether use of the word 'injury' suggests that proof of physical injury would be required, and how this would apply to occurrences of serious sexual assault, which often do not include physical injury. For this reason, the Associate considers that the use of the words 'serious harm' would be preferable to 'serious injury'.

Without defining 'serious harm' or 'serious injury', the Association can envisage difficulties surrounding what constitutes a serious injury, leading to a degree of speculation by courts and juries. Any definition should be non-exhaustive or provide a non-exhaustive list of examples and should, at the least, state that 'serious harm' includes serious sexual assault.

(b) Should a non-exhaustive list of factors be included to assist in determining whether the person claiming self-defence has acted reasonably?

The Association is generally supportive of including a non-exhaustive list of factors.

Proposal 2. ***The new self-defence provision should provide that evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence. It should further provide that the person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:***

(a) the person is responding to a non-imminent threat of harm or

(b) the use of force is in excess of the force involved in the harm or threatened harm.

***Question 3**. What are your views on proposal 3?*

While the Association can see the benefit of proposal 2 in relation to domestic violence victims and is generally supportive of providing for victim-survivors of domestic violence, the Association is concerned about the practical application of such a provision.

The Association notes that it appears unclear from the draft proposal whether a person relying on the defence bears an onus of proof to establish that the victim was the perpetrator of domestic violence against them. It is also unclear whether, in a situation where a person defends themself against their current partner but has been subjected to domestic violence by a former partner or other family member, that experience is relevant, and if so, how.

Further, the Association questions whether it is desirable that the proposal be limited to domestic violence victims, as opposed to forming part of the objective assessment of reasonableness available to all persons availing themselves of self-defence. For example, where a defendant has been physically or sexually abused by another person (such as a neighbour or teacher) over a protracted period of time, the matters raised in proposal 2 would also seem relevant to considering that defendant's claim of self-defence. Accordingly, the Association suggests Proposal 2 could be incorporated into the general assessment of whether any defendant's conduct is a reasonable response or, at least, should apply to a broader category of situations and defendants.

The Association looks forward to reviewing draft legislation where it can be further assessed how proposal 2 mighty be enacted and how it would operate in conjunction with other proposed amendments.

Proposal 3. The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

***Question 4**. What are your views on proposal 3?*

The Association does not support the proposal as the broad wording of the proposal will likely unfairly limit the application of the defence. The Association is concerned that the current proposed wording would exclude self-defence from a person who is intoxicated when, in exactly the same circumstances, a non-intoxicated person would be successful in relying on the defence at trial.

While the Association understands the concerns highlighted in the Consultation Paper at paragraph 151, the Association is concerned that proposal 3, as currently worded, appears to punish an intoxicated person. The Association notes that voluntary intoxication, including in a public place, is not an offence. By way of example, a person who is walking home in a state of serious intoxication should be able to use force in defence of an attempted sexual assault where their belief that their conduct in self-defence was necessary was substantially affected by their intoxication, in a situation where a non-intoxicated person, in the same situation, would likely also have formed the view their actions were necessary. It is often very difficult to determine whether, and to

what degree, a person's belief is affected by their intoxication, meaning the defence may be withheld from persons in similar circumstances to this example.

The Association is also concerned that the proposal may have a disproportionate impact on Aboriginal and Torres Strait Islander defendants, given the observations made in paragraph 152 of the Consultation Paper. However, the Association's concerns in this regard extend beyond just situations of homicide. In communities with high rates of both alcohol abuse and violence, persons, including women and vulnerable people, may need to defend themselves properly against assault while their judgment is substantially affected by self-induced intoxication. The wording of proposal 3, too readily, precludes their proper access to a defence.

Further, the Association is concerned that use of the words 'not available' will result in more instances of the availability of the defence being litigated significantly before a judicial officer as part of determining whether to leave the defence to the jury. It would be more desirable that the concerns sought to be addressed by proposal 3 be considered by a jury as part of deciding whether a defendant's conduct was a reasonable response.

Ultimately, the Association is of the view that the objective test of reasonableness in the self-defence provision is sufficient to account for intoxication and that this approach is strongly preferable to proposal 3. The Association suggests that words to the following effect could be included in the non-exhaustive list of factors when assessing reasonableness:

"*Whether and the extent to which the defendant was affected by voluntary induced intoxication*."

Question 5. *In light of proposals 1 and 2 (about self-defence), should the defence of compulsion in section 31(1)(c) of the Criminal Code be repealed?*

The Association does not support the repeal of s 31(1)(c) in circumstances where there are offences that may attract the operation of the defence in s 31(1)(c) that would not be captured by the new proposed self-defence provision (in particular, property and drug offences).

The Association may reconsider its position depending on any proposed draft amendments to s 31(1)(d) and looks forward to reviewing any draft legislation with the view to considering whether the proposed amendments would mean that s 31(1)(d) properly covers all instances of duress or compulsion where self-defence would not apply.

Question 6. *In light of proposals 1 and 2 (about self-defence), are changes to the defence of duress in section 31(1)(d), and the exclusions in section 31(2), of the Criminal Code, required?*

The Association is broadly supportive of changes to the duress provision to simplify the application of the provision.

The Association supports removing the exclusions to duress and compulsion contained s 31(2).

The Association is particularly supportive of removing the exclusion of offences for which causing grievous bodily harm, or intending to cause grievous bodily harm, is an element. Only two other Australian jurisdictions exclude the application of duress to offences of causing, or intending to cause, grievous bodily harm or similar level of harm.[1] Grievous bodily harm can include a wide spectrum of injuries, including injuries only slightly more serious than 'bodily harm', as defined in s 1. Sections 31(1) defences should be available to offences causing such injuries, noting self-defence is available to such offences. Moreover, the exclusion of the offence causing grievous bodily harm under s 320 from the operation of s 31(1) make little sense when the defence applies to other serious offences with higher maximum penalties, such as rape, aggravated robbery and manslaughter.

The Association also supports removing the exclusion of the offence of murder. Making compulsion and duress available to murder does not make killing permissible. It simply excuses it in the rare situation of duress.[2] Excluding murder asks too much of a reasonable person who is in a situation of such gravity that their conduct meets the criteria for the defence of duress. For good reason, several other jurisdictions permit application of the defence of duress to murder, including the Commonwealth, Victoria, Western Australia and the Australian Capital Territory.[3]

The limitation as to those entering unlawful associations or conspiracy also needs revision, noting the current wording applies too widely.

The Association looks forward to reviewing any draft legislation which proposes amendments to section 31(1)(d) and section 31(2).

In relation to both questions 5 and 6, the Association notes that it is difficult to foresee to all future applications of the new self-defence provision and, accordingly, what, if any, amendments are required to section 31. Members of the Association were able to provide real life examples of occasions where the defence of self-defence was not available, but the defence of compulsion or duress was. The Association is concerned that any repeal of these sections would be premature and that it may be prudent to reconsider the questions in three to five years to allow the impact of any enacted changes to the self-defence provisions to be properly assessed.

Proposal 4. The partial defence of killing for preservation in an abusive domestic relationship in section 304B of the Criminal Code should be repealed.

Question 7. *What are your views on proposal 4?*

The Association's submission as to Proposal 4, question 7, is that s 304B should not, at this stage, be repealed. While the Association recognises the Proposal of the QLRC is well reasoned, it nevertheless proceeds on the basis that situations to which s 304B may relate will now be captured on the reframed self-defence model. However, the Association notes that this reframed model is presently untested in practice and it cannot be said, at this stage with certainty, that there will not be a situation which falls outside

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[1] See *Criminal Code* (Tas), s 20; *Criminal Code* (NT), s 40(2) (in respect of 'serious harm').
[2] Horder, *Ashworth's Principles of Criminal Law* (10th ed, 2022), at chapter 7.
[3] *Criminal Code* (Cth), s 10.2; *Crimes Act 1958* (Vic), s 322O (but note further requirement in s 322O(4)); *Criminal Code* (WA), s 32; *Criminal Code* (ACT), s 40.

the reframed self-defence model and would have been properly dealt with by the repealed s 304B.

In circumstances where the offence of murder carries a sentence which cannot be mitigated, it is the view of the Association that potential victims of domestic violence who unlawfully kill their abuser should not be deprived of the ability to mitigate the offence from murder to manslaughter. Therefore, while the mandatory sentencing regime remains in force, and until such time as the reframed self-defence model is enacted as framed, and tested in practice, the Association supports the retention of the provision, despite its complexities as identified in *R v Tracey* [2024] QCA 19. However, should the present sentencing regime relating to murder be amended, then the Association acknowledges that s 304B would, potentially, have little to no work to do where its purpose would still be able to be achieved in the proper exercise of the sentencing discretion. In those circumstances, there would be greater merit in the proposed repeal.

It is the submission of the Association that whether s. 304B should be repealed is a matter that can be revisited in the future should it be shown to be impractical, unused, or prejudicial in its application.

Proposal 5. The partial defence of killing on provocation in section 304 of the Criminal Code should be repealed

Question 8. *What are your views on proposal 5?*

The Association strongly opposes the repeal of the partial defence of killing on provocation in s 304.

Provocation under s 304 – a necessary and critical safeguard

The Association considers that the partial defence of provocation provides a necessary and critical safeguard in Queensland's criminal justice system. The Commission has recognised that there are cases where the partial defence of provocation operates, appropriately, and in line with community standards to reduce a person's culpability.[4] It is the Association's view that the repeal of this partial defence would severely disadvantage vulnerable members of the community, including victim-survivors of domestic and family violence, who have killed in circumstances in which their moral culpability is reduced. The Association does not believe that other potential amendments proposed by the Commission, such as changes to the mandatory penalty for murder, amendments to self-defence and the introduction of new partial defences, would be sufficient to ensure such reduced culpability is appropriately recognised.

At this point in time, it is not clear what changes, if any, will be made to the mandatory sentencing regime for murder. Nor is it clear how any potential changes will operate in practice. It is apparent from the preliminary research conducted by the Commission that, in some jurisdictions, changes to the mandatory sentencing regime for murder appear to have had little practical effect on the length of sentences imposed. For example, the Commission's preliminary research indicates that, in Western Australia, a jurisdiction that has adopted presumptive life imprisonment for murder, the presumption has been

[4] Consultation paper, at [206].

displaced on only two occasions.[5] If a similar approach is adopted by Queensland Courts, the changes to the mandatory sentencing regime will not provide a viable alternative mechanism for recognising a person's reduced moral culpability in cases where the defence of provocation is currently operating appropriately.

Similarly, at this point in time, it is not clear what changes, if any, will be made in relation to self-defence. For example, it is not apparent whether proposed amendments to self-defence will apply in cases where a sexual assault or assaults is the triggering event for a homicide. Similarly, the Association considers that proposal 3, if enacted, is likely to severely limit the availability of self-defence, including for Aboriginal and Torres Strait Islander peoples and victim-survivors of domestic and family violence who have developed a substance abuse disorder in an effort to manage complex post-traumatic stress disorder.[6]

Just as importantly, it is not clear how any proposed changes to self-defence will apply in practice. In particular, it is not clear how any amendments to self-defence will be interpreted and applied by juries. The findings outlined in the Commission's community attitudes report suggest that self-defence does not work well for victim-survivors of domestic and family violence and victims of sexual assault who kill in response to abuse.[7] As outlined in the Commission's Background paper 3: Understanding DFV and its role in criminal defences, in a scenario which involved a woman who killed an abusive intimate partner, 64% of respondents thought manslaughter was appropriate, 19% murder and only 16% of respondents thought she should not be guilty of any offence. The reasons given by participants who said that manslaughter and murder were appropriate instead of an acquittal suggest that members of the community still do not understand the dynamics of domestic and family violence, including how it can entrap a victim-survivor, the significant lethality risk faced by victim-survivors of coercive control and the cumulative and longer-term impacts of domestic and family violence on victim-survivors.[8]

The Association considers that the persistence of community misconceptions about the nature of domestic and family violence and sexual assault is likely to continue to limit the availability of appropriate defences, such as self-defence, regardless of any proposed legislative reforms. In these circumstances, the partial defence of provocation continues to provide a critical safeguard through which victim-survivors of domestic and family violence who kill their abusive partner in circumstances which may still fall outside the operation of the amended self-defence provisions (whether due to the terms of the legislation or the way in which the legislation is applied by juries) may avoid a murder conviction.

Similarly, for the reasons that are outlined below in response to questions 9 and 10, the Association does not consider that the proposed partial defences of excessive self-defence or a bespoke trauma-based defence provide an appropriate alternative which would justify the repeal of the partial defence of provocation.

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[5] Consultation paper, at [264] .
[6] Consultation Paper, at [152] - [153].
[7] Background paper 3: Understanding DFV and its role in criminal defences, at [89], [92] – [93].
[8] Background paper 3: Understanding DFV and its role in criminal defences, at [89]- [90].

It appears that there is a real potential that any proposed defences will be limited to killings that are able to be proved to have been committed in the context of domestic and family violence by a person whom the jury considers, applying stereotypes of the ideal victim, to meet the requirement of a person most in need of protection. The experiences of the Association's members suggest that there are likely to be considerable evidentiary difficulties in establishing the history and context of domestic and family violence, including whether the defendant was the person most in need of protection. These evidentiary hurdles are likely to be exacerbated in cases where the defendant does not present as an "ideal victim." As recognised in the consultation paper, research indicates that women who do not meet the stereotype of how the "ideal victim" should present and behave are most likely to have limited access to defences, such as self-defence. These barriers are likely to disproportionately affect Aboriginal and Torres Strait Islander women, victim-survivors who are not small and petite, those with drug and alcohol issues or with a criminal record and woman who have fought back in the past.[9] These factors are likely to limit the availability of the proposed partial defences for victims-survivors of domestic and family violence in a way that the broader partial defence of provocation, which does not require proof of a specific history of domestic violence or the person in need of most protection, does not.

The Association also submits that the partial defence of provocation should also be able to be raised in cases where a person who has experienced a history of extreme DFV with previous partner(s), loses control and kills an abusive partner in a different relationship. In such a case, other proposed defences would be unlikely to apply having regard to the history of the later relationship. Whether or not the partial defence is accepted by a jury will depend on the circumstances of each individual case. However, in the Association's submission, the partial defence of provocation should be able to be raised on behalf of a victim-survivor who has killed in this context.

While there is a significant and understandable focus within the consultation paper on the way in which existing and proposed criminal defences, including provocation in s 304, operate in the context of domestic and family violence, the Association considers that it is also critically important to recognise that the partial defence of provocation in s 304 provides an important safety net for other marginalised members of society whose unique life experiences may render them vulnerable to losing self-control and killing when subjected to provocative conduct.

A person's particular vulnerability may arise from circumstances such as their youth, mental health concerns which fall short of unsoundness of mind, a history of trauma caused by racism or sexual or physical abuse, domestic and family violence in a previous relationship or any combination of these factors. Given the uncertainties surrounding the operation of any proposed changes to the mandatory sentencing regime, which includes recent amendments that impose mandatory life sentences for children convicted of murder, and the real possibility that the proposed additional partial defences will be limited to killings which occurred in the context of domestic and family violence, the proposed reforms do not provide a viable alternative mechanism for recognising a person's reduced moral culpability in such cases. As a result, the repeal of the partial defence of provocation is likely create a further barrier to justice for already vulnerable

[9] Consultation Paper, at [135].

members of the community, such as young people, Aboriginal and Torres Strait Islander peoples, people with complex mental health issues and/ or a background of significant trauma.

Potential re-drafting of s 304

Notwithstanding the Association's opposition to the repeal of the partial defence of provocation, the Association recognises that many of the criticisms of s 304 outlined in the Consultation Paper have merit. In particular, the Association agrees that the partial defence, in its current form, is complex and uses confusing and outdated language. The Association also recognises that it has been necessary for the partial defence to evolve to recognise, more effectively, the circumstances in which victim-survivors of domestic and family violence kill.

It is respectfully submitted that the way in which the various amendments have been drafted over time has increased rather than reduced the complexity of the provision. The Association submits that, contrary to proposal 5, the most appropriate way for the concerns that have been identified in the consultation paper to be addressed is to redraft the partial defence in order to ensure that it is modernised, simplified and reflective of current community attitudes.

The Association does not accept the proposition that consistency with other Australian and international jurisdictions is a valid justification for the repeal of the partial defence in s 304. While the Association recognises that the partial defence of provocation has been repealed in some Australian jurisdictions, it is important to note that provocation continues to operate in a number of Australian jurisdictions including New South Wales, the Australian Capital Territory and the Northern Territory. The partial defence of provocation or a similar defence which reduces murder to manslaughter, in circumstances involving a loss of self-control, also continues to operate in a number of overseas jurisdictions such as England, Wales, Northern Ireland, Scotland and Canada.

However, the Association notes that Queensland is an outliner in one critical respect when it comes to the partial defence of killing on provocation: it is the only jurisdiction in which the burden of proof has shifted from the prosecution to the defence. While this is not a topic that has been raised for specific consideration in the consultation paper, the Association does not support the reversal of the onus of proof in relation to provocation. Such a position is inconsistent with the approach taken in all jurisdictions that have been explored in the Commission's cross jurisdictional analysis as well as fundamental tenets of Queensland's criminal justice system.

In terms of a suggested approach to the potential re-drafting, the Association submits that the starting point should be replacing outdated terminology such as "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool" with the relatively straight forward and modern terminology contained in jurisdictions such as New South Wales, the Australian Capital Territory and the Northern Territory.[10] In using these jurisdictions as a guide, the central tenets of the redrafted

[10] See s 13 of the Crimes Act 1900 (ACT); s 23 of the Crimes Act 1900 (NSW) and s 158 of the Criminal Code (NT).

provision would be that the partial defence of provocation applies to reduce murder to manslaughter if:

- the act of the person that caused the death was in response to conduct of the deceased towards or affecting the person; and
- the conduct of the deceased caused the person to lose control; and
- the conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm.

In order to address any continuing barriers that vulnerable members of the community may experience in accessing the partial defence, particularly victim-survivors of long term domestic and family violence, the Association submits that the re-drafted provision should also explicitly contain a sub-section or sections which provide that, in deciding whether the conduct causing the death occurred under provocation:

- regard may be had to the history of relationship between the person and the deceased;
- there should be recognition that a person's loss of self-control may be caused by a variety of emotions including fear and panic as well as anger; and
- recognition that the conduct of the deceased may constitute provocation even if there is an interval between the provocative conduct and the act causing death.

These concepts are consistent with the current law on provocation in Queensland and the Association submits that their explicit inclusion in the terms of the statute will help to remove the continuing barriers that victim-survivors of domestic and family violence, as well as other vulnerable members of the community (for example victims or institutional abuse and/or prolonged sexual violence), have previously faced when attempting to access the partial defence. Explicit statutory recognition of principles such as the lack of a need for suddenness or immediacy between provocative conduct and the act that caused death and/or the lack of need for proportionality between the provocative conduct and the act causing death is contained in the New South Wales, Australian Capital Territory and Northern Territory legislation.

Finally, in relation to the proposed redrafting, the Association submits that any appropriate statutory exclusions should be included in the legislation in a clear and straight forward fashion. The excluded categories under current law in Queensland are words alone; anything done or believed to have been done by the deceased to end or change the nature of the relationship; and unwanted sexual advance. Consideration should be given to whether all or some of these excluded categories can be defined with more precision.

Guidance may be found in the drafting of the other Australian provisions. For example, the concept of "unwanted sexual advance" in the current sub-section 304(4) in Queensland, which is also expanded upon in sub-sections 304(8) and (11), is simplified in New South Wales, the Northern Territory and the Australian Capital Territory to the principle that "non-violent sexual advance(s)" in isolation are not a sufficient basis for the partial defence of provocation.

Consideration should also be given to whether the re-drafted provision should include an exclusion similar to the one outlined in s 23(3)(b) of the Crimes Act 1900 (NSW) which provides that the conduct of the deceased does not constitute extreme[11] provocation if the accused incited the conduct in order to provide an excuse to use violence against the deceased. Some variation of this exclusion may be useful in addressing the concerns raised by the heavily publicised case of *Peniamina*,[12] in which the deceased wife's provocative conduct of producing a knife from the kitchen and cutting her husband as he grabbed at the knife only occurred after she had been accused by her husband of infidelity and hit in the head causing her mouth to bleed.

While the Association acknowledges that the community does not support provocation defences where the defendant's conduct is motivated by anger, jealously, or a desire for control, particularly, in cases involving domestic and family violence,[13] the Association also urges caution in placing too much emphasis on the factual scenario in a single case. The experiences of the Association's members suggest that the case of *Peniamina* was an extreme case which is not reflective of how the partial defence regularly operates in practice.

It is also important to note, in considering whether the partial defence is consistent with current community attitudes, that the jury system, itself, is a mechanism which ensures that current community attitudes are at the forefront of the application of provocation. This is because the decision of whether or not the partial defence is successful in any criminal trial is ultimately a matter for the jury who, themselves, are randomly selected members of the Queensland community. The case study of *R v Kelsey*, which is summarised in the Commission's Background paper 3: Understanding domestic and family violence and its role in criminal defences, demonstrates that the circumstance that provocation is raised in a criminal trial does not necessarily mean that it will be accepted by a jury.[14]

Putting aside outlying cases such as *Peniamina*, the Association submits that the continuation of a partial defence of provocation, in an amended form, is consistent with contemporary community standards. In particular, the Association notes that there was strong community support for partial and complete defences and consideration of abuse for victim-survivors of domestic and family violence who kill an abusive partner (key finding 10).

The Association considers that provocation is one of a number of defences that should continue to be available to victim-survivors of domestic and family violence and other vulnerable members of the community who kill in the context of abuse and trauma. The case of *Peters*, is recognised by the Commission as an example of a meritorious case where the partial defence operates appropriately and in line with community standards to reduce a person's culpability.[15]

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[11] The New South Wales legislation refers to the concept of "extreme provocation". It is submitted that use of this type of language in any redrafted legislation is likely to create additional barriers for victims of domestic and family violence who seek to rely of the partial defence and should not be adopted in Queensland.
[12] R v Peniamina (2021) 9 QR 124
[13] Consultation Paper, at page 11.
[14] Background paper 3: Understanding DFV and its role in criminal defences, at pages 35 – 36.
[15] Consultation Paper, at [206] and footnote 184.

As has been explored above, there are barriers which mean that existing and proposed defences, including self-defence, will not always be available to be raised for women who are victim-survivors that have killed their intimate partner. Similarly, due to enduring misconceptions about the nature of domestic and family violence, there is a real danger that, even if raised, self-defence will not always be accepted by a jury, even in seemingly meritorious cases. In these circumstances, the Association maintains that a modernised partial defence of provocation is a safety net that should be available to ensure that, in appropriate cases, reduced culpability is adequately recognised. It is submitted that the Association's position in this regard aligns with current community standards.

It is also important to recognise that the utility of the partial defence of provocation does not only occur in matters that proceed to trial. The Association's members have consistently found that the availability of the partial defence of provocation continues to contribute significantly to a willingness, by both the defence and the prosecution, to negotiate pleas to manslaughter, whether or not the ultimate resolution is on the basis of s 304.

For completeness, the Association notes that, as at the time of drafting this response, the Commission is yet to release research report 6 which contains a homicide case analysis. The Association looks forward to reading this report and may wish to make further submissions in response once the research in the additional reports has been considered.

As has been outlined, it is ultimately submitted by the Association that a comprehensive redrafting, rather than a repeal of s 304, will most appropriately serve the interests of justice and the Queensland community by ensuring that there is an effective safeguard that is accessible to vulnerable members of the Queensland community, including victim-survivors of long-term domestic and family violence, who kill in response to provocation.

The Association's submissions concerning the potential re-drafting of section 304 are not intended to be exhaustive or even indicative of a concluded position on the appropriate nature of any of the specific proposed amendments. Instead, the submissions of the Association are intended to highlight that there are a number of ways in which the provision can be amended to ensure that it is appropriately modernised, simplified and reflective of current community attitudes.

Question 9. *Should the Criminal Code be amended to add a new trauma-based partial defence that applies when a victim-survivor of domestic violence kills their abuser? How should this be framed?*

The Association does not support the introduction of a new trauma-based partial defence that applies when a victim-survivor of domestic violence kills their abuser.

Given that the primary recommendation of the Association's submission is that section 304B should be retained, the proposed new partial defence is unnecessary. It is further submitted that this proposed partial defence would operate no more effectively than the current section 304B.

If section 304B is repealed, in the Association's view, the proposed new partial defence in Question 10 – excessive self-defence - is preferable.

In this regard, the Association notes that the Community Attitudes Survey Research Report indicated strong community support for partial and complete defences and consideration of abuse for victim-survivors of domestic and family violence who kill an abusive partner.[16]

The elements outlined at p 45 of the Consultation Paper present a series of problems.

At a more general level, in the experience of members of the Association, a history of domestic violence is very difficult to establish. The proposed defence will not be available where no relevant relationship can be established. Proof of particular circumstances in a relationship becomes even more challenging when one party is deceased. While it is acknowledged that police processes are likely to improve because of the recommendations of the Women's Safety and Justice Taskforce, police records of domestic and family violence over past decades do not provide accurate evidence of domestic and family violence history. For example, records within QPRIME or similar databases will often provide a hearsay account, only, of an attending police officer's observation. Parties are often misidentified. Intoxication of the parties is frequently cited to justify not taking further investigative action. Parties' unwillingness to engage with police often prevents further investigations. If an application for a protection order arises, applications are often made by police based upon hearsay evidence. Orders are frequently made on a 'without admissions' basis, providing no evidence in a criminal proceeding about culpability for any domestic and family violence.

Given the relative recency within which the community has come to understand 'coercive control', it is even more unlikely a defendant would have any real capacity to prove a history of coercive control via admissible evidence.

Additionally, the recent expert evidence provisions regarding domestic and family violence[17] are yet to be tested. New Part 6A, Division 1A was inserted into the *Evidence Act* on 28 February 2023 and there is no reported case law on the application of any provision other than section 103CB.[18]

It is noted that, in the Community Attitudes Survey Research Report, participants made no substantially different determination regarding the availability of a partial defence to killing a domestic partner whether the defendant had reported domestic and family violence to police or not.[19]

Identifying the 'person most in need of protection' will create a difficulty for defendants who have been misidentified as perpetrators of domestic violence. It is known that

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[16] Consultation Paper, "Key findings" at p.11.
[17] Sections 103CA-103CD of the *Evidence Act.*
[18] *R v LBD* [2023] QCA 266.
[19] Review of Particular Criminal Defences: Community attitudes to defences and sentences in cases of homicide and assault in Queensland, Queensland Law Reform Commission, Research Report 1, November 2024, p.69.

women of Aboriginal and Torres Strait Islander background are more likely to be misidentified as respondents in protection order applications.[20]

Further, the Association queries the time at which a defendant would be required to establish that they were the 'person most in need of protection' and, particularly, whether that would be at the time of the killing or generally within the relationship.

Additionally, the Association notes that the phrase 'person in need of protection' was not designed as a question for a jury to consider. While the term 'person most in need of protection' has been included in the *Domestic and Family Violence Act* at section 4 for some time, section 22A was only recently inserted[21] and was designed to provide guidance to Magistrates to consider when determining an application for a protection order under the *Domestic and Family Violence Act*.[22]

'Substantial contribution' of domestic violence to the act or omission causing the death of the deceased introduces a legal test which will be difficult to apply. It is noted that 'substantial impairment' in the context of section 304A often causes issues.[23] Authorities regarding 'substantial impairment' will not provide assistance in relation to 'substantial contribution' unless the term would be applied to the state of mind of the accused in the same way – for example, capacities of the accused as considered in *R v Trotter* (1993) 68 A Crim R at 537. Outside of the specific context of section 304AA, the word 'substantial' has been observed as a word 'calculated to reveal a lack of precision'.[24]

It is noted with concern that a trauma-based partial defence has been considered in other jurisdictions and not supported.[25] A situation in which Queensland would become the outlier is undesirable.

If the rationale for this proposed partial defence is to provide a partial defence to defendants who would be excluded from self-defence owing to their self-induced intoxication (Proposal 3), it would be better to resolve the applicability of the intoxication exclusion rather than to introduce a new partial defence where the evidence required to rely upon the proposed defence for it is not strong.

It is noted that the Consultation Paper has specifically asked whether it is appropriate to extend a partial defence of this type to other cases where a victim-survivor may kill their abuser because of trauma, such as where they have experienced long-term sexual abuse but there is no relevant relationship. And, if so, how this is to be achieved.

The Association considers that proposed amendments to self-defence and inclusion of 'serious harm' including sexual violence would address this issue appropriately.

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[20] Australia's National Research Organisation for Women's Safety. (2020). Accurately identifying the "person most in need of protection" in domestic and family violence law: Key findings and future directions (Research to policy and practice, 23/2020). Sydney: ANROWS

[21] 28 February 2023.

[22] Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 Explanatory Notes, p.6.

[23] This much is acknowledged in the Supreme and District Court Bench Book at Chapter 100 – Diminished Responsibility: s 304A.

[24] *Tillmanns Butcheries v Australasian Meat Industry Employees' Union & Ors* (1979) 27 ALR 367 at 382 per Deane J

[25] Consultation Paper, "New Zealand's consideration of a trauma-based partial defence" p. 44-45.

Question 10. *Should the Criminal Code be amended to add a new partial defence to murder that applies where the defendant has acted excessively in self-defence and, if so, should the defence apply:*

(a) only in the context of DFV where the person in most need of protection kills their abuser; or

(b) generally?

This option is preferred to the proposal for a trauma-based partial defence contained in Question 9. If the Commission accepts the Association's primary submission that s 304B should be retained, this partial defence may be unnecessary.

Further, it must be noted that the need for this partial defence is informed by the course taken regarding mandatory life imprisonment in cases of murder. If mandatory life imprisonment is replaced with another option providing greater sentencing discretion, there would be less need for a partial defence like this.

If, however, mandatory life imprisonment remains, it is essential that an accused can have as many opportunities to defend themselves as possible. If the partial defence of provocation to murder is repealed, this proposed partial defence may become essential and, therefore, should have general application and not be restricted to victim-survivors of domestic and family violence.

Application of the proposed partial defence, generally, will ensure that the defendant's subjective belief and the reasonableness of the response are question for a jury. In this way, alignment with community expectations is ensured.

The moral culpability of a person who acts in excessive self-defence is fundamentally different from other cases of murder.

The harmonious consideration of the elements of self-defence and excessive self-defence would be welcome and ensure that directions to juries are simpler.

The existence of a partial defence of 'excessive self-defence' in other Australian jurisdictions provides greater support for the introduction of this partial defence (see for example, *Crimes Act 1900* (NSW), s. 421; *Criminal Law Consolidation Act 1935* (SA),[26] s. 15; Criminal Code (WA) s 248(3). It is noted that Western Australia introduced the partial defence of excessive self-defence when the defence of provocation to murder was repealed.

It is noted that the Community Attitudes Survey Research Report indicated that there is some community support for a partial defence of excessive self-defence.[27]

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[26] Noting that the Government of South Australia is currently considering amendment of this section following the manslaughter conviction of Cody Edwards in 2024, with the proposed amendments removing the availability of the partial defence to a defendant who was substantially affected by self-induced intoxication.

[27] Consultation Paper, "Key findings" at p.12.

It is noted that, if an intent to kill existed in a case of excessive self-defence, this partial defence could be open to misuse.

It is considered that, in the event of any repeal of the defence of provocation, this new partial defence would provide an appropriate defence to long-term victim-survivors of sexual violence or domestic violence who kill outside of a 'relevant relationship' which would go some way to replacing provocation as a defence. The extent to which this replacement would cover all circumstances of reduced moral culpability is something that may not be known until the new partial defence has been in place for some years.

As a general comment in respect of both questions 9 and 10, the Association notes that Research Projects 4, 5 and 6 are yet to be completed and that the outcomes of those projects would be highly relevant to feedback offered by the Association.

Question 11. *Should the mandatory life sentence for murder be:*

(a) retained for all murders;
(b) retained but only for particular cases;
(c) replaced with a presumptive life sentence; or
(d) replaced with a maximum life sentence

Question 12. *Should the minimum non-parole periods for murder be:*

(a) retained
(b) amended to allow a discount for a guilty plea or cooperation with law enforcement authorities, or both;
(c) replaced with a presumptive non-parole period; or
(d) replaced with an entirely discretionary approach to setting the non-parole period?

Question 13. *Do you have a preferred approach when combining reforms to the head sentence and non-parole period*?

The Association strongly supports the repeal of the mandatory sentencing regime for murder.

In answer to questions 11 to 13, the Association's preferred approach is to replace mandatory life imprisonment for murder with a maximum life sentence (option 11 (d)) as well as replacing the minimum non-parole periods with an entirely discretionary approach to setting the non-parole period (option 12(d)).

It is submitted that this approach is preferred as it gives Courts the greatest ability to individualise sentences by distinguishing between the gravity of different types of murder and the culpability of different defendants. Such an approach also aligns with current community standards. The results of the community attitudes survey demonstrate that the community does not support mandatory life sentences for murder and, instead, expects individualised criminal justice responses to the use of lethal violence.

A further benefit of providing courts with this broad sentencing discretion is that it allows sentencing courts to take into account a defendant's plea of guilty in a meaningful way which, in turn, is likely to encourage the resolution of matters without the need of a trial.

A broad sentencing discretion for murder will also allow courts to impose sentences that take into account the various mitigating and/or aggravating circumstances of a particular case. Higher rates of guilty pleas for murder, as seen in jurisdictions such as the Children's Court of Queensland which did not (until recently) have a mandatory sentencing regime, is of significant utility to the criminal justice system. Not only does it reduce the time and costs associated with the Court process but it also reduces the emotional toll on all parties involved in a murder trial.

If, contrary to the submissions made on behalf of the Association, any partial defences (including killing on provocation or killing in an abusive domestic relationship) are repealed, it is imperative that sentencing courts are given as wide a sentencing discretion as possible when imposing sentences for murder.

Unless there is a broad discretion, which allows Courts to impose the type of sentences that defendants are currently receiving when sentenced to manslaughter on the basis of the current partial defences, Courts will not have the necessary tools to ensure that a defendant's reduced culpability is appropriately recognised in meritorious cases. The Association submits that the combination of life imprisonment as a maximum head sentence and an entirely discretionary approach to the setting of a non-parole period is the only approach which will grant Courts a sufficiently broad discretion to achieve this end.

The Association also submits that, if the Commission does recommend an entirely discretionary approach to the setting of non-parole periods for murder, the Commission will also have to consider how the existing serious violent offences scheme would operate under the amended legislation, given that murder is not an offence that is currently listed in schedule 1 of the Penalties and Sentences Act.

The Association's position in relation to the serious violence offences scheme, more generally, is that it creates an unnecessary fetter on the sentencing discretion of the Courts. However, the Association acknowledges that, as long as the scheme remains in operation, it would be an anomaly if murder were excluded from the scheme while less serious offences, including manslaughter or even minor assaults, are included.

For completeness, the Association notes that, as at the time of drafting this response, the Commission is yet to release research report 2 on sentencing for murder. The Association looks forward to reading this report and may wish to make further submissions in response once the research in the additional reports has been considered.

Proposal 6. The defence of provocation in section 268 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defined in section 1 of the Criminal Code

Proposal 7. The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code

Question 14. *What are your views on proposal 6?*

Question 15. *What are your views on proposal 7?*

The Association urges the Commission not to recommend limiting the scope of provocation in section 269 so that it would not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Similarly, the Association urges the Commission not to recommend limiting the defence of prevention of repetition of insult in section 270 of the Criminal Code so that the defence only applies to offences of which assault is an element and so that it would not apply to domestic violence offences as defined in section 1 of the Criminal Code.

The reasons underpinning the Association's opposition to proposals 6 and 7 are, largely, the same as those that underpin the Association's opposition to proposal 5, with necessary adaption.

The reasons for that opposition are:

(a) The Association believes that the proposals would disadvantage vulnerable members of the community, including victims of domestic violence and people with disadvantaged or impaired socialisation because of their low socioeconomic upbringing or race. The proposals would also disadvantage those with disorders that impair impulse control but do not provide a complete defence. A prime example is found in returned services people who suffer from post-traumatic stress disorder. Similarly, those who labour under intellectual impairment because of an acquired brain injury or alcohol foetal syndrome, which would not provide a defence but make them much more vulnerable to acting impulsively because of repeated insult or provocation would be disadvantaged.

(b) The Association does not accept that key findings 3 and 8 of the community attitudes survey justify the restriction of s 269 and 270 in the way outlined in proposals 6 and 7. It is the experience of the Association's members that the requirement in s 269 that the force used not be disproportionate to the provocation in s 269 and the requirement in s 270 that any force used be reasonably necessary to prevent the repetition of an insult or injury mean that, in practice, sections 269 and 270 are not successfully being used as a basis to improperly avoid a conviction for offences involving an assault by a perpetrator of domestic and family violence.

(c) As outlined in relation to proposal 5, whether or not the defences of provocation to assault or prevention of repetition of insult are successful in any particular case will be decided by a jury, and thus by definition, will be reflective of the attitudes of the community. The Association acknowledges that domestic and family violence is a complex and, at times, poorly understood community problem and is concerned that proposals aimed at removing the defence from one perpetrator who, in one sense, appears to be undeserving of the provision will rob another in different circumstances that may amount to a deserving application, for example, a victim who finally snaps and uses retaliatory violence because of a history of domestic violence which may include coercive control such as repeated insults or vicious verbal abuse.

(d) The Association is concerned that proposals 6 and 7 will improperly limit the availability of the defences in cases where there has been contemporaneous or even historical misidentification of the person most in need of protection. The Association agrees with the concerns raised in the Commission's background paper 3 stemming from misidentification and criminalisation of victim-survivors of abuse.[28]

(e) The Association is concerned that restricting the operation of sections 269 and 270, in the way outlined in proposals 6 and 7, is likely to increase, inappropriately, the criminality of Aboriginal and Torres Strait Islander peoples in circumstances where they should have access to a defence and where they are already significantly over-represented in Queensland's criminal justice system. In this respect, the Association agrees with the observations of the Commission in background paper 3 that, "Unfortunately, the criminalisation of violence against woman has had unintended consequences. Most significantly, it has increased arrest of women victim-survivors and led to their subsequent incarceration. This is particularly so for Aboriginal and Torres Strait Islander women." The Association is concerned that the restriction of existing defences in the way outlined in proposals 6 and 7 will exacerbate this troubling dynamic, particularly, given the research surrounding misidentification and stereotypes of the ideal victim.

(f) The specific criticisms of provocation to assault identified in paragraph [298] of the consultation paper support an expansion of the defence rather than its restriction. The Association would support the concept identified in paragraph [310] of the Consultation Paper of reinstating the wider interpretation of s 269 and removing its restriction to offences in which assault is an element.

The Association expresses the same reservations – as set out above – with respect to the final form of any amendments to self-defence and the interplay with proposals 6 and 7 and the potential for gaps that naturally arise as a result. In particular, the results of the community attitudes survey suggest that the persistence of community misconceptions about the nature of domestic and family violence and sexual assault appear to continue to limit the successful use of self-defence in cases in which a victim of domestic and family violence or sexual assault has used retaliatory violence. In these circumstances, the Association does not accept the proposition, outlined in paragraph [309] of the consultation paper, that the proposed changes to self-defence (if enacted) will, necessarily, be readily available and successful in cases involving victim-survivors of domestic and family violence (or sexual violence more generally) who are provoked into using retaliatory violence. The Association's concern in this regard is even more pronounced in cases involving a defendant who does not present as an "ideal victim", including Aboriginal and Torres Strait Islander women.

For the reasons outlined above, the Association does not oppose amendments being made to s 269 in order to modernise the language used in the section and ensure broad consistency with the partial defence of killing on provocation outlined in s 304.

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[28] In particular at pages 14 – 16.

Question 16*. What reforms are needed to criminal law practice and procedure to improve access to appropriate defences by DFV victim-survivors who offend?*

The Consultation Paper notes the particular challenges DFV victim-survivors, who are charged with offences, face in engaging with the practice and procedures of the criminal law and posits a number of changes that may assist victim-survivors in navigating these issues. The Association is cognisant of the unique complexities that victim-survivors face in this context, particularly, the difficulties that may flow from the misidentification of the true perpetrator of violence. The Association offers the following comments on the proposals put forward.

Special protections for DFV victim-survivors during police interviews

The Association would support and encourage reforms in this regard. Experience of practitioners supports the concern, highlighted in the Consultation Paper, that women who face domestic violence may be more likely to accept some responsibility for a domestic incident, particularly, in early "field interviews" with police, in circumstances where they are, in fact, the victim. Admissions of responsibility that may be thought to be reasonable concessions, or a way to deescalate tension in a traumatic situation, can, as the criminal process takes place, have consequences for the person well beyond what was anticipated or intended by that person. There is the possibility that these admissions, made without advice and support, could paint a victim-survivor as an offender, or detract from defences that may appropriately be available.

The Association would support a proposal to include DV victim-survivors as a category of persons who enjoys special protections, under the *Police Powers and Responsibilities Act* (**PPRA**), when being spoken to by police. It is acknowledged that these provisions would impose some additional burden on police in accurately identifying a victim-survivor and in providing appropriate protections to them. However, the identification of victim-survivors is already a critical role police undertake in dealing with domestic incidents. The fact that this is a difficult task should not stand in the way of the important reform that is proposed.

The Association notes that special protections already exist in the PPRA for vulnerable groups such as Aboriginal and Torres Strait Islander people. These provisions have been in place for a significant period of time and, in the experience of practitioners, have been beneficial and not unduly added to the burden placed on investigating police offers.

Expressly recognising DFV victim-survivors and Aboriginal and Torres Strait Islander people, who are defendants, as special witnesses

The Association notes that there is some uncertainty as to whether a DFV victim-survivor who is a defendant, would be covered by s21A (when giving evidence). In the Association's view, there is no good reason for a defendant witness to be treated any different from a witness called by the prosecution, insofar as s21A is concerned. Accordingly, amending provisions to ensure that a DFV victim-survivor or Aboriginal and Torres Strait Islander person is able to be treated as a special witness, irrespective of the party calling them, is a sensible reform that the Association supports.

Pre-charge consideration of victimisation and abuse history of a defendant

As noted above, the Association appreciates the difficulty police on the ground face in identifying the person in most need of protection in a domestic situation. That being said, the identification of the person in most need of protection is a critical step in ensuring the criminal justice process is not abused to further traumatise or victimise someone who has suffered from domestic violence. With this in mind, the Association supports steps to include in the Police Operational Procedures Manual requirement for consideration of a person's victimisation and abuse history before charging them with a criminal offence. Such information is clearly critical in understanding the context and history of the relationship behind any incident being investigated. It would be useful for explicit, non-exclusive, factors for consideration to be spelt out in the manual along with guidance on identifying 'defensive violence'.

Improved access to bail for DFV victim-survivors

The Association's experience is that show-cause provisions relating to domestic violence cause significant difficulty in obtaining bail in the Magistrates Court. Of course, a defendant has recourse to apply to the Supreme Court to be granted bail. Experience of practitioners is that it is common for Supreme Court bail to be granted (regularly with the consent of the prosecution) where it has been refused in the Magistrates Court due to what might be described as an 'over reliance' on the show cause provisions.

However, recourse to the Supreme Court is not a straightforward or inexpensive exercise. Even where a defendant has the benefit of proper advice and legal aid funding, the denial of bail in the Magistrates Court necessitates them spending a significant period of time in custody whilst awaiting a hearing in the Supreme Court.

With these issues in mind, the Association would support the amendments proposed, which would remove the need to "show cause" if a defendant demonstrated they were the person most in need of protection.[29] It is envisaged that, in such a case, a defendant would need to produce or point to a level of cogent evidence to satisfy the Court that they were the person most in need of protection. Whilst this might be somewhat onerous, it would remove any concern that a DFV perpetrator would be able to abuse the amendments to avoid the true intent of the show-cause provisions.

The Association would similarly support a proposal to add a requirement that would expressly require a person considering a bail application, including a watch house police officer, to consider the availability of defences, along with the strength of the prosecution case.

Specialist prosecutors and defence lawyers for women who kill

The Association does not support the implementation of specialist prosecutors or lawyers for women who kill or, indeed, for any special category of defendant.

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[29] The Association holds this view notwithstanding that the concept of "most in need of protection" diminishes the usefulness of certain of the partial defences proposed.

In the Association's view, the public (including special categories of defendants) are best served by prosecutors and defence lawyers with broad based experience. Whilst specialisation has superficial attraction, the Association is concerned that such a regime would see the relevant lawyers develop a limited skill set which might risk them being less able to adapt to situations that may arise for time to time in litigation but are not often encountered in the area within which they specialise. In the Association's view, a broad practice for both prosecutors and defence lawyers ensures exposure to people from many walks of life and to many unique legal issues. This broad-based experience ultimately makes for better and more balanced lawyers who are best placed to assist clients and victims, including those who encounter domestic violence.

The Association has recently run a number of CPD seminars covering issues germane to DFV matters, including training relating to vulnerable peoples and vicarious trauma. Training of this nature is important and will continue to be provided. Training of this nature, coupled with a broad legal experience, is ultimately the best way to ensure the community is best served by the profession. The Association understands that ODPP and LAQ are continuing to provide DFV training to practitioners in their offices. It is also noted that the Women's Safety and Justice Taskforce has increased awareness of the need for legal practitioners to be sensitive to the impacts of domestic violence upon clients and witnesses along with the impacts of vicarious trauma. Free online training is available via government websites and is accessible by all practitioners.

The Association is also concerned that requiring certain practitioners to specialise in an area such as domestic violence related homicides may unduly burden those practitioners by solely and continuously exposing them to an area of practice that is highly traumatic.

Question 17. *What reforms are needed to criminal law practice and procedure to facilitate:*

(a) Early identification of self-defence in criminal investigations and prosecutions; and

In the Association's view, a defendant should be entitled to cross examine core witnesses at committal for history of the relationship between the accused and the deceased without the need to seek leave. In the Association's view, this is unnecessary and creates difficulty for a defendant seeking to cross examine witnesses who observed family violence or witnesses of violence by the deceased in their relationship with the accused and in former relationships.

If cross-examination is permitted without leave, allowing such evidence to be obtained at the committal stage, defendants will be in a position identify self-defence earlier and may potentially prompt the earlier resolution of matters which consequently would reduce the amount of court time to be devoted to criminal trials.

The Association further submits that disclosure of the criminal history, NFP history and previous QP9s of the deceased should be mandatory earlier in the matter. If, for example, there is early disclosure which reveals a history of domestic violence, this can inform the decision as to how the matter will proceed to committal. In the experience of the

Association's members, it can be difficult for defence counsel to obtain that evidence early in a matter.

(b) Early resolution of criminal prosecutions?

The Association favours the early involvement of ODPP prior to committal as it can foster efficiency of processes and early negotiation on charges.

However, the Association opposes any measure which purports to require defence counsel or a defendant to provide notice to the prosecution of which defences might be relied upon. Defence counsel already consider whether or not to reveal potential defences by way of submissions seeking substitution of charges/discontinuing of charges in the course of a matter. On other occasions, the disclosure of intended defences will not be in a defendant's best interests and a requirement that that be done, universally, will be detrimental to a defendant's right to a fair trial in many cases.

The Association also opposes any measure which would require pre-trial hearings on the issue of whether a defence is available and notes that the Consultation Paper proposes hearings to assess the evidence on the depositions. Whether a defence is open at the conclusion of a trial is always a question decided on the evidence which has actually been heard. If a pre-trial hearing which considers the depositions only is concluded and the evidence which emerges at trial differs in any meaningful way (as it often does), the issue would have to be revisited during the trial in any case. In the Association's view, the current provision, which is permissive in nature, is appropriate. As for interlocutory appeals, the Association is concerned that such a procedural amendment may lead to delayed or aborted trials where appeals are brought against a trial judge's ruling mid-trial.

The Association, respectfully, agrees with the proposed changes to police and prosecution guidelines about preference for charging manslaughter in certain circumstances.

As for directions by a trial judge about which defences may be available and not relied upon by the defence, this would, in the Association's view, cause confusion and may cause mistrials. For example, if counsel has considered a defence is available but unlikely to succeed, directing a jury to consider that defence would be unproductive. If a change were proposed to criminal procedure in this regard, the Victorian position should be preferred.

Question 18. *What reforms are needed to criminal law practice and procedure to facilitate the admission of evidence about the nature and impact of DFV on victim-survivors who offend?*

In the Associations view, mandatory directions with respect to the expected responses by victims of domestic and family violence as well as the nature and impact of domestic violence on people are preferable. The new directions in s 103A of the *Evidence Act* appear to be more directed towards complainants but should be made available to defendants as if the deceased was capable of being called. Any amendments made should not limited to any particular demographic, as anyone can respond to domestic

and family violence in a way that results in a death. As such, the amendments should be as general as possible.

The Association opposes any amendment to s 21 of the *Evidence Act*. The ability to obtain and rely upon bad character evidence about the victim, which can properly be the subject of objections, should be retained.

Question 19. *What reforms are needed to criminal law practice and procedure to improve access to justice for Aboriginal peoples and Torres Strait Islander peoples?*

In the Association's view, the use of intermediaries may provide assistance to Aboriginal and Torres Strait Islander Peoples, as individual defendants can be highly vulnerable. Additionally, support people should be made available (and mandatory) for all records of interview with police and whenever evidence is given.

Intermediaries could assist the court with reports and provide insight into the limitations of a defendant, both in evidence in chief and cross examination. Support persons could then be drawn from within same four categories as intermediaries.

Additionally, the Association suggests that consideration should be given to allowing a defendant to be a special witness, which may require the definition under s 21(a) to be broadened.

The Association supports the provision of extra funding for community justice groups and, potentially, for cultural reports, with some reservations. While it is true that some defendants may more readily confide in elders from their own community, any such communication could also include admissions against interest or denials of offending. These are matters which can cause significant complication in the disposition of matters.

That raises two separate considerations. First, defendants may be assisted by culturally appropriate support during the preparation of their matters. Second, there is a need for sentencing courts to have before them cultural information which is relevant to the sentencing process.

In the Association's view, it is important that those two issues are kept separate.

Question 20. *Are reforms needed to majority verdicts in murder and manslaughter cases?*

The Association is of the view that there is no need for any reforms to majority verdicts in murder and manslaughter cases. It agrees unanimity is required in murder cases to ensure a just outcome and community confidence in that verdict, particularly given the mandatory sentencing regime. In the experience of the Association's members, majority verdicts aren't prevalent enough to require change.

There is little support from the Association that the speculative risk arises, frequently or at all, where one 'hold-out' on a jury results in a compromised verdict of manslaughter instead of murder. The offence of murder and its penalty requires a unanimous verdict for a finding of guilt.

Question 21. Do you support:

(a) Option 1: repeal section 280 of the Criminal Code; or
(b) Option 2: limiting the application of section 280 (and if so, how); or
(c) Some other approach?

The Association submits that the appropriate approach to question 21 is to refine the application of section 280 in combination with court-based diversionary options introduced to divert parents who use unreasonable corporal punishment from the criminal justice system and to provide support, education and rehabilitation.

The defence of domestic discipline in section 280 of the Criminal Code justifies the use of physical violence against a child for the purposes of 'correction, discipline, management or control'. The force used must be reasonable in the circumstances. The defence is available to a parent, person in the place of a parent, schoolteacher or master. It is the Association's view that any amendment to the defence of domestic discipline should be directed to achieving the aims of protecting children while also ensuring parents are not criminalised for the use of minimal physical force in domestic discipline, in combination with a pathway to diversion by the courts for more serious examples of conduct which may not be considered reasonable.

While it is accepted that support for corporal punishment is declining in Australia, the use of corporal punishment to discipline a child continues to be common, notwithstanding the general increase in understanding that it can be counter-productive and harmful.
The Association's view is the research on community attitudes and opinions outlined at page 74 of consultation paper properly reflects the attitudes of the community and experience of Association members. It is also noted that it is the majority of cases (60%) where police appropriately chose not to charge at all, being cases which involve allegations of common assault.

The Association's view is that repealing the defence, entirely, would lead to criminalisation of corporal punishment which may be relied upon more in disadvantaged communities. Criminalisation would lead to further disadvantage to those communities and family units.

The Association's view is consistent with the generally supportive view of a defence being available for parents where they have used minimal force to discipline a child and support for the defence of domestic discipline where a teacher used very low levels of force for the purpose of management or control but not for the purposes of discipline or correction. The Association does not favour a criminal justice response in cases involving minimal force.

The Association recommends an approach which allows a gradual movement to an eventual repeal of the defence in the future by, firstly, providing legislative guidance on factors relevant to the assessment of reasonableness and a pathway to diversion for education and rehabilitation by the courts where cases may fall outside what is considered reasonable. Legislative guidance on factors should be included by a non-exhaustive list of matters such as:

- the need to consider age, physique and mentality of the child;
- whether it is part of a course of conduct, which is not for the purposes of domestic discipline, involving physical violence or other types of maltreatment including exposure to DFV within the home;
- limiting the purposes for which domestic discipline may be used; and
- including definitions of 'parent', 'person in place of a parent', 'teacher' and 'master'.

Further, any amendment should provide a non-exhaustive list of circumstances in which force is deemed to be unreasonable such as where the force:

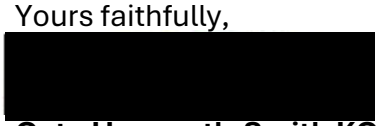
- was applied to head, face or neck of the child;
- was excessive;
- was inflicted with an implement or weapon; or
- is more demonstrative of physical abuse and may be indicative of the risk of future harm to the child.

The Association is of the view the benefit of this approach is the additional guidance provided to decision-makers of all types while ensuring that community standards of reasonableness are explicitly reflected in legislation. At the same time, community benefit will be obtained by offering a pathway for diversion, assistance, rehabilitation and education where the force used is unreasonable, rather than proceeding directly to a criminal conviction.

Moving directly to a legislative scheme which repeals the defence may have immediate adverse consequences by criminalisation of conduct which, while having declining support, remains common and marginally accepted. That should be avoided in favour of a scheme which minimises the force which may be used but continues to educate, reinforce and enhance the changing the community attitudes.

The Association is grateful for the opportunity to make submissions on the Consultation Paper and would be grateful to answer any further questions you may have.

Yours faithfully,



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