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Queensland Law Reform Commission
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Email: LawReform.Commission@justice.qld.gov.au.

Dear Sir/Madam

RE: Review of Particular Criminal Defences

We welcome the opportunity to make a submission to this review.

We write jointly as academics specialising in criminal law, criminal procedure, and the law of evidence in the TC Beirne School of Law at the University of Queensland.

Introduction and General Comments

Like many parts of the *Criminal Code* (Qld), the defence provisions are influenced by its original drafting in the late 1800s and its piecemeal development over the following 120 years. Some of the *Code's* more particular idiosyncrasies, such as its approach to 'state of mind' elements and the scaffolding of several key non-fatal offences against the person around the definition of 'assault' in s 245, affect how a number of its defence provisions are interpreted and applied. An overarching aim of this Review of criminal defences should be to simplify the *Code's* selection of excuses and justifications where possible and appropriate.

Consistent with this aim, we recommend that as part of any amendments that follow this review the placement of defences in the *Code* is made more straightforward. This could be achieved by collating the general defences at the front of the *Code* (a similar approach to that taken in the *Criminal Code* (Cth)). Having these defences spread piecemeal throughout the *Code* is undesirable, not least because it makes the *Code* harder for members of community to navigate and understand.

This submission comments on the topics of the Review as follow:

1. The Mandatory Penalty for Murder
2. Provocation (s 304)
3. The s 304B Defence
4. A Proposed Trauma-Based Defence
5. Self-Defence
6. Excessive Self-Defence
7. Compulsion and Duress
8. Domestic Discipline
9. Provocation (ss 268, 269)

This submission also briefly addresses the property defences and the defence of dwelling defence.

We acknowledge that this Review has arisen principally out of a need for existing defences to better protect victim-survivors of domestic and family violence (DFV). We agree with the need to take all appropriate measures to address this issue, including careful review of the criminal law. At the same time, it is important to consider how any amendments to the general and partial defence provisions in the *Code* might operate outside a DFV context as well, to forestall any unintended consequences that may result in injustice.

1. The Mandatory Penalty for Murder

The need to review and amend the mandatory penalty for murder is paramount. It is, without a doubt, the single issue in the *Code* which most urgently requires change. Removing the mandatory penalty will permit sentencing courts to properly take into account the blameworthiness of individual offenders and to craft an appropriate sentence on that basis. We stress that we do not recommend this because we think murder requires lower sentences. Rather, we argue that a mandatory life sentence distorts a 'just deserts' model of punishment, which undermines any expression of retributive punishment as well as failing to allow for individualised justice.

Although a mandatory life sentence sounds like a strong and punitive sentence, removing a mandatory life sentence in Queensland might allow for sentences that are *in effect* longer than the periods currently served in prison under a term of 'life' imprisonment – depending on the head sentence imposed and the date of parole eligibility. 'Life imprisonment' in Queensland does not necessarily mean that a person remains in prison for life (although they do remain under supervision for life). This makes the question of parole eligibility an important one, with time frames for eligibility fixed at sentence (in accordance with law), but decisions on granting parole made by the parole board once the eligibility date is reached. In other States, guilty defendants frequently serve terms of actual imprisonment for the offence of murder that exceed those served in Queensland, despite not having a mandatory life sentence regime. Removing a mandatory life sentence would also allow for greater clarity about sentencing among the community, as sentences imposed would more accurately reflect the time actually served in custody.

Removing a mandatory life sentence will also, importantly:

- Remove the need for the partial defences – all of which are unsatisfactory in different ways;
- Likely facilitate more convictions for murder, including more guilty pleas;
- Allow the State to review the extent of its 'life imprisonment' penalty;
- Better reflect community expectations of punishment; and
- Bring Queensland into line with other Australian States and Territories.

The need for partial defences in the *Code* is driven principally by the current mandatory penalty for murder (and formerly by the risk of capital punishment). Partial defences ameliorate the harshness of a mandatory life sentence by allowing for a finding of manslaughter over murder, which then allows for discretion to be exercised at sentence. In effect, arguing a partial defence 'front-ends' a consideration of the quantum of blameworthiness by making it part of a finding of criminal responsibility (guilty v not guilty) rather than a sentencing consideration. This is conceptually problematic, but it also has significant practical implications for criminal process, including prosecutorial and defence decision-making, and trial process. For example, the mandatory penalty for murder reduces the incentive for an accused to plead guilty to the charge – there can be no deduction for the plea and an accused may as well seek a manslaughter conviction if it allows them any chance of avoiding mandatory life. The current state of affairs likely increases costs by leading to more, and

more complex, trials where accused contest murder charges and raise numerous defences (including partial defences) for the jury's consideration. In addition, the partial defences are themselves complex, they sometimes overlap, and they set up a difficult choice between arguing self-defence or a partial defence in factual circumstances where self-defence may be open. Arguing self-defence opens the possibility of a full acquittal but carries the real risk of an unmitigated sentence of life imprisonment. This is a particular concern in cases involving victim-survivors of DFV and is explored further below.

Our strong recommendation is that **there should not be a mandatory life sentence for murder in Queensland**. Murder should have a maximum penalty of life imprisonment.

2. Provocation (s 304)

If the mandatory penalty for murder is removed, the need for the partial defence of provocation under s 304 of the *Criminal Code* would be very limited and we would suggest it is repealed.

If the mandatory penalty is retained, the case for provocation is that it provides an 'escape clause' for defendants facing a murder conviction and the certain risk of life imprisonment. It allows juries to consider that a defendant may have acted in the 'heat of the moment', that they 'lost control', and that their killing of another is, in some sense, less blameworthy. Some may argue that, with all the limits now placed on the defence, it can be justified.

We reject these arguments and recommend removal of provocation – even if the mandatory penalty is not changed. At the most basic level, the defence of provocation communicates that being provoked into killing another human being is justifiable (at least to the extent that a murder conviction can be avoided). It communicates that if someone makes another person too angry, or offends them too much, or causes too great a hurt to their feelings, then they can be killed and that killing will not be murder. In modern society this position is fundamentally wrong.

If someone is 'provoked' into killing another because of a threat of serious harm or death to themselves or another, self-defence is the appropriate avenue. As we argue below, duress should also be available to murder. Circumstances that fall outside self-defence or duress, where the defendant is provoked and there is no danger to themselves or others, should not be sufficient to avoid a conviction for murder. Properly drawn defences of self-defence and duress obviate any need for a partial defence of provocation.

3. The s 304B Defence

If the mandatory penalty for murder is removed, and self-defence is expanded (as described below), the problems that necessitated this defence should be obviated and it could be removed. The behaviours reflected in s304B are more appropriately described as self-defence, and an accused should have the benefit of a full acquittal on that basis. Even if self-defence was not successfully made out, the absence of a mandatory life sentence would allow for judicial discretion at sentence and appropriate considerations could be set out in the *Penalties and Sentences Act 1992* (Qld) accordingly. In addition, it would be important to provide appropriate DFV-relevant training and support to decision-makers in the criminal justice system (such as lawyers, jurors, and the judiciary) as part of the implementation of an expanded self-defence provision. Ongoing monitoring and review would be necessary to ensure that the removal of this defence does not leave a justice gap for victim-survivors of domestic and family violence.

If the mandatory penalty is retained and self-defence is expanded (as described below), we would hope that the expanded self-defence provision would more appropriately capture and reflect the factual circumstances contemplated by s304B, thereby making it redundant in practice. Still, the risk remains that self-defence may not operate as intended, and repealing s304B would again expose a victim-survivor of DFV to a mandatory life sentence for murder. We acknowledge that s304B's status as a partial defence is conceptually problematic, we note that it contributes to procedural and strategic complexity, and we note that its retention may undermine the smooth development and operation of an expanded self-defence provision. Nonetheless we argue that it should be retained if there is no change to the mandatory penalty as the risk for victim-survivors is otherwise too great.

4. A Proposed Trauma-Based Defence

If the mandatory penalty for murder is removed, this partial defence should not be introduced.

If the mandatory penalty is retained, we would still argue against the introduction of a partial defence of this nature.

It is unclear exactly how the elements of this defence could be drawn in a way that works well in practice and that properly circumscribes its scope. It would add further complexity to an already difficult domain, and there is significant potential for it to result in unexpected negative outcomes. It is beneficial instead to work towards embedding trauma-informed approaches into the practices of justice system actors, and to consider how this might factor into sentencing considerations (if the mandatory penalty is removed).

5. Self-Defence

We are supportive of the goal to make self-defence more straightforward and, in particular, to reduce it to a single provision. The approach combining reasonableness and necessity and entailing a mix of subjective and objective tests is appropriate and consistent with other jurisdictions. We make several initial observations on the various proposals for this offence:

1. Introducing numerous and potentially compounding qualifications to a new self-defence provision (each likely requiring complex and intersecting jury directions) would defeat a key purpose of reform: simplification.
2. This defence is a general provision in the *Criminal Code* and applies to all circumstances of offending, not only those perpetrated by victim-survivors of DFV against their abusers, so care must be taken to ensure it achieves justice in all circumstances.

<u>Self-Defence Proposal 1:</u>

P1: 'Serious injury'

As the Discussion Paper proposes, self-defence to murder should only be available where it is proportionate to the harm defended against. In such circumstances, Proposal 1 suggests expressly limiting the defence to cases where the defendant believed it necessary to defence against death or serious injury. The term 'serious injury' is not used in the *Code* in relation to offences against persons and using it may introduce additional unnecessary complexity (and is inconsistent with the current and common use of the term 'grievous bodily harm' as defined in s 1). It would likely require extensive definition that would, in any case, overlap with grievous bodily harm. Concerns that grievous bodily

harm does not include sexual offending could be addressed by modifying the proposed limitation so that it is inclusive of death, grievous bodily harm, and 'prescribed sexual offences'. These offences may be listed in a subsection of the provision.

While this modification would be preferable to 'serious injury', which sexual offences should be included is unclear (we note in this context that 'serious sexual assault' in Victoria is undefined).[1] While it would manifestly include rape, should it extend to sexual assault or assault with intent to commit rape? There are numerous sexual offences in Chapter 22 for which an argument could also be made, particularly cases where a person may be defending themselves or another from child sex offences. For example, perhaps a parent or carer would be justified in killing someone to defend a child from ongoing sexual abuse in certain circumstances.

In any case, it is questionable whether these express limitations are required, given the twin standards of 'reasonableness' and 'necessity' encompass consideration of proportionality. It would be hard to argue that a disproportionate response is a reasonable one, or that the defendant believed it necessary, and this is likely to be especially so where the response constitutes murder. Relying on reasonableness and necessity is consistent with other jurisdictions (such as NSW) and avoids difficulties with defining 'serious injury' or drawing arbitrary lines between offences against which reckless or intentional killing is justified. **Our response to question 2(a) of proposal 1 is: the term 'serious injury' should not be used.**

P2: List of Factors

In response to question 2(b) of proposal 1, our answer is no. There is no need for a non-exhaustive list of factors in the provision, particularly ones that are manifestly obvious (e.g. use of a weapon and the 'nature of the force') and which would be taken into account by any jury acting reasonably. Any consideration of reasonableness and necessity would account for these factors where relevant. In addition, factors that are relevant to a consideration of reasonableness and necessity (or their absence) would be raised by counsel as they present on the facts and would almost certainly be adverted to by a trial judge in summing up.

<u>Self-Defence Proposal 2</u>

With regard to proposal 2, it is unclear whether the Review is proposing to include the listed clarifications in the self-defence section or in a separate 'family section' – i.e. the approach in Victoria.[2] We consider the Victorian approach to be helpful and appropriate.

P2 – Should the provision provide that evidence of domestic violence is relevant to the defence?

A specific note re: the relevance of evidence of domestic violence helps to expand and clarify the scope of what could be considered relevant and is a useful addition, although it could be argued that this addition is somewhat redundant, given that relevant evidence is generally always admissible.[3] Nonetheless, as the expanded defence is new and there is a need to ensure it captures the contexts currently covered by e.g. s304B, adding this guidance may be warranted.

[1] Of course, even if 'serious injury' is used the same problem would present itself, given that term will require definition.
[2] *Crimes Act 1958* (Vic), s 322M.
[3] Unless caught by some other exclusionary rule

P2 – 'Non-imminent threat of harm'

The provision should note that a person may act in self-defence even if there is a non-imminent threat of harm. This is important as it clarifies the expanded scope of a consideration of the necessity and reasonableness of a defendant's conduct and underscores that the provision does not impose any requirement of imminence.

P2 – 'Use of force in excess of the force involved in the harm or threatened harm'

The clarification that a person may believe their conduct necessary and reasonable, even where the force is in excess of that responded to, should not be included. Such circumstances can already be taken into account in the defence provision as proposed as they go to consideration of necessity and reasonableness. While the justifications for the clarification in the Discussion Paper are centred on victim-survivors of DFV and education around DFV narratives, this defence is not limited to those contexts, and this may give rise to problematic consequences. A better approach may be to consider how jury directions should be crafted to account for questions of necessity and reasonableness in specific contexts (such as DFV), andto address how proportionality might connect to the question of reasonableness in those contexts.

Self-Defence Proposal 3: Intoxication

Intoxication is a complex issue and raises competing concerns, as noted in the Discussion Paper. Removing the availability of self-defence entirely where a person is substantially affected by self-induced intoxication appears overly severe. There is also the problem of determining the threshold for 'substantially affected'.

A better approach may be to simply obviate the influence of intoxication in considering the reasonableness of the defendant's acts, similar to s 348A(2) of the *Criminal Code* in relation to a belief in consent. This could be achieved through the following wording:

> 'In deciding whether a person's conduct was a reasonable response in the circumstances as the person perceived them to be, regard may not be had to voluntary intoxication of the person caused by alcohol, a drug or another substance'.

Our answer to question 4 on proposal 3 is that intoxication should not be a complete bar to the defence.

Self-Defence: conclusion:

Based on our comments above, a proposed self-defence provision could appear as follows:

(1) A person is not criminally responsible for an act or omission if:
  (a) the person believes that conduct was necessary:
    (i) In self-defence or defence of another;
    (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.
(2) It is immaterial that the person is responding to a non-imminent threat of harm.
(3) In deciding whether the person's conduct was a reasonable response in the circumstances as the person perceived them to be, regard may not be had to voluntary intoxication of the person caused by alcohol, a drug or another substance.
(4) Subsection (1) does not apply if the person:

a. Is responding to lawful conduct; and
b. 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.

We note that the chapeau of the provision should not state that 'a person acts in self-defence if'. It should state that 'a person is not criminally responsible for an act or omission if […]', consistent with other defences in the *Criminal Code*.

Self-Defence: Other Issues:

Defence of Property

We note that this Review does not include the property defences in the *Criminal Code*, which are found in ss 274 to 278 and s 267. Given the review of the self-defence provisions, it would nonetheless be timely to also simplify these defences. This can be done by consolidating defence of property into the proposed self-defence provision. Such an approach is consistent with the *Criminal Code* (Cth), the *Crimes Act 1900* (NSW), and the *Crimes Act 1958* (Vic).

If defence of property is included, an additional clarification would be necessary to ensure that defence of property cannot be a defence to murder (see, eg, *Crimes Act 1900* (NSW), s 420).

6. Excessive Self-Defence

If the mandatory penalty for murder is removed, this partial defence should not be introduced. Attention should be paid to ensure that sentencing reflects these considerations, as appropriate.

If the mandatory penalty for murder is not removed, this proposed partial defence appears to be a better alternative than provocation or a trauma-based defence and may help to fill a gap for victim-survivors of DFV in certain circumstances.

7. Compulsion and Duress

Given the proposed amendments to self-defence we agree that compulsion under s 31(1)(c) of the *Criminal Code* should be repealed. **Our answer to question 5 is yes**.
In our view, the defence of duress under s 31(1)(d) should be available to all offences in the *Code*. The restrictions in s 31(2) related to murder and grievous bodily harm should be removed. The rationale for doing so has been well canvassed in the literature. **Our answer to question 6 is yes in this regard.**

8. Domestic Discipline

We are supportive of Option 1 in the Discussion Paper, being repeal of the defence under s 280 of the *Criminal Code*. The arguments for doing so have been made persuasively in the literature for many years and are summarised in the Discussion Paper. We note especially the preliminary findings identified in the Paper - that s 280 operates as a bar to prosecution. It is particularly troubling that it has barred prosecution in cases of serious violence and non-fatal strangulation.

We do not support Option 2 and make the following comments on the proposed amendments:

- *Limiting the defence to common assault*. While this amendment has the benefit of preventing s 280 being used in relation to more serious offences against the person, common assaults can still involve significant harm. The amendment also implicitly communicates that assaulting children is ok, as long as there is no visible injury. It is worth also observing that more serious offences, such as s 339, have a broad scope and may extend to very minor injuries (the definition of 'bodily harm' can include even light bruising), while there are other minor offences (such as s 328) with lower penalties that would not be covered if the defence was restricted to s 335 alone. The structure and coverage of the various non-fatal offences in the *Criminal Code* does not lend itself to this approach.

- *Defining what is reasonable and unreasonable*. The problem with trying to define what is 'reasonable' is that the kinds of limits envisioned are likely to be vague and uncertain or otherwise arbitrary. Vague and uncertain criteria include that force is 'trivial' or 'negligible' or used in 'anger', while it is arguably arbitrary to exclude force that causes bodily harm, applied to the head, or with an instrument. Many kinds of harm can be very serious even if not applied to the head or with an instrument, while significant pain and trauma can be inflicted without causing 'bodily harm'. There is the further issue that listing what is unreasonable always means that some types of force and harm are, by definition, 'reasonable'; in other words, that some violence against children is ok.

- Defining parent etc. Defining these terms would not remedy the fundamental problems with the defence.

9. Provocation (ss 268, 269)

The defence of provocation to assault under ss 268 and 269 of the *Criminal Code* has proved less controversial than the partial defence contained in s 304 and has received little attention in the literature. This is understandable, given that it applies to less serious offences. Nonetheless, and as with the s 304 defence, our position is that ss 268 and 269 should be repealed. This should be extended to the defence under s 270 (prevention of repetition of insult), given that section's link to the definition of provocation in s 268 and its similar scope.

One of our rationales for this position is similar to our arguments set out above for repeal of s 304. Simply put, a defence of provocation communicates to the community that it is justifiable to attack and harm others if they cause anger, distress, or offence. It holds that in such cases liability for a potentially serious violent offence can be avoided and that any moral culpability or blameworthiness of an accused falls below the threshold that attracts the sanction of the criminal law. In modern society this position is fundamentally wrong. In its 1998 Report, the Model Criminal Code Officers Committee (MCCOC) found that the defence in s 269 'seemingly lacks any coherent rationale except for the general idea that a person who loses self-control is somehow less blameworthy than one who does not. Closely examined, that rationale is, as a general proposition, very hard to defend'. That Report found that for offences with no mandatory penalty, circumstances of provocation could be taken into account in sentencing. It may be noted that the MCCOC's consultations at the time brought no support for a defence of provocation to non-fatal offences.

As with s 304, if someone is 'provoked' into an offence due to a threat of harm to themselves or another, self-defence is the appropriate avenue. Defences of duress and defence of property may also provide appropriate avenues in certain cases.

There are further good arguments for repeal of ss 268 and 269. The first concerns its availability to offences of which assault is an element. This was held in *R v Williams* [1971] Qd R 414, and later confirmed in *Kaporonovski v The Queen* (1973) 133 CLR 209, to limit the defence strictly to offences that include assault (as defined in s 245 of the *Code*). In *Kaporonovski*, the High Court held that a defence under s 269 was not available to a charge of doing grievous bodily harm (with McTiernan ACJ and Menzies J further excluding wounding and causing death or grievous bodily harm by the dangerous driving of a motor vehicle in obiter dicta).

The defence under s 270 does appear to be more widely available, particularly following the Court of Appeal's decision in *R v Major* (2015) 2 Qd R 307 that s 270 is available to manslaughter. Smith DCJA appeared to doubt this conclusion in *R v TM* [2018] QDCPR56, holding that s 270 is not available to s 315A given that the choking offence does not contain 'assault' as an element. Smith DCJA held that:

> [10] In my respectful view if one imports the definition of "provocation" from 268 into 270, the defence only applies to an offence of which assault is an element. In that situation, it does not apply to the offence choking.
>
> [11] My view is fortified because the words "for an assault" are used in 270, which to my mind clearly contemplates that the defence applies to an assault. Such a term is not used in the other defence provisions in Chapter 26 of the Code (such as 271, 272, 273, 274, 275, 276, 277, 278 or 279).
>
> [12] In my view, the only reasonable interpretation is that this defence applies to a charge of which assault is an element. Choking is not such an offence.
>
> [13] I appreciate *Major* may be thought to decide differently, but in that case, both parties conceded it applied to manslaughter.

While the (apparently) limited application of ss 268, 269, and 270 to offences of which 'assault' is an element may have made some sense when the *Code* was first drafted, it makes very little sense in the context of the modern *Code*. The majority of non-fatal offences against the person do not have 'assault' as an element. It is also not the case that assault-based offences are generally less serious (and which could justify limiting provocation to them). Some 'non-assault-based' offences are minor and a handful attract lower penalties than ss 339 and s 340 (assault occasioning bodily harm and serious assaults). For example, that provocation may be a defence to assault occasioning bodily harm (s 339) but not to wounding (s 323) is incoherent in the broader context of the *Code*.
It may be noted that the Queensland Criminal Code Review Committee, in its Final Report of the Criminal Code Review Committee to the Attorney General in June 1992, recommended at that time that provocation be extended to all offences that entail an assault, rather than restricting it to offences with assault as an element.

Second, provocation as a defence to assault has no basis in the common law. It was an invention of Sir Samual Griffith when he first drafted the *Code*, as he stated in a letter to the Attorney-General accompanying the draft code: '[such a defence is] not to be found [...] in a concrete form in any English book'. Griffith further stated that:

> There is no such doubt that in actual life some such rule as that is stated in [s 269] is assumed to exist, although it is probably not recognised by law. The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority, but I apprehend that it is of at least equal importance as applied to other cases of personal violence

The defence is not present in the criminal law of almost all comparable jurisdictions (Western Australia being the notable exception). The structure of Queensland's criminal law does not justify this departure from the common position; i.e. there is nothing about the offences or principles of criminal responsibility in this State that specifically warrants the ss 268, 269 defence, or that under s 270. Their presence in the *Code* reflects outdated attitudes to moral culpability for provoked acts of violence, creates inconsistency in the application of defences to non-fatal offences, and is out of step with other jurisdictions. We are aware of no calls to introduce a defence of provocation to assault in other jurisdictions or any principled argument to do so.

Our answers to questions 14 and 15 are consistent with these views.

We thank you for your consideration.

Yours sincerely

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