

# Review of particular criminal defences

## Killing for preservation in an abusive domestic relationship information sheet

Version November 2023

Killing for preservation in an abusive domestic relationship as a partial defence to murder is in section 304B of the Criminal Code.

The defence gives ‘special consideration’ to ‘victims of seriously abusive relationships’ who kill their abusers. It aims to balance the punishment of those who would otherwise be guilty of murder and the need to give legal protection to victims of serious abuse.<sup>1</sup>

Section 304B applies if the elements of murder are met. It offers a partial defence if:

- the deceased had committed acts of serious domestic violence against the person in the course of an abusive domestic relationship,
- the person **believed** the act or omission causing death was **necessary to preserve themselves** from death or grievous bodily harm, and
- there were reasonable grounds for the person’s belief, taking into account the abusive domestic relationship and all the circumstances.

An **abusive domestic relationship** involves a history of serious acts of domestic violence. Whether the acts were ‘serious’ is a question of fact for the jury to decide. The defence can apply even if:

- the relationship included acts of domestic violence that may seem minor or trivial in isolation,
- the person also sometimes committed acts of domestic violence in the relationship, or
- the person’s conduct in causing the deceased’s death would not be warranted in response to the deceased’s particular act of domestic violence, except for the history of violence.

If the defence under section 304B is raised on the evidence, the prosecution has the burden to exclude it beyond reasonable doubt. If it is not excluded, the defence reduces the person’s criminal liability so that they are guilty of manslaughter, not murder. This gives the court a wider sentencing discretion as murder attracts a mandatory sentence of life imprisonment.<sup>2</sup>

Section 304B operates in addition to other defences.

### 304B Killing for preservation in an abusive domestic relationship

- (1) A person who unlawfully kills another (the **deceased**) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
  - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
  - (b) the person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
  - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

### 304B Killing for preservation in an abusive domestic relationship cont.

- (2) An **abusive domestic relationship** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
- (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
- (4) Subsection (1) may apply even if the act or omission causing the death (the **response**) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.
- (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
- (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.
- (7) In this section—  
**domestic violence** see the Domestic and Family Violence Protection Act 2012, section 8.

The Criminal Code applies definitions in the Domestic and Family Violence Protection Act 2012 to the defence.<sup>3</sup>

A **domestic relationship** means a 'relevant relationship' under that Act, which is an intimate personal relationship, a family relationship or an informal care relationship.<sup>4</sup>

**Domestic violence** means behaviour, or a pattern of behaviour, towards a person in the relationship that is: physically, sexually, emotionally, psychologically or economically abusive; threatening; coercive; or in any other way controls or dominates the person and causes them to fear for their own or someone else's safety or wellbeing. It includes intimidation, harassment, damage to property, and threats of death or injury.<sup>5</sup>

Relevant evidence about domestic violence can be admitted under the Evidence Act 1977. This can include evidence about the history of the domestic relationship, the psychological effect of domestic violence, the cumulative effect of domestic violence, and any retaliation for or factors affecting help-seeking behaviour by the person. It can include expert evidence. These provisions apply to any criminal proceeding and are not specific to cases in which section 304B is raised.<sup>6</sup>

Section 304B was added to the Code by amendments made in 2010.<sup>7</sup> This gave effect to recommendations of a report to the government on defences to homicide in abusive relationships.<sup>8</sup> It was recognised that other defences, like provocation and self-defence, may not be available in cases where a person in a seriously abusive relationship kills their abuser. The new defence aimed to overcome these limitations and the lack of sentencing discretion on convictions for murder in such cases.<sup>9</sup>

Section 304B was amended in 2011 and 2012 to add the words 'for preservation' to the section heading and apply relevant definitions under the Domestic and Family Violence Protection Act 2012 – but it has not otherwise been changed.<sup>10</sup>

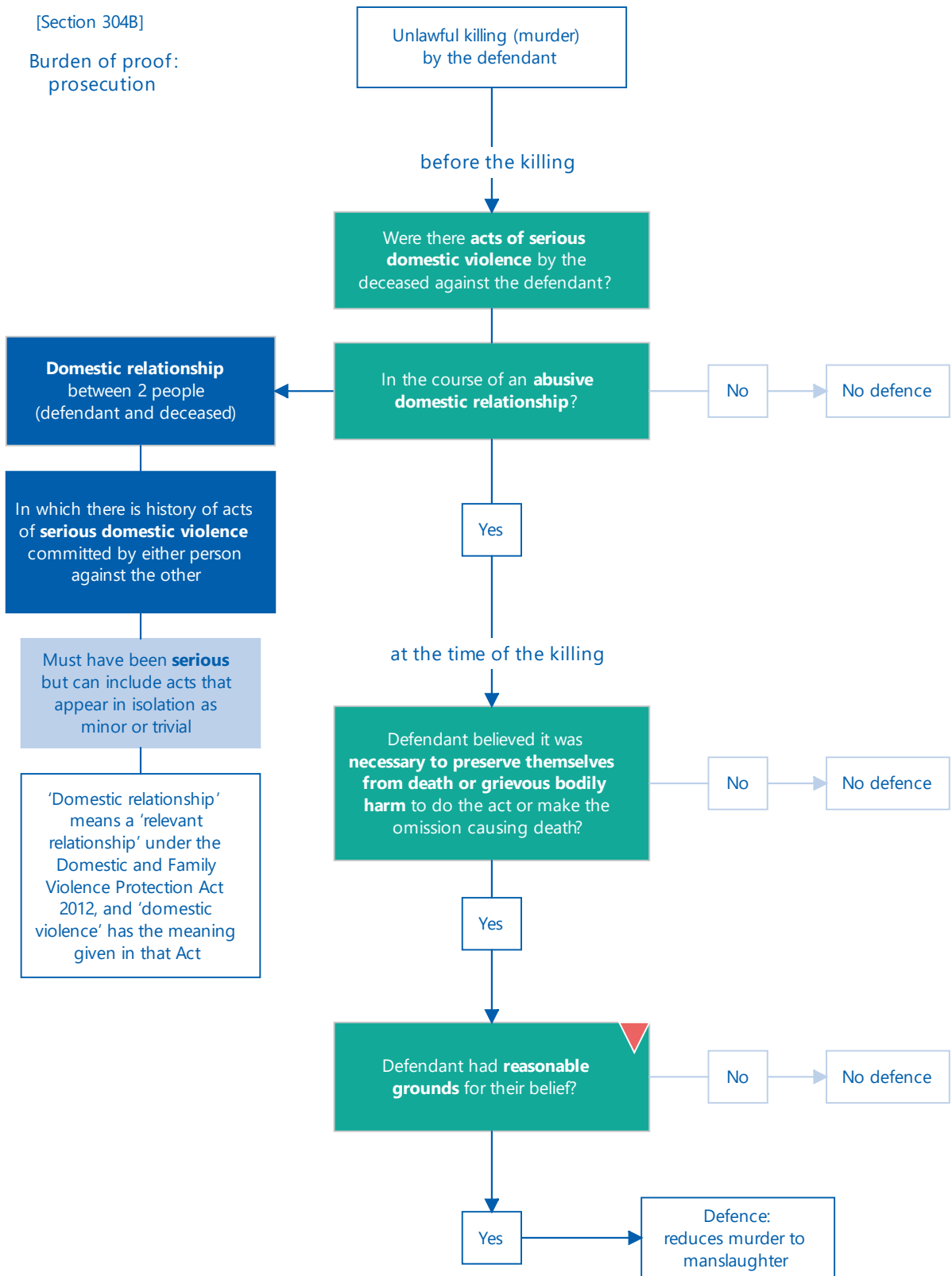
Criticisms of the defence in section 304B include concerns that it:<sup>11</sup>

- provides a partial defence only, in contrast with the complete defence of self-defence (and could undermine legitimate self-defence claims<sup>12</sup>)
- does not apply where the person kills their abuser to protect someone else, such as a child or other family member
- may be underused.

Queensland is the only Australian jurisdiction with the partial defence of killing for preservation in an abusive domestic relationship.

However some places, like Western Australia, have a partial defence of excessive self-defence; and some, like Victoria, have a provision about the operation of self-defence in the context of domestic and family violence.<sup>13</sup> For example, in Victoria, the legislation provides that self-defence may be available in a domestic and family violence context even if the person is not responding to an immediate harm or the force used in self-defence exceeds the force involved in the harm. It also allows relevant evidence of domestic and family violence to be given.<sup>14</sup>

Figure 1: killing for preservation in abusive domestic relationship provision in Queensland



▼ Taking into account the abusive domestic relationship and all the circumstances

As part of their duty to ensure a fair trial, judges in criminal trials are required to sum up the case and give the jury directions about the law and how to apply it, and how to assess the evidence. To help judges with this, suggested directions in the Queensland Supreme and District Courts Criminal Directions Benchbook offer guidance on the directions that should be given.

The following extract is from the suggested direction in the benchbook on the partial defence of killing for preservation in an abusive domestic relationship under section 304B. View the full text on the [Queensland Courts website](#).<sup>15</sup>

### **Suggested directions for section 304B: killing for preservation in an abusive domestic relationship**

...

The defence [in section 304B] operates as a partial defence, not a complete defence, because if it applies its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder.

A matter for your consideration ... is whether the deceased committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship. An abusive domestic relationship is a domestic relationship existing between two persons in which there is a history of acts of serious domestic violence committed by either person against the other. A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.

... a further matter for consideration is the requirement that 'the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death'. This concerns the defendant's actual belief (not that of some hypothetical person) as to whether the act or omission was necessary to preserve the defendant from death or grievous bodily harm.

In considering the additional issue of whether the defendant had reasonable grounds for that belief, you should have regard to the evidence as you find it of an abusive domestic relationship and all the circumstances of the case, including acts of the deceased that were not acts of domestic violence.

The defence may apply even if the act or omission causing the death of the deceased (the response) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.

It is not for a defendant to prove that this partial defence applies, rather the onus is on the prosecution to exclude the defence. The defence is excluded if the prosecution satisfies you beyond reasonable doubt that:

1. the deceased did not commit acts of serious domestic violence against the defendant in the course of an abusive domestic relationship; or
2. the defendant did not believe it was necessary for the defendant's preservation from death or grievous bodily harm to do the act or make the omission that caused the death of the deceased; or
3. if the defendant had such a belief, the defendant did not have reasonable grounds for the belief, having regard to the abusive domestic relationship and all the circumstances of the case.

If you come to consider this defence, because you provisionally reach the view that the defendant unlawfully killed the deceased such that the defendant would be guilty of murder, but the prosecution does not satisfy you beyond reasonable doubt that this defence is excluded, then the defendant would be not guilty of murder, but guilty of manslaughter.

# References

- 1 Queensland, Parliamentary Debates, 26 November 2009, 3669–70 (C Dick, Attorney-General and Minister for Industrial Relations).
- 2 See the ‘Penalty for murder information sheet’ on our website <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.
- 3 See Criminal Code (Qld) ss 1 (definition of ‘domestic relationship’), 304B(7).
- 4 See Domestic and Family Violence Protection Act 2012 (Qld) s 13.
- 5 See Domestic and Family Violence Protection Act 2012 (Qld) s 8.
- 6 See Evidence Act 1977 (Qld) pt 6A div 1A, inserted by Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023 (Qld) pt 5; Explanatory Notes, Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (Qld) 11–12. See also *R v Falls*, Queensland Supreme Court, Applegarth J, 26 May 2010; Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 10.
- 7 By the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld) s 3.
- 8 See G Mackenzie & E Colvin, Homicide in Abusive Relationships: A report on defences, July 2009, [1.32](2), (4), (6). See also the ‘Timeline of legislative reforms and proposals in Queensland’ on our website <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.
- 9 See Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 1–2, 9.
- 10 See Criminal Code and Other Legislation Amendment Act 2011 (Qld) ss 3, 6; Domestic and Family Violence Protection Act 2012 (Qld) ss 216, 218 (as passed).
- 11 See e.g. A Hopkins & P Easta, ‘Walking in her shoes: battered women who kill in Victoria, Western Australia and Queensland’, *Alternative Law Journal*, vol 35(3), 2010, pp 135–7, doi:[10.1177/1037969X1003500301](https://doi.org/10.1177/1037969X1003500301); M Edgely & E Marchetti, ‘Women who kill their abusers: how Queensland’s new abusive domestic relationships defence continues to ignore reality’, *Flinders Law Journal*, vol 13, 2011, pp 129–30, 152, 170–71; H Douglas, ‘A consideration of the merits of specialised homicide offences and defences for battered women’, *Australian and New Zealand Journal of Criminology*, vol 45(3), 2012, pp 374–8, doi:[10.1177/0004865812456851](https://doi.org/10.1177/0004865812456851); Women’s Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland*, 2021, vol 2 pp 259, 322, vol 3 p 714.
- 12 See C Nash & R Dioso-Villa, ‘Australia’s divergent legal responses to women who kill their abusive partners’, *Violence Against Women*, 16 February 2023, doi:[10.1177/10778012231156154](https://doi.org/10.1177/10778012231156154), citing *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015.
- 13 See the ‘Self-defence information sheet’ on our website <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.
- 14 See Crimes Act 1958 (Vic) s 322M (and s 322J).
- 15 Queensland Courts, Queensland Supreme and District Courts Criminal Directions Benchbook, 14 September 2021, <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>. See ch 99 on killing for preservation in an abusive domestic relationship (notes omitted).