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29th April 2025

President Fleur Kingham
Chair
Queensland Law Reform Commission
Level 30
400 George Street
Brisbane Qld 4000

By email: qlrc-criminaldefence@justice.qld.gov.au

Dear Chair,

Re: QLRC Consultation – Review of Particular Criminal Defences

Thank you for the opportunity to provide comments on the Queensland Law Reform Commission (**QLRC**) Consultation Paper entitled 'Review of particular criminal defences' (**Consultation Paper**) which seeks feedback on 7 proposals for reform regarding certain criminal defences including, notably, the defence of provocation (**Consultation**). On 14 April 2025, ATSILS participated in the Roundtable event for the Consultation wherein oral submissions were made. The purpose of this written submission is to reiterate in writing our key oral submissions, which relate to potential unintended consequences on Aboriginal and Torres Strait Islander individuals that might arise from certain proposed reforms of the defence of provocation in the context of domestic and family violence, mandatory sentencing for murder and domestic discipline.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We

now have 25 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Comments on the Consultation Paper

In this response, we have elected to focus on Proposals 6 and 7, which we foresee have the potential to have unintended negative consequences on Aboriginal and Torres Strait Islander persons. We have also outlined some comments in response to Question 11 (Mandatory Sentencing) and Question 21 (Domestic Discipline).

Proposal 6 – The defence of provocation in section 269 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defied in section 1 of the Criminal Code

We agree with item 305 of the Consultation Paper, that repeal of the defence of provocation has the potential to increase the criminalisation of Aboriginal and Torres Strait Islander individuals. We support the retention of the defence of provocation. However, in our view, limiting the defence of provocation so that it does not apply to domestic violence offences, as is proposed in the Consultation Paper, has the potential to open up a range of further complexities when considering cultural context.

Consideration of cultural context is particularly important noting the fact that Aboriginal and Torres Strait Islander women and men are at a far greater risk of being a victim of domestic violence than non-Indigenous men and women. The Australian Institute of Criminology statistical report entitled 'Homicide in Australia 2021-22' evidences that in 2021-22:

(a) Aboriginal and Torres Strait Islander females aged 15 years and over were 33 times more likely to be hospitalised due to family violence than non-Indigenous women; and
(b) Aboriginal and Torres Strait Islander men were 27 times more likely to be hospitalised due to family violence than non-Indigenous men[1].

Higher rates of family violence must be viewed in the context of the ongoing impacts of intergenerational trauma and entrenched systemic disadvantage.

Further, whilst we acknowledge that domestic and family violence on the whole is a gendered issue, family and intimate relationship dynamics, in particular when considering cultural context, are inherently complex and not always binary in nature (i.e., one person is the perpetrator and is always the perpetrator, and one person is the victim and is always the victim). In our coalface experience in representing clients in relation to domestic violence matters, we have seen complex dynamics time and time again, such as scenarios that might involve circumstances of mutual abuse and/or an individual being subjected to prolonged abuse by their partner leading them to, one day, react with violence. An additional layer of complexity can be demonstrated by a common scenario that we see with our clients, particularly from Far North Queensland, where a woman who has been subjected to prolonged abuse from their partner, one day, having 'had enough', reacts by throwing a rock or flinging a mug at their partner. The woman is subsequently charged by police as being the perpetrator of a domestic violence offence[2]. If the defence of provocation would not be available to her, it would remove the ability for her or her defence to put her actions in proper context. This would appear to have the opposite result of what is intended by this proposed reform.

Furthermore, the conduct that falls within the scope of *domestic violence offences* is very broad, especially when considering the broad definition of *relevant relationship*. We offer the following examples of conduct that is likely to fall within the relevant scope:

- incidents involving siblings, an uncle and nephew, or two grown men who are relatives engaging in an altercation;
- a father losing his cool with his son and his son, out of frustration, punching his father;

[1] H Miles, E Faulconbridge & S Bricknell, *Homicide in Australia 2021–22,* Statistical Report no. 45. Canberra: Australian Institute of Criminology.
[2] We note that the misidentification by police of Aboriginal and Torres Strait Islander women as perpetrators of domestic violence offences was evidenced in the 2022 Independent Commission of Inquiry into Queensland Police Service Response to Domestic and Family Violence.

- a child that has constantly been put down by a parent, which has caused long-lasting harm to the child, and one day reacts with violence.

Limiting access to the defence of provocation in the above scenarios could result in unjust outcomes for the accused/defendant. Additionally, it could also contribute to overincarceration numbers, for which the significant flow on effects are well-documented.

Accordingly, for the reasons outlined above, we support retention of the defence of provocation and do not support limiting the defence in the manner proposed.

Proposal 7 – The defence of prevention of repetition of insult inspection 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.

In our view, the defence of prevention of repetition of insult should be retained in its current form, and not limited as proposed, for the same reasons as outlined in our response to Proposal 6 above.

There is also no logical basis to absolve those in a domestic relationship of insulting or provocative acts towards their partner. Indeed, given that one partner will be more attuned to knowing what will provoke the other (i.e. how to 'hit a raw nerve'), there is logic in the suggestion that 'provocation/insults' should carry a wider interpretation within such a relationship – not removed altogether. **Absolving those who would provoke or insult (i.e. remove accountability for their actions), will do nothing less than increase domestic violence.**

Question 11 (Mandatory Sentencing) – '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?'

Mandatory sentencing for murder is of particular importance, especially given the recent 'Adult Crime, Adult Time' legislative amendments. We hold significant concerns regarding the application of mandatory sentencing to children. We concur with the problems with the mandatory penalty of life imprisonment for murder and minimum non-parole periods as outlined in the Consultation Paper including that they discourage guilty pleas, that they do not reflect individual circumstances, that mandatory sentencing for murder and the associated minimum non-parole periods is 'contrary to our community attitudes survey, which found that the community does not

support the mandatory life sentence for murder and instead expects sentencing to reflect the defendants' culpability in the specific circumstances.', and that such 'may disproportionately impact disadvantaged persons, including Aboriginal peoples and Torres Strait Islander peoples, and their communities and DFV victim-survivors, because the court's ability to recognise mitigating and aggravating factors is restricted.' (Page 51, Consultation Paper).

In the context of the proposals contained within the Consultation Paper to remove/limit certain defences to murder, we do not support retaining mandatory sentencing for all murders. We recommend that there be, in lieu, a presumptive life sentence and that the judge has a discretion to provide a lower sentence in consideration of relevant mitigating factors. As a supporting recommendation, we also strongly recommend that there be additional funding provided to legal assistance services to address access to justice issues, including to fund the preparation of specialist reports to rebut this presumptive sentence.

Indeed, in our own experience, convictions for murder can often hang on a knife's edge – with the potential for one jury convicting and another (faced with the same facts), acquitting. Accordingly, affording a presiding judge with sentencing discretion is always to be preferred – as specific circumstances (including the evidence presented during any trial or sentence), can be given due weight.

Question 21 (Domestic Discipline) - '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.

Whilst we do not commonly seek to rely upon this defence when representing clients and we agree that support for corporal punishment is declining, to the extent that this defence could be relevant to conduct of parents in disciplining their children, we do not support the wholesale repeal of section 280 for the following reasons:

(a) oversurveillance of Aboriginal and Torres Strait Islander families continues to result in disproportionate scrutiny by police and child protection systems;

(b) this can result in outcomes where minor physical correction that might otherwise be ignored in other households is criminalised in Aboriginal and Torres Strait Islander families (we note the following statement in the Consultation Paper, which supports this point: 'As one police officer explained "by and large it [the domestic discipline defence] allows parents to properly correct behaviour and control

behaviour with young people without making every day parenting a criminal offence"'[3]);

(c) with the reality of overcriminalisation of Aboriginal and Torres Strait Islander individuals, we would not be keen to support the repeal of a defence that could potentially assist a client in relevant circumstances.

In addition, the defence contains within it the safeguard that the force used must be reasonable in the circumstances. We are satisfied that consideration of community standards can be sufficiently achieved by reasonableness being assessed by a magistrate exercising their discretion or a jury, as the case might be.

Undermining a parent or guardians' ability to 'reasonably' discipline a child will also lead to a reduction in community safety. There is a reason that the vast majority of children in the criminal justice system, do not have an authority figure in their life.

With respect to potential for reform, we submit that there be consideration given to statutory recognition of traditional authority figures in child rearing roles within the cultural norms of Aboriginal and Torres Strait Islander communities, support for community-led dispute resolution and parenting programs and cultural competence training for police, child safety officers and judicial officers.

We thank you for the opportunity to provide feedback on the Consultation Paper.

Yours faithfully,

Shane Duffy
Chief Executive Officer

[3] Page 75.