Queensland Law Reform Commission
PO Box 13312
George Street Post Shop
Brisbane, QLD 4003

20 April 2025

Dear Officer,

RE: Queensland Law Reform Commission Review of particular criminal defences

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Queensland Law Reform Commission's Review of particular criminal defences, regarding the defences of self-defence, provocation as a defence to assault, provocation as a partial defence to murder, and the partial defence to murder of killing for preservation in an abusive domestic relationship.

The ANU LRSJ Research Hub falls within the ANU College of Law, Governance and Policy's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, Governance and Policy who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. Implement guidance for public prosecutors in determining appropriate and just charges for defendants who are victims of Domestic and Family Violence;

2. Repeal sections 271, 272, 273 of the *Criminal Code Act* 1899 (Qld) ('*Criminal Code*'); Adopt the new self-defence provision proposed in Proposal 1, subject to the removal of subsection (c) limiting self-defence for murder;

3. Endorse Proposal 2 for the introduction of a self-defence provision which provides that:

    - *Evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence.*
    - *A person may believe that their conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:*
        i. *the person is responding to a non-imminent threat of harm; or*
        ii. *the use of force is in excess of the force involved in the harm or threatened harm.*

4. Repeal the Defence of Provocation for Assault (ss 268 and 269) and as a Partial Defence to Murder (s 304) under the *Criminal Code*, subject to the adoption of recommendation 5;

5. Replace the mandatory sentence of life imprisonment for murder with a maximum sentence of life imprisonment; and

6. Do not repeal the partial defence of killing for preservation in s 304B of the *Criminal Code* without the codification of an alternative partial defence that acts alongside the complete defence of self defence.

If further information is required, please contact us at [redacted].

On behalf of the ANU LRSJ Research Hub,
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1. Guiding Principles

a. We oppose mandatory sentencing

Mandatory sentencing limits a court's discretion to take into account all the relevant circumstances of the case to come to a sentence that is fair, proportionate and appropriate. Judges no longer have discretion to weigh up sentencing considerations including the context and motivations for the offence and the offender's background and circumstances. As a result, decisions of the legislature and executive carry greater weight, undermining the constitutional separation of powers. Mandatory sentencing contradicts the core principles of proportionality and imprisonment as a last resort in Australia's criminal justice system[1]. It is also inconsistent with Australia's international obligations under the International Covenant on Civil and Political Rights ('ICCPR') and the Convention on the Rights of the Child ('CROC').[2] Having a minimum mandatory sentence demonstrably may also discourage guilty pleas and disproportionately impact disadvantaged groups including Indigenous Peoples[3] and domestic and family violence ('DFV') victim-survivors.[4] For these reasons, we oppose mandatory sentencing for all criminal offences.

b. We recognise the law's gendered history and its impacts today

It must be recognised that the criminal law, and criminal defences in particular, have historically been formulated in a way that aligns with male experiences.[5] The law of homicide in particular has historically privileged and excused male violence.[6] In contrast, women who resort to violence after experiencing prolonged DFV have not had their experiences accounted for. They have historically been subject to the full force of the law, with no appropriate defence available.[7] To combat this, two distinct options for law reform are available: (1) creating special defences for women, or (2) modifying the existing offences to account for women's experiences.[8] Queensland has adopted a combination of both, reforming the provocation defence and adding a partial defence of killing for preservation. In evaluating the existing law, we recognise the gendered history of the criminal law and its continuing impact, and argue that this is an essential part of considering options for law reform.

[1] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, No 133, December 2017) 275 [8.9] ('*Pathways to Justice*').
[2] See Law Council of Australia, *The Mandatory Sentencing Debate* (Research Paper, September 2001) 8-9.
[3] Ibid 6-7.
[4] Queensland Law Reform Commission, *Review of Particular Criminal Defences* (Consultation Paper, February 2025) 51 ('*QLRC Consultation Paper*').
[5] Stanley Yeo, 'Resolving Gender Bias in Criminal Defences' (1993) 19(1) *Monash University Law Review* 104.
[6] Kate Fitz-Gibbon and Sarah Walklate, *Gender, Crime and Criminal Justice* (Taylor & Francis Group, 3rd ed, 2018) 186.
[7] Ibid.
[8] Yeo (n 5) 104.

c. We frame the experience of DFV through a social entrapment lens

Understandings of DFV in criminal trials are 'lagging behind, and failing to utilise readily available research'.[9] Inaccurate understandings of DFV, including victim-blaming attitudes and misogynistic stereotyping go to the heart of any criminal trial where a victim-survivor has acted against their abuser.[10] Many of these phenomena were helpfully identified in the Commission's Background Paper.[11] We concur with the Women's Safety and Justice Taskforce, and with a wealth of literature in this area, in finding that social entrapment is the most accurate and productive framing of DFV in criminal law contexts.[12] Social entrapment renders visible not only direct violence, but controlling and coercive behaviours of abusers, institutional and social responses, and structural inequalities. Each of these dimensions shape the decision-making possibilities and behaviours of victim-survivors of abuse.[13]

Further, social entrapment extends to the criminal legal responses to abuse.[14] For instance, pressure from prosecution to plead guilty to lesser charges of manslaughter rather than contest self-defence, pathologisation of violent responses to abuse, and failures of counsel to adduce social entrapment evidence, all reduce victim-survivors' ability to defend themselves in the courtroom, and to remove themselves from the cycle of harm which characterises the abuse-to-prison pipeline. We recommend that the Commission considers how social entrapment shapes all aspects of the experience of family violence, including legal responses to it.

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[9] Heather Douglas, Stella Tarrant and Julia Tolmie, 'Social Entrapment Evidence: Understanding Its Role in Self-Defence Cases Involving Intimate Partner Violence' (2021) 44(1) *UNSW Law Journal* 326, 330.

[10] Ibid 329.

[11] See, for example:

> *'Police, lawyers, judges and juries may think a victim-survivor's failure to seek help or to leave means that the abuse they have experienced is not serious. Non-physical forms of abuse may be minimised or not investigated, particularly where there is an absence of physical violence. A failure to leave may be presented as illogical, rather than a rational response to real and significant risks.'*

Queensland Law Reform Commission, *Understanding domestic and family violence and its role in criminal defences* (Discussion paper 3, February 2025).

[12] See, eg. Douglas, Tarrant and Tolmie (n 9); Julia Tolmie et al, 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence' (2018) 2 *New Zealand Law Review* 181; Vanessa Bettinson and Nicola Wake, 'A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response' (2024) 87(1) *Modern Law Review* 141.

[13] Julia Tolmie, Rachel Smith and Denise Wilson, 'Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework' (2024) 30(1) *Violence Against Women* 54.

[14] Tolmie et al (n 12) 207.

d. We are concerned with reducing the criminalisation of victim-survivors

DFV drives women's offending.[15] Nationally, women are being incarcerated at a higher rate than men, with the population of women in prison increasing by 64% between 2010-2020.[16] An overwhelming majority of these women are victim-survivors of DFV or other violence. 85% of women in prisons have experienced DFV, and 98% have some history of trauma or victimisation.[17]

The prison system itself is a source of violence for victim-survivors of abuse. Incarcerated women speak of:

> *'emotional abuse from severing their connection with their children, and causing and exacerbating mental illness; financial abuse through extremely low-paid labour and poor prospects of post-release employment; sexual violence and humiliation in the form of strip searching; and victim-blaming and punishment, as though offending was not already an act of survival'.*[18]

These patterns are particularly pronounced for Aboriginal and Torres Strait Islander women, for whom the ongoing impacts of colonial and racist structures reproduce the violence of abuse as institutional violence.[19] Misidentification of First Nations victim-survivors as perpetrators of DFV by police and criminal legal infrastructure is rampant. A 2017 Queensland Domestic Violence Death Review and Advisory Board report found that in nearly all domestic and family violence related deaths of First Nations people, 'nearly all of the victims had a prior history of being recorded as both respondents and aggrieved parties' prior to their death.[20]

The criminalisation of women who are victim-survivors of DFV does not minimise harm and violence for victims or for the community. Rather, it extends that violence through institutional responses without addressing underlying causes or directing resources into harm prevention. We consider it a priority to minimise the impact of criminalisation on victim-survivors, prevent victim misidentification, and minimise contact between the criminal legal system and victim-survivors who act against their abusers. These priorities are preliminary steps in the task of meaningfully investing in harm minimisation and breaking the cycle of violence.

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[15] Victoria Law, author of *Resistance Behind Bars: The Struggles of Incarcerated Women* stated:
'Among people incarcerated in women's prisons, past abuse—family violence, sexual violence and/or domestic violence—is so prevalent we now have a term for it: the abuse-to prison pipeline… many women imprisoned for the death of their partner or ex-partner had experienced sustained abuse from that partner… That's in large part because of the way our adversarial criminal legal system works—a prosecutor's job is to convict (or wring a guilty plea from a defendant), not to examine the underlying causes for why harm or violence happened.'
Quoted in: Justice Map, *Doing Time for Men's Crimes: How Male Violence is Driving Record Numbers ofWomen into Australian Prisons* (Report, November 2024) 32 ('*Doing Time for Men's Crimes*').

[16] Australian Institute of Health and Welfare, *The health and welfare of women in Australia's prisons* (Report, November 2020) 2.

[17] *Doing Time for Men's Crimes* (n 15) 32.

[18] Ibid 22.

[19] Senate Standing Legal and Constitutional Affairs References Committee, Parliament of Australia, *Missing and Murdered First Nations Women and Children* (Final Report, 15 August 2024).

[20] Queensland Domestic and Family Violence Death Review and Advisory Board, *2016-17 Annual Report* (Annual report, 2017) 82.

2. Self-Defence

a. Preliminary considerations for self-defence

Evidence suggests that many victim-survivors of DFV who use violence against their perpetrators do not access, or are unable to access, self-defence leading to an acquittal.[21] Increasing access to self-defence should be a priority of this Commission in seeking to ensure that women who are victim-survivors of DFV are not unduly criminalised for their responses to the violence they experience.[22]

Farrugia identified two factors, flowing from the 2014 suite of law reforms to the Victorian *Crimes Act*,[23] which deterred the use of self-defence for victim-survivors of DFV.[24] The abolition of the de facto partial defence of defensive homicide, and the charging practices of the Office of Public Prosecutions were found to have the effect of exerting pressure on victims of DFV to accept plea deals for lesser charges 'despite the existence of cogent evidence of self-defence'.[25] We consider these factors to be necessary preliminary considerations for reform to self-defence, and recommend that the Commission consider all proposed reforms in light of their effects on the accessibility of self-defence in DFV contexts.

i. Charging decisions

Women charged with murder after killing their abusive partner face pressure to plead guilty to a lesser offence such as manslaughter, rather than contest a murder charge with self-defence and risk a conviction carrying a mandatory life sentence.[26] Stubbs and Tolmie observe that even where making out self-defence is viable, '[p]leading guilty to manslaughter... in exchange for the prosecution agreeing to drop murder charges, has emerged as perhaps the most common defence strategy in battered women's homicide cases in Australia'.[27] In Queensland, the harsh mandatory sentencing regime for murder and the difficulty of making out self-defence makes this especially so. Aboriginal and Torres Strait Islander women face additional pressures to plea bargain as a result of distrust in the legal system, risks

[21] Between 2005 and 2013 in Victoria, following reforms to self-defence, which largely reflected the proposed reforms considered by this Commission, seven women killed their intimate partners. All of the women who did so were victim-survivors of DFV from that partner. Yet none of the women concerned were acquitted on the basis of self defence.
Deborah Kirkwood, Mandy McKenzie and Danielle Tyson, *Justice or Judgement? The impact of Victorian homicide law reforms on responses to women who kill intimate partners* (Domestic Violence Resource Centre Victoria, 2013) 43 ('*Justice or Judgement*').

[22] Heather Douglas notes that despite reforms implementing greater consideration of the nature of DFV within self-defence and the laws of evidence, 'it remains very difficult for battered women to meet the threshold required to succeed in a claim of self-defence'.
Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 367, 377.

[23] *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic).

[24] Vincent Farrugia, 'Family Violence and the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic): Justice in the Accessibility of Self-Defence' (PhD Thesis, Victoria University, 2020).

[25] Ibid 6.

[26] Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Charges of Homicide: The Structural and Systemic versus the Personal and Particular' in Wendy Chan, Dorothy E Chunn and Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (Glasshouse Press, 2005) 191.

[27] Ibid 198.

associated with not meeting the 'ideal victim' standard (due to the combined effects of gender and racial discrimination), and the historical context of dispossession and removal from family and community effected through the criminal legal system.[28]

Conversely, women are more likely to plead not guilty and contest charges with self-defence, where they are originally charged with a lower offence such as manslaughter. In New South Wales, a review of homicide defences in 2013 concurred with this position, and recommended the creation of specific guidelines for prosecutors to aid in determining the more appropriate charge against defendants who have experienced DFV which related to their offending.[29] We recommend similar steps be taken to ensure charging decisions reflect the experience of DFV and do not undermine well-intentioned law reform attempts. Guidance should illuminate the social entrapment model of DFV and expand prosecutors' understandings of how structural and institutional, including prosecutorial, responses to DFV shape victim-survivors' behaviour and options.

Recommendation 1: Implement guidance for public prosecutors in determining appropriate and just charges for defendants who are victims of DFV.

ii. Availability of partial defences

Consideration of the interactions of self-defence with partial defences, and the availability of partial defences is an important matter regarding the formulation of an amended self-defence provision. The proposed repeal of the partial defence of killing for preservation, despite its non-use since introduction, removes an important potential half-way house between conviction and acquittal by self-defence for women who respond to their abuse with violence.[30]

The Victorian Law Reform Commission's 2004 report into defences to homicide recognised the trend of plea deals resulting in victim-survivors of FDV pleading guilty to lesser offences where acquittal through self-defence might have been available, as described above.[31] It hoped that this trend would be somewhat alleviated by the reintroduction of the partial defence of excessive self-defence, as 'self-defence will no longer be an "all or nothing" defence'.[32]

This analysis by the VLRC reflects our position. Where self-defence is often inaccessible, the availability of partial defences plays an important role in ensuring charging decisions, trials and sentencing can accurately reflect the experience of DFVDFV and its impact on offending victim-survivors. Conversely, where there are no or few partial defences available, ensuring that self-defence is accessible and that it broadly captures the range of defensive acts which victim-survivors may use in response to abuse, must

[28] Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41(1) *Australian & New Zealand Journal of Criminology* 138, 150.
[29] Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The partial defence of provocation* (Final Report, 23 April 2013) 168.
[30] Nicola Wake, 'His home is his castle. And mine is a cage': a new partial defence for primary victims who kill. (2015) 66(2) *Northern Ireland Legal Quarterly* 149, 159.
[31] Victorian Law Reform Commission, *Defences to Homicide* (Final Report, August 2004) 102.
[32] Ibid.

be a priority. Our recommendations with regard to self-defence and the proposed repeal of killing for preservation are thus made in light of recognising the significant impact of DFV on women's offending. Reforms in this area must be consistent with the objective of reducing criminalisation of victim-survivors to minimise the ongoing harm they endure, both directly in their home setting and and indirectly through institutional responses to DFV, including criminalisation.

b. Consultation Paper Proposal 1: A new self-defence provision

Recommendation 2: Repeal sections 271, 272, 273 of the Criminal Code Act 1899 (Qld) ('Criminal Code'); Adopt the new self-defence provision proposed in Proposal 1, subject to the removal of subsection (c) limiting self-defence for murder.

We support the repeal and replacement of ss 271, 272 and 273. These provisions have been confusing in application, sustain an anachronistic distinction between provoked and unprovoked self-defensive action, and are inconsistent with approaches to self-defence in both common law and other Australian and international jurisdictions. We largely support the proposed new provision in Proposal 1 of the Commission's Consultation Paper with the exception of subsection (c).

i. Proposal 1 subsection (c): limiting the threats which can sustain self-defence to murder

The proposed self-defence provision should omit this limitation on the range of perceived threats which can sustain self-defence to a murder charge.

This limitation on self-defence is inconsistent with self-defence formulations across the majority of Australian jurisdictions, except for Victoria. This limitation in Victoria was introduced in the 2005 suite of reforms which also saw the introduction of the alternative lesser charge of defensive homicide.[33] Indeed, the Victorian Department of Justice's 2013 review of defensive homicide proposed the removal of the limitation, acknowledging that 'narrowing … the range of possible threats that can sustain a self-defence argument might prove detrimental to improving [abused women's] position'.[34]

The limitation imposes an evidentiary threshold for threat perception which is inconsistent with understandings of coercive control and social entrapment dynamics in DFV. The proposed revised self-defence provision adopts a subjective test for necessity regarding the response to the perceived threat. This is the more appropriate approach. The limitation proposed in subsection (c) of the proposal would require that victim-survivors had the subjective belief that they were being threatened with death or serious injury.

However, victim-survivors face challenges in relation to the admission of evidence demonstrating their perception of the threat they faced due to the nuanced dynamics of DFV characterised by coercive

[33] *Crimes (Homicide) Act* 2005 (Vic).
[34] Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality Before the New Victorian Law' (2012) 36 *Melbourne University Law Review* 250, 264, cited in Department of Justice, *Defensive Homicide: Proposals for Legislative Reform* (Consultation Paper, September 2013).

control and social entrapment. Bettinson and Wake describe coercive control as an 'ongoing pattern of behaviour' which consists of both physical and non-physical tactics designed to subordinate the victim 'through intimidation, isolation, taking away means of independence that prevent escape and the micro-regulation of everyday behaviour'.[35] In this context, a victim's failure to comply with their abuser's demands may be met with punishment, physical or nonphysical, which only the victim is able to appreciate their abuser as being capable of, as a result of their history of pattern observation in the abuser's behaviour. Tolmie et al provide the example that a 'partner who has repeatedly raped or hurt [a victim] when she refused "sex", demands "sex", then this request will be experienced as the threat of rape or physical violence [as declining] "sex" raises the reasonable expectation of violent reprisal'.[36]

Despite the amendments to evidence rules in Proposal 2, there are significant evidentiary challenges to admitting evidence which accurately captures the nuanced experience of a victim-survivor's perception of threat escalation. This is evident in Victoria following the 2005 suite of reforms to self-defence. Between their introduction and 2013, the only woman who killed her abusive partner in which the charges were dismissed on the grounds of self-defence was Freda Dimitrovski.[37] Here, other family members were present to witness and give evidence that the abuser violently attacked Freda immediately before she killed him.[38] In their assessment of the impact of the 2005 Victorian reforms, the Domestic Violence Resource Centre Victoria concluded that:

> *'the potential envisioned … in relation to the use of expert evidence has not been realised. There was little, if any, indication in our study that a broad range of experts with specific family violence training is being called upon by legal counsel. Rather, we found that in these cases expert evidence was confined to that provided by forensic psychiatrists and psychologists who undertook psychological assessments of the women and did not appear to provide evidence relating to the broader social context of family violence'*.[39]

The complex and nuanced ways in which coercive control and social entrapment escalate to violence will make it difficult for victim-survivors to adduce evidence which demonstrates that they feared death or serious injury. Therefore, this proposed limitation on self-defence may make it more difficult for victim-survivors who kill their abusers to access self-defence.

Further, the provision is not necessary as the existing self-defence provision itself will limit the range of perceived threats to which lethal violence will be considered a necessary response. The High Court acknowledged this as a phenomenon of the common law construction of self-defence in *Zecevic*:

> '*A threat does not ordinarily call for [killing or doing serious bodily harm] unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm*'.[40]

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[35] Vanessa Bettinson and Nicola Wake, 'A New Self-Defence Framework for Domestic Abuse Survivors Who Use Violent Resistance in Response' (2024) 87(1) *Modern Law Review* 141, 144.
[36] Tolmie et al (n 12) 210.
[37] *Justice or Judgement* (n 21) 43.
[38] Ibid.
[39] Ibid 47.
[40] *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662 (Wilson, Dawson & Toohey JJ).

Community opinion on the reasonableness of the use of lethal force as a self-defensive response to different forms of violence, including sexual violence, is mixed. Rather than imposing the threat of serious injury or death as a threshold for accessing the defence, enabling the reasonableness calculus to be considered by the jury not only reflects this divergence in community opinion more accurately, but re-emphasises the burden held by the prosecution of proving beyond reasonable doubt that the act was not reasonable.

Further, in light of the operation of the mandatory minimum sentence of life imprisonment for murder, this higher evidentiary threshold for threats which can sustain self-defence to murder is likely to aggravate the trend of pushing victim-survivors who kill their abusers into guilty pleas for manslaughter rather than contesting self-defence in a murder trial, even where it may be available and salient.

We note that this limitation is being proposed at the same time as the proposed repeal of the partial defence of killing for preservation. Victoria, the only other state to adopt a limitation on the threats required to contest self-defence to murder charges, introduced this limitation coterminously with the adoption of the offence of defensive homicide, a lesser offence of killing which acted as a de facto partial defence for women who killed their abusive partners.[41] Defensive homicide offered a lower charge and sentence where the circumstances would otherwise constitute murder, and victim-survivors believed that their conduct was necessary to prevent serious injury or death, but this belief was not held on reasonable grounds.[42] Defensive homicide thus served as a 'halfway house' or a fallback charge between a murder conviction and acquittal. If there is no analogous partial defence in Queensland, women who kill their abusive partners and are charged with murder will either have to meet the high evidentiary threshold for threat perception in order to access an acquittal, or face a mandatory minimum life sentence's imprisonment. As such, if the killing for preservation partial defence is to be removed, the broader self-defence provision which is intended to replace it should be sufficiently accessible to capture the instances of victim-survivor defensive violence for which killing for preservation was intended.. In light of the evidentiary challenges associated with demonstrating the victim-survivor's belief in the threat of death or serious injury they faced, the inclusion of this proposed limitation, without a partial defence to fall back on, will result in a self-defence provision that remains unjustly inaccessible to women who kill their abusers.

A further benefit of the non-inclusion of this proposed limitation is that, as the Victorian Department of Justice's review of the limitation in 2013 pointed out, by avoiding distinctions between the elements of self-defensive murder and other forms of self-defensive killing (such as self-defensive manslaughter and self-defensive attempted murder) the task of instructing the jury is made easier:

> '*[I]t will mean that one test for self-defence applies to all offences to which it is relevant … Where self-defence is in issue … [the removal of the limitation] would mean that the trial judge only needs to explain self-defence to the jury in one way. It would no longer be necessary to explain the differences between self-defence for the offences of murder and manslaughter. This issue also arises in the context of attempted murder. When the DPP charges a person with attempted murder, the DPP almost invariably charges the alternative offence of intentionally*

[41] *Crimes (Homicide) Act* 2005 (Vic) (n 33) s 9AD, repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic).
[42] *Babic v R* (2010) VSCA 198 [94].

causing serious injury. As the judge will need to direct the jury about self-defence in relation to both attempted murder and intentionally causing serious injury, having the same test for self-defence for both offences would be easier for the judge to explain to the jury and easier for the jury to understand'.[43]

c. Consultation Paper Proposal 2: Evidence

Recommendation 3: Endorse Proposal 2 for the introduction of a self-defence provision which provides that:

- Evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence.
- A person may believe that their conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:
    - the person is responding to a non-imminent threat of harm; or
    - the use of force is in excess of the force involved in the harm or threatened harm.

We view that these the amendments proposed in Proposal 2 are consistent with best practice for framing DFV as social entrapment in criminal trials, including the removal of the imminent threat requirement, and an acknowledgement of the nuanced, often non-incident-based nature of threat to which self-defence might be a response in DFV contexts.

However, these conceptual shifts must be associated with accompanied paradigm changes which ensure that this understanding of DFV structures the application of self-defence laws in practice. The effectiveness of law reforms is conditional on 'how the legal profession interprets and applies' them, which in turn depends on legal professionals' understandings of DFV.[44] Appropriate guidance for prosecutors, legal practitioners and judges is recommended. This guidance must aim to enhance understandings of social entrapment dynamics in DFV contexts, and the broader types of evidence, including expert evidence, which can be used at trial to assist in establishing an accurate picture of the interpersonal, institutional, and structural responses to violence which generate social entrapment. It must provide best practice directions for legal professionals at key junctures such as in charging decisions, committal proceedings, jury direction, and sentencing as to the impact of DFV on interactions with the legal processes at hand.

On this, we welcome the amendments made to the *Evidence Act 1977* (Qld) in introducing ss 103ZA-ZC, which provide judicial discretion to direct a jury with regard to the relevance of DFV to self-defence, coercive and controlling behaviour which may constitute DFV, and interpersonal, institutional, and structural factors which influence how a person responds to DFV, consistent with a social entrapment

[43] Department of Justice (n 34) 37.
[44] *Justice or Judgement* (n 21) 37.

lens.[45] These provisions will go some way in providing guidance to judges in combating misconceptions about DFV within jury deliberations and decision-making. We recommend additional efforts to enhance judicial officers' understandings of the dynamics of DFV through a social entrapment lens, and to provide guidance on implementing these understandings at key junctures in the criminal legal process.

[45] *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act* 2023 (Qld) s 67.

3. Provocation

a. Provocation as a partial defence to murder – section 304

i. Provocation in the context of gendered violence

The excuse of provocation for an offence involving an assault under sections 268 and 269, and the partial defence of provocation under section 304 of the Criminal Code has long been criticised for excusing male violence against women, particularly in cases of FDV or homicide. Given the overwhelming evidence of its misuse, and the fact that most Australian jurisdictions have now repealed similar provisions, this submission argues that sections 268 and 269 should be abolished to prevent the law from legitimising gendered violence.

As Criminology Professor Danielle Tyson of Deakin University argues in *Sex, Culpability and the Defence of Provocation*, one of the most troubling aspects of this defence is its role in legitimising an exculpatory 'narrative of excuse' for perpetrator's murderous anger and rage against their victims.[46] By allowing perpetrators to argue that their loss of control was justified by the victim's words or actions, the law perpetuates the idea that mere emotions—particularly jealousy, possessiveness, or humiliation—can reduce culpability for homicide.[47]

This concern has been widely recognised in legal reform discussions in Canadian jurisdictions. The National Association of Women and the Law argues in *Stop Excusing Violence Against Women*, a report submitted to the Federal Department of Justice Canada, that:

> *'By placing the focus on the victim's behaviour, the law capitalizes on historic Judeo-Christian ideologies that blame women for the evils of mankind, and that immunize men from responsibility for their behaviour. The plausibility of the provocation hypothesis in spousal femicide cases rests on sexist assumptions about female maliciousness and male vulnerability. It excludes the real context and dynamic of male domination and patriarchal violence."*[48]

This critique underscores the fundamental flaw in provocation as a defence: it shifts attention away from the perpetrator's actions and instead scrutinises the victim. As Jenny Morgan from the University of Melbourne's Law School notes in *Who Kills Whom and Why?*,[49] legal categories often obscure rather than illuminate the social realities in which these crimes occur. As Morgan powerfully states, "dead women tell no tales, tales are told about them".[50]

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[46] Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge, 2013), 21.

[47] Gillian Findlay, 'The Defence of Provocation – Is There a Place for it in Modern Law?' Robson Crim (Web Page, 18 DanielleMarch 2023)

[48] National Association of Women and the Law, *Stop Excusing Violence Against Women*, (Position Paper, April 2000), 21-22.

[49] Victorian Law Reform Commission, *Who kills whom and why: Looking beyond legal categories* (Occasional Paper, 2002)

[50] Morgan, Jenny (1997) 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' 21 Melbourne University Law Review 237.

ii. Historical misuse of provocation as a partial defence to murder and the role of section 304 in perpetuating sentencing disparities

Provocation has historically been used to justify men's violence against women, resulting in lesser sentences where it is successful. The following cases are examples of this pattern.

R v Auberson[51]

> Mr Auberson killed his wife and was found guilty of manslaughter with provocation. His wife had left him and he suspected that she was having an affair. Mr Auberson invited his wife to their home to discuss resuming their relationship. He reported that his wife stated that she did not want to resume the relationship, informed him that she was in a new relationship and threatened to 'go for' his money and super. Mr Auberson then strangled his wife, used bathroom scales to hit her on the head and cut her throat with a stanley knife. He was sentenced to 9 years' imprisonment and an appeal by the Attorney-General against the sentence was unsuccessful.

R v Schubring; Ex parte Attorney-General (Qld)[52]

> Mr Schubring killed his wife and was convicted of manslaughter having successfully used the partial defence of provocation. Mr Schubring had killed his wife by strangling her with a dog lead after he had rendered her unconscious by bashing her head against tiles. The killing occurred in a context where Mr Schubring's wife had informed him that she was leaving him and Mr Schubring knew his wife was involved with someone else. He was ultimately sentenced to 10 years imprisonment following a successful appeal by the Attorney-General on the grounds that the original sentence of seven and a half years was manifestly inadequate.

R v Sebo, ex parte Attorney-General[53]

> Mr Sebo was convicted of manslaughter, successfully arguing the defence of provocation after killing his 16-year-old girlfriend. He described that his girlfriend was drunk and she taunted him, claiming she had slept with other men. He hit her with a steering wheel lock on her head and continued to do so after she had fallen on the ground. She died two days later in hospital. Mr Sebo was sentenced to 10 years' imprisonment.

The 2011 reforms were intended to address the 'bias and flaws' of the partial defence of provocation.[54] The insertion of sub-s (3) into s 304 in particular was designed to deal with 'an unacceptable response by a party to a domestic relationship, to an event affecting the relationship, arising from a choice made by the deceased about the relationship'.[55] It was implemented to limit the availability of the defence to

[51] [1996] QCA 321.
[52] [2005] 1 Qd R 515.
[53] (2007) 179 A Crim R 24.
[54] Explanatory Memorandum, *Criminal Code and Other Legislation Amendment Bill 2010* (Qld) 1.
[55] Ibid 12.

'those who kill out of sexual possessiveness or jealousy'.[56] Subsequent interpretation of s 304(3) by the High Court has limited its effectiveness.

Section 304(3) has been construed narrowly by the High Court, such that other behaviour by a victim may constitute provocation if it can be isolated from their decision to end or change the relationship. In *Peniamina v The Queen*,[57] the High Court held that the deceased threatening Mr Peniamina with a knife and cutting his hand was not something 'done to change the relationship'.[58] Mr Peniamina had confronted his wife, alleging that she had been unfaithful. He states that she refused to talk to him about it and he hit her in the face, following which she grabbed the knife and attempted to attack him with it but he grabbed it and she cut his hand. Mr Peniamina stabbed his wife at least 29 times on the head, neck and shoulders and after he had followed her out the front of the house where she tried to hide behind a car, used a cement bollard to hit her on the head. This case demonstrates the inefficacy of s 304(3) in combatting the gendered issues with the provocation defence.

iii. Cross-jurisdictional Comparisons

Queensland remains an outlier in retaining the partial defence of provocation to murder under section 304, despite growing recognition across Australian and international jurisdictions that the defence is outdated, unjust, and inconsistent with contemporary understandings of gendered violence. The overwhelming trend in legal reform has been towards abolishing provocation, as seen in Tasmania, Victoria, Western Australia, and New Zealand. These jurisdictions have acknowledged that provocation excuses lethal violence, particularly in cases of intimate partner homicide, and have instead introduced reforms that better reflect the realities of DFV.

Tasmania was the first Australian jurisdiction to abolish the partial defence of provocation. On 18 March 2003, the *Criminal Code Amendment (Abolition of the Defence of Provocation) Bill* was passed, repealing section 160 of the *Criminal Code Act* 1924.[59]

The Victorian government faced significant public pressure to reform provocation laws following the highly publicized case of *R v Ramage*.[60] James Ramage killed his estranged wife, Julie Ramage, after she told him she had moved on from their relationship. His successful use of the provocation defence—reducing his conviction from murder to manslaughter—exposed how the law disproportionately benefited men who killed out of jealousy and rage.

In response, the Victorian Parliament passed the *Crimes (Homicide) Act* 2005, which abolished provocation as a partial defence.[61] The reform also strengthened self-defence provisions, particularly for victims of family violence. In his second reading speech, then Attorney-General Rob Hulls MP stated:

[56] Ibid 3.
[57] (2020) 271 CLR 568.
[58] Ibid 582 [28].
[59] *Criminal Code Act 1924 (Abolition of Defence of Provocation) Act* 2003 (Tas).
[60] R v Ramage [2004] VSC 508
[61] *Crimes (Homicide) Act* 2005 (Vic) (n 33).

> *'By reducing murder to manslaughter, the partial defence [of provocation] condones male aggression towards women and is often relied upon by men who kill partners or ex-partners out of jealousy or anger. It has no place in a modern, civilised society.'*[62]

Further, the Victorian Law Reform Commission identified that the provocation defence is inherently shaped by male responses to conflict and is therefore structurally biased against women:

> *'The association of provocation with typical male responses is said to make it a defence which is more suited to men than to women, even taking into account changes that have occurred over the past 50 years. A sudden violent loss of self-control in response to a particular triggering act is seen to be the archetypal male response to provocative conduct. Despite changes that have been made over time, this test remains very difficult for women to use.'*[63]

This structural bias means that women who kill abusive partners often struggle to meet the traditional requirements of provocation, strengthening the argument for repeal.

Western Australia followed Victoria's lead with the passage of the *Criminal Law Amendment (Homicide) Bill* 2008,[64] which repealed provocation as a defence. The reforms ensured that murder convictions result in a presumptive life sentence, while still allowing judicial discretion in sentencing if mitigating circumstances exist. This approach removes the problematic narrative that violent loss of control is an excuse for homicide while preserving judicial flexibility in appropriate cases.

Recommendation 4: Repeal the Defence of Provocation for Assault (ss 268 and 269) and as a Partial Defence to Murder (s 304) under the Criminal Code Act 1899 (Qld), subject to Recommendation 5.

b. The role of provocation in mitigating the mandatory life sentence for murder

Although there are significant issues with the provocation defence, we also acknowledge the role of partial defences in mitigating a mandatory life sentence. The utility of provocation as a defence where there is a minimum mandatory penalty for murder reflects the history of the provocation defence, which originally intended to distinguish between premeditated malice and a sudden loss of control.[65] Such a delineation was crucial where a conviction for murder carried the death penalty.[66] It has been pointed out that some utility carries to the present day, as it is unacceptable that someone who was provoked and killed another as a result of a loss of control in that moment would receive the same sentence as someone who has intentionally planned to carry out a murder.[67]

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[62] Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349.
[63] Victorian Law Reform Commission, *Defences to Homicide* (Final Report, 2004), 27-28.
[64] *Criminal Law Amendment (Homicide) Bill* 2008 (WA)
[65] Andrew Hemming, 'Provocation : A Totally Flawed Defence That Has No Place in Australian Criminal Law Irrespective of Sentencing Regime' (2020) 14 *University of Western Sydney Law Review* 1, 2.
[66] Ibid.
[67] Peter Davis, 'Provocation - Where to Now? The Implications of the Peniamina Case' (Conference Paper, Queensland Bar Association Annual Conference, 27 March 2022).

Mandatory minimum sentencing has been consistently identified as a barrier to the abolition of the partial defence of provocation by law reform bodies across Australian jurisdictions.[68] We argue that along with repealing the defence of provocation, the mandatory minimum life sentence for murder should be replaced with a maximum sentence of life imprisonment. Mandatory minimum sentencing often relies on aims of deterrence, incapacitation and retribution as justification,[69] which is an inaccurate perception of the purposes of sentencing.[70] It has been asserted that mandatory minimum sentencing 'capitalise[s] on moral panic regarding criminal offenders' rather than prioritising natural justice, procedural fairness and human rights.[71] There is little evidence that a mandatory minimum sentence is an effective deterrent.[72]

Mandatory sentencing fails to acknowledge offenders' individuality and lived experience, instead treating them as a 'faceless, undifferentiated mass'.[73] Offenders are grouped into a single category, ignoring the broad range of conduct that may fit within an offence and disregarding the offender's background, personal circumstances and context.[74] Judicial discretion is limited while increasing the significance of decisions by police and prosecutors which may undermine the separation of powers.[75] The fixing of a mandatory minimum sentence effectively means that the legislature and the executive are determining the sentences for particular crimes.

A presumptive minimum sentence can have a similar effect to a mandatory minimum sentence.[76] Therefore, we recommend a removal of the mandatory minimum sentence and its replacement with a maximum sentence, to provide the greatest level of sentencing discretion. However, if this is not available, any of the alternative options proposed in the Consultation Paper[77] that involve replacing the mandatory minimum sentence or the minimum non-parole period are preferable to the current system as they provide greater discretion for the sentencing judge.

Recommendation 5: Replace the Mandatory Life Sentence for Murder with a Discretionary Sentencing Regime

In tandem with abolishing provocation, we recommend amending the sentencing framework for murder to remove the mandatory minimum life sentence. This would allow judges to appropriately consider mitigating factors, such as genuine remorse or contextual circumstances, within a discretionary sentencing model that still maintains life imprisonment as the maximum penalty.

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[68] See, eg, Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008) 10; Victorian Law Reform Commission, *Defences to Homicide* (n 31) 7; Law Reform Commission of Western Australia, *Review of the Law of Homicide* (Final Report, Project No 97, 2007) 216-218.
[69] Amy Elton et al, 'Mandatory Practices and the Transformation of Due Process' (2018) 44(3) *Monash University Law Review* 621, quoting *Woodson v North Carolina* 428 US 280, 304 (Stewart J) (1976).
[70] See *Penalties and Sentences Act 1992* (Qld) s 9(1).
[71] Ibid 637.
[72] *Pathways to Justice* (n 1) 275 [8.9].
[73] Elton et al (n 69).
[74] Ibid 635.
[75] *Pathways to Justice* (n 1) 275 [8.9].
[76] *Pathways to Justice* (n 1) 274 [8.5]
[77] *QLRC Consultation Paper* (n 4) 52-6.

4. The partial defence of killing for preservation in an abusive domestic relationship (section 304B)

Whilst the partial defence of killing for preservation is flawed, its existence is crucial as 'the absence of a partial defence (means that) self-defence becomes an all or nothing claim'.[78] Ergo, as the only state in Australia with this partial defence, it is critical for Queensland to maintain and amend this provision to capture cases that are not considered murder but do not meet the scope of self-defence. This is evident through comparative analysis in New Zealand with Victoria, which demonstrates that without a partial defence, victims are regularly sentenced more harshly and convicted with murder.[79]

One of the main criticisms of the current partial defence of killing for preservation lies in the fact that it does not accommodate circumstances where the defendant kills their abuser in order to protect another. On this subject, the Law Commission for England and Wales outlined [80]:

> *'"gross provocation" is a basis for reducing first degree to second degree murder. Causing or allowing a child to see or hear physical, sexual or psychological abuse might well amount to gross provocation to another family member … There would be no need to portray (the killing) as a form of 'violent' conduct from which the defendant was defending the child.'*

Through this, the partial defence can be extended to accommodate circumstances where a parent or guardian kills in defence of another. However, it should be considered whether or not the partial defence can reduce murder conviction to manslaughter.

It is plausible to say that the outcome of *R v Falls* demonstrates that the exception of killing in defence of another could be adopted into the partial defence.[81] In this particular case, Ms Falls had faced a long period of violence perpetrated by her husband, including regular beatings to her legs, restrictions on her freedom of movement and communication with her family, threats of self-harm and isolating her from society. The event which triggered the killing of her abuser involved a threat towards one of their four children in order to intimidate Ms Falls from inviting her mother to their home. Due to her lack of trust in and previous negative experiences with the police, Ms Falls grounded sleeping pills in her abusers meal and shot him in his sleep.

Ms Falls was however found not guilty as she 'believed on reasonable grounds she could not otherwise protect herself and/or her child' unless the abuser was killed.[82] (It is worthy to note that Ms Falls possessed no history of drug or alcohol abuse, criminal offences, was relatively young and a mother of four children. Hence, multiple mitigating factors were considered in the decision of the criminal case.)

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[78] Wake (n 30).
[79] Ibid 153.
[80] Ibid 90.
[81] *R v Falls, Coupe, Cumming-Creed & Hoare* [2010] QSC.
[82] Transcript of Proceedings, *R v Susan Falls, Bradley James Coupe, Christopher Anthony Cumming-Creed and Anthony James Hoare* (Supreme Court of Queensland, Applegarth J, 26 May 2010).

The case of *Falls,* inspires an amendment where threats made against a third-party, which inflicts a reasonable apprehension of imminent danger (against the accused or the third-party), should be considered when applying the partial defence of killing for preservation. Building on this, if found reasonable, the charge of murder should be reduced to manslaughter. In this, the following elements could be considered in order to determine whether the new provision can reduce the conviction and is applicable to the accused unique situation:

- level of harm
- degree of fear caused
- history of violence
- circumstances and characteristics of the third-party (relationship with accused and abuser, age, previous experience with domestic violence, psychological and physical health etc.)
- the accused's interpretation of the threat
- imminence of danger

Recommendation 6: Codify an alternative partial defence that acts alongside the complete defence of self defence

With this, we do not support the repeal of the partial defence of killing for preservation without the introduction or amendment of alternative partial defences which provides an exception for unique and specific circumstances where a child's or vulnerable individual's life is under threat.