Transcript: 15 February 2024 - Launch of the review of particular criminal defences[1]

Judge Anthony Rafter SC: Good evening, everyone. I'm Tony Rafter, the Deputy Chair of the Queensland Law Reform Commission, and it gives me great pleasure to welcome everyone here to the launch of the Commission's review of particular criminal defences.

We begin by respectfully acknowledging the traditional custodians of the lands on which this event is taking place, the Jagera and Turrbal peoples. We also acknowledge the traditional custodians of the various lands on which our online audience is gathered. We respect and honour their Elders past and present. We also acknowledge and welcome all First Nations people who are attending tonight's event in person or online.

I also particularly acknowledge the presence of the President of the Court of Appeal, the Honourable Justice Debra Mullins AO, the Chief Judge of the District Court of Queensland, His Honour Chief Judge Brian Devereaux SC, other members of the judiciary, the Honourable Margaret McMurdo AC, the Chair of the Queensland Law Reform Commission, Fleur Kingham, as well as members and staff of the Commission, the Chair of the Sentencing Advisory Council, the Honourable Ann Lyons, the Shadow Attorney-General, Mr Tim Nicholls MP, the Acting Deputy Director-General, Justice Policy and Reform, Department of Justice and Attorney-General, Ms Leanne Robertson, and other distinguished guests.

I mentioned at the beginning the apology of the Attorney-General, who is unable to attend due to her other important commitments. The Attorney-General though is represented here by her Policy Advisor, Ms Megan Bowie.

For those who are joining us by livestream, we welcome your participation in the Q & A segment of tonight's event at the end. If you have a question, please submit it using the chat function. If you have problems, then let us know that through the chat function, or alternatively phone the number in the email reminder for this event.

It is our great privilege to be joined this evening by the Honourable Margaret McMurdo AC, who will shortly deliver an introductory address about the work of the Women's Safety and Justice Taskforce and the background to its recommendation that the operation of defences and excuses in the Criminal Code be referred for independent review by the Commission. Following Margaret's address, there will be a panel discussion about some of the issues raised by the Commission's review.

There will be an opportunity for audience participation during a Q & A session at the end of the panel discussion. Now, the introductions of our distinguished guests. Our distinguished guests need no introduction, but I will give them a brief one anyway. Margaret has had a very distinguished legal career, and has been recognised for her service to the law and judicial administration in Queensland, particularly in the areas of legal education and women's issues. Margaret was President of the Court of Appeal from 1998 until 2017. Prior to that, Margaret was a judge of the District Court and the Childrens Court. Margaret retired in 2017, having served as a judge for more than 25 years. After leaving the bench Margaret continued to serve the community in various roles, including by conducting inquiries and chairing the Board of Legal Aid Queensland, as well as being Chair of the Board of Governors of Queensland Gives. Of particular relevance to the launch tonight, in 2021 Margaret was appointed to chair the Women's Safety and Justice Taskforce, which completed its final report in July 2022.

[1] This transcript has been edited for readability and clarity.

We are also fortunate to be joined tonight by 4 distinguished panellists. Collectively, they have a great depth of expertise and experience across the areas of criminal law and practice, and domestic and family violence research, and homicide law reform.

Saul Holt KC is a member of the Queensland and New Zealand bars. He took silk in 2012. Saul was Chief Counsel at Victoria Legal Aid until 2013, and was Victorian Law Reform Commissioner until 2014. He is a general editor of Butler and Holt's "Indictable Offences" in Queensland and a contributing author of O'Callaghan's "Federal and Victorian Regulators". Saul is a leading barrister with vast experience in criminal law at trial and appellate level.

Todd Fuller KC is currently Acting Director of Public Prosecutions. He was appointed Deputy Director of Public Prosecutions in 2016. Todd has more than 35 years' experience in criminal law, appearing in major criminal trials and appeals. He was appointed Senior Counsel in 2010.

Melia Benn is a Mamu and Gunggandji woman. She is one of only 2 practising barristers of Indigenous heritage at the Queensland Bar. Melia has a very broad practice in class action proceedings, as well as coronial inquests, discrimination law and human rights matters. She is a sessional legal member of the Mental Health Review Tribunal and practises in Cairns and in Brisbane.

Professor Kate Fitz-Gibbon is an Honorary Professorial Fellow at Melbourne Law School, University of Melbourne, and Principal Consultant at Sequre Consulting. Kate has led over a decade of research in Australia and internationally, examining the operation and reform of homicide laws.

I'm sure you'll agree that this panel is well-equipped to assist on the matters that are the subject of this review. The reference followed a recommendation of the Women's Safety and Justice Taskforce, which examined coercive control and domestic violence in Queensland. The terms of reference require the Commission to consider the defences of self-defence, provocation, killing for preservation in an abusive domestic relationship and domestic discipline. The Commission is also required to consider the mandatory penalty of life imprisonment for murder, its impact on the operation of the defences, and whether the mandatory penalty should be removed. In making its recommendations, the Commission is required to have regard to the findings and recommendations of the Taskforce. The Commission must also consider other matters, including ensuring just outcomes by balancing the rights and interests of victims and accused persons, the need to ensure that the criminal law reflects contemporary community standards and the experiences of victims and survivors and their families in the criminal justice system. There are many issues to be considered, including whether the defences can be made simpler and clearer so they can be easier to understand and to apply, and whether the defences as they exist remain fit for purpose and meet community expectations.

The Commission Intends to release further background papers during 2024. Already, the Commission has released its first background paper, introducing the review and seeking feedback on issues raised by the terms of reference. The paper and a range of supporting documentation is available on our website. We anticipate releasing a consultation paper, calling for formal public submissions in late 2024. These activities will inform the Commission's final report and recommendations, which are due to the Attorney-General by 1 December 2025. Would you all please join me now in welcoming the Honourable Margaret McMurdo.

The Hon Margaret McMurdo AC: Thank you, Tony, and thank you for the very thorough and concise introduction, considering you had all these people to talk about, and a big review to talk about. Very concise. Welcome to everyone. I was going to repeat all the honourable mentions, but Tony did such a good job, and because we had a late start, I think I might just say that you are all distinguished guests because you've given up your Thursday evening to

consider these important issues, which have been referred to the QLRC for review. And thank you all for that. It's a terrific effort on your part. I, too, acknowledge and honour the Traditional Owners of this place, the Turrbal and Jagera, and pay my respects to their Elders past and present, and to First Nations people here this evening, whether in person or virtually. I'm delighted to see First Nations people engaged in the issues raised by this review. At the recent launch of the Legal Aid Queensland Blurred Borders, a young Jagera woman, in her Welcome to Country, explained that this area in George Street around the courts was traditionally used for women's business. How appropriate, I thought, that we have women in the roles of Queensland Chief Justice, President of the Court of Appeal, Debbie Mullins, who is here today, and the Chief Magistrate, though not yet First Nations women, but I'm sure that time will come. I mention the traditional female connection to this land as women are responsible for this QLRC referral. In 2021 and 2022, I had the privilege of chairing the Queensland Women's Safety and Justice Taskforce, some members who I think are here tonight, perhaps virtually.

It is also great to see my Director, Sarah Kay, here. Sarah and all members of the Taskforce and Secretariat made a mighty contribution to our work. Our responsibility was to consider and report on how best to legislate against coercive control, whether domestic violence should be a stand-alone criminal offence, and the experience of women and girls in the criminal justice system. The response was overwhelming. Seven hundred submissions, 500 from people with lived experience of family violence, and from diverse backgrounds, First Nations, culturally and linguistically diverse, disability, sex workers, and LGBTQIA people, mostly women, but some men, a reminder that although domestic and family violence is a gendered crime, particularly against women, exceptionally, men, too, can be victims of female perpetrators.

The Taskforce held hundreds of meetings with relevant stakeholders, including the judiciary, legislators, police, the legal profession, policy makers and service providers from Thursday Island, Mount Isa, Cairns, Townsville, the Cape York communities, Yarrabah, Woorabinda, Palm Island and Toowoomba, as well as in the more populated southeast corner.

I thought I knew about these issues, given my long career as barrister, Judge and Royal Commissioner, but I learned so much more, and on a number of levels. This broad engagement helped the Taskforce develop a package of recommended reforms for legislative and practical system-wide change. The Taskforce delivered 2 reports, "Hear Her Voice 1" and "Hear Her Voice 2", with 270 recommendations for domestic violence and justice system reforms, including reforms to improve the experiences of women and girls as accused persons and defendants, and a lot of those reforms could well have wider implications for reform in the criminal justice system beyond the gendered recommendations that we made.

The Taskforce found deep dissatisfaction among many stakeholders with the operation of criminal defences relating to lethal violence. For example, was self-defence available for a woman who kills a partner after she has been the victim of years of his domestic violence, given the imminent requirements of the defence? See, for example, Justice Applegarth's unreported 2010 decision in *R v Falls*. Did the defences unfairly apply to Sandra Peniamina's violently jealous killer husband, acquitted of murder despite the 2011 Code amendments reducing the scope of the defence of provocation where the killing resulted from sexual jealousy? Why could we find no reported instances where section 304B of the Criminal Code, introduced in 2011, the defence of killing in an abusive relationship, was used.

We heard that provocation was needed as a partial defence to murder, reducing the offence to manslaughter, because Queensland, unlike many other jurisdictions, had mandatory life imprisonment for murder. This reminded me of a letter of congratulations when I was appointed as a District Court Judge in 1991. A woman wrote to congratulate me but also to speak to me as a woman and a mother. She was advocating for her son, who was 17 years old when he was convicted of murder and sentenced to life imprisonment after being involved as an accomplice in an armed robbery in company gone wrong. He was not the killer, and he

had no intention of physically harming anyone. It has always seemed to me unjust that someone in the position of her son should receive the same penalty as a premeditated killer. And I had spent far too many nights and weekends agonising over whether, on the particular grizzly facts of a murder conviction, the trial judge had erred in giving the jury directions, and too much time worrying about the public cost and the personal trauma ensuing if a retrial had to be ordered.

I was also acutely aware of the complexity of these directions for trial judges, and of the virtual impossibility for jurors to understand these complex directions. The Taskforce considered these were important legal and policy issues beyond the Taskforce's gendered terms of reference, which would affect cases beyond those involving coercive control and domestic violence against women and girls.

Our Recommendation 71 was that the government consider referring these issues for review to the QLRC. I am, therefore, delighted that the government acted on our recommendation, and delighted to be launching this review tonight. It is headed by an excellent criminal lawyer, Judge Rafter SC, and his team, all of whom I'm confident have empathy for victims of domestic and family violence, a sound knowledge of their dreadful effects and the current community standards and expectations which have evolved beyond those outdated gendered understandings when the legendary Sir Samuel Griffith wrote the Criminal Code in 1899.

Unfortunately, as we learned through the work of the Taskforce, many of those outdated understandings have continued to exist in some form or another in many areas in the legal system for far too long. I urge the Commission in this review to ensure the views of First Nations people, and a diverse range of people with lived experience, are considered and acted on. This review presents a critical opportunity to properly consider how the defences in our criminal law and related practice and procedures can best deliver the outcomes the community expects as we move into the second quarter of the 21st century. It will involve successfully navigating the difficult tensions between the rights of victim-survivors of domestic and family violence and the rights of accused persons through the application of sound legal principles regarding criminal responsibility, the value to be placed on human life, contemporary community standards, and the need to ensure just outcomes.

It is big picture stuff. We have to get this right so as to maintain public confidence in our criminal justice system and, ultimately, in our democracy. The Commission's first discussion paper and associated documents provide an excellent launch pad for this big picture review. I commend them to you. I urge you to listen carefully to the excellent panel discussion you're about to hear and, whether inspired or incensed by its content, to actively and respectfully engage with this important, complex legally, socially and emotionally QLRC review. The work of the Commission, the criminal justice system and our community can only be enriched by the input of your unique and valuable experience. Thank you.

Judge Anthony Rafter SC: Thank you very much, Margaret, for that introduction. That was illuminating, and I think it informs some of what we're going to move on to discuss with the panel now. First of all, we want to discuss whether changes to the defences are needed to better reflect circumstances involving domestic and family violence. Many changes to the law result from particular cases. For example, the 2007 *Sebo* case resulted in a review by the Law Reform Commission and, ultimately, an amendment to provocation, limiting the ability to rely on words alone. And then Margaret mentioned the *Peniamina* case. We want to discuss what changes might be needed and, in particular, whether changes are required to better reflect circumstances involving domestic and family violence. And we particularly need to bear in mind that circumstances such as *Peniamina* might provoke a particular response, but there will be other cases, where perhaps a victim of domestic violence might want to rely on a defence such as provocation. So, the law, of course, is drawn in general terms, and we need to be mindful of unintended consequences as a result of, for example, removing a defence. I want to

discuss with the panel now whether changes are needed to better reflect circumstances involving domestic and family violence. We're fortunate to have Todd. Todd was counsel in *Peniamina* and well placed, as Acting Director, to comment on that. Do you have a view, Todd?

Todd Fuller KC: I can start with the fact that Queensland's one of the few jurisdictions that still has the partial defence of provocation. And if you look at it historically, the defence of provocation is actually one of mercy, because it reduced an offence of murder to manslaughter and when the code was drafted, resulted in the death penalty being imposed. Provocation gave the court and a jury a prerogative of mercy with respect to the circumstances in which something occurred. We obviously no longer have the death penalty. The issue is tied in then with one of the other questions around mandatory life imprisonment, and the consequences between being convicted of manslaughter, where there's a discretionary sentence imposed, and murder, where there is a mandatory life penalty, which is then governed by parole, so that we have an Act now that dictates when a person can apply for parole. And in Queensland, 20 years is the current requirement. When I started out, it was 12. Then, because of community pressure, it then turned to 15, and it's now at 20, with multiple killings attracting a minimum of 35, and with deaths involving police officers, the mandatory minimum parole period is 25. So, there's been a change in the landscape.

It's a bit of *deja vu* for the Law Reform Commission because provocation was the subject of a report in 2008 that Justice Atkinson was the author of, with a number of eminent people. And the big discussion and conflict within that report, which was before the High Court in *Peniamina* because they were interpreting the legislation that followed on from that report, was the very thing you've identified, Judge. How does provocation sit with respect to the killing in a domestic situation? It needs to be looked at from both sides, whether the perpetrator is in fact the victim of domestic violence and, therefore, there needed to be some protection. And the report actually spoke to that, saying that if we took away provocation, we are exposing people who have been the subject of domestic violence to a penalty for murder, because there would be no litigation with respect to it. And, of course, a couple of things came out of that.

You've already mentioned *Sebo*, so words can only be considered provocative if they're of an exceptional or extraordinary character, or an extreme character. Then there was the issue around domestic violence and the allowance with respect to that, and the amendment, which was argued in *Peniamina* about whether the act, whether the provocative act by the person was in the course of either ending the relationship or changing it.

In *Peniamina*, he considered that his partner was being unfaithful. She had left him for a time and gone to New Zealand, then had come back from New Zealand, and was now sleeping in a separate room. They had 2 young children in the house. He became aware that she'd been texting another man. He'd that afternoon gone and spoken to a relative and discussed what his situation was like, and he went home to confront his partner. That confrontation resulted in him initially punching her. She then fled from him into the kitchen and armed herself with a knife. His account was that he went into the kitchen to disarm her, and in taking the knife off her, she pulled the knife away from him and cut his hand. He identified that as the act of provocation that caused him to lose control and then to stab her a number of times, to the point that he broke the knife in her. She fled outside, collapsed on the ground, and he picked up a concrete bollard and bashed her to death with it. Now, the argument became, because of the change of the onus following the 2008 report, the onus being on the defendant, it was for him to nominate what act, for him to prove, on the balance of probabilities, what the provocation was, and he thus relied upon the cutting of his hand.

The argument then became around the provision in the code, which was again amended following the 2008 report, that said if that act occurred in the act of ending the relationship or changing it, it could not be a provocation. And the argument then became was the cutting of

the hand an act that was ending the relationship, or was changing the relationship, and what could be taken into account in the unfaithfulness, the arguments which would have occurred beforehand that led to that incident occurring in the kitchen. So, it was a misdirection point. The majority ruled that it was a narrow construction to be applied, and it had to be an act in the course of ending or changing the relationship. The slashing with the knife didn't fall into that provision, so it didn't need to be an extreme circumstance for it to then apply. The matter was sent back for retrial. Before the court though, in Canberra, the majority, and Justice Bell in particular, was saying, 'Well, how is this provocation? How is provocation established in this case, given the nature of it?' And indeed, the minority, and Justice Keane and Justice Edelman, were of the view that: was there an evidential basis for provocation to be waived? Of interest though in the retrial, the jury were hung with respect to murder, and because of the provisions that allowed a majority verdict to be taken, he was convicted of manslaughter.

He was sentenced to 16 years imprisonment with respect to that. And, so when you look at the serious violent offence regime with respect to it, there was a significant difference in the penalty of what he would've served as against being convicted of murder. But it showed the difficulty of 2 things that happened. One was the changing of the onus because it was thought that it was going to make it more difficult, but it enabled the defendant to narrow down what the considerations were with respect to the defence. And the second part of it was how do you legislate to talk about the various things that happen within a relationship and try to turn them into a piece of legislation that will be able to apply in all circumstances. They talk about difficult cases making bad law.

Well, difficult cases often expose the limitations of the language that we have and the drafting concepts. So, the argument became about what does the word 'based on' as against 'caused by' with respect to provocation. And the minority was saying, the use of different words meant it had to be broader. They should have taken into account all of the circumstances where the majority said: actually it's really the narrow view that's to be taken with respect to it because we've got to rely upon the intention of drafters when they use particular words to assist us. And, of course, the difficulty is it's about humanity and the interactions of people, and how you turn it into legislation. Samuel used objective tests with respect to a number of defences, with some subjective elements with respect to it, to give contemporary capacity, as times changed with respect to it. But if you think about the time when the Code was actually drafted, and the attitudes about relationships, about property rights with respect to partners and children, with respect to the fact that the death penalty so state-sanctioned killing was in vogue, and our Code contained whipping and hard labour as consequences for committing offences. In 2023, we're a long way away from where we were when the Code was drafted. And so looking at the way the legislation has been interpreted in *Peniamina*, and there hasn't been very many cases where this provision has been interpreted, it obviously didn't meet the need in that particular case. And we can see from the community outrage that it's hard to describe those facts to a group of people without them being horrified by what occurred. But the other difficulty is when you're in a courtroom and structuring things as they are with respect to the Benchbooks and directions, how do you capture that humanity, for non-lawyers to confront that?

Judge Anthony Rafter SC: That is a very interesting analysis, and a very insightful view about that case. I want to bring Kate in now, because Kate has researched in this area over a long period of time, and you have a lot of knowledge. Kate, your views.

Professor Kate Fitz-Gibbon: Thanks very much. And I think where Todd finished there, around that history, is so important when we look at the gendered ways that the defences have come to operate across a number of jurisdictions, and Queensland being one of them. One of the other examples, when provocation was first crafted in the 17th century, where there was the death penalty, was when women were considered property, and it was to allow an accepted excuse if a woman had cheated on her husband or was threatening to leave him, it was acceptable. It was considered a lesser crime if her husband killed her.

When we fast-forward, yes, we have come along significantly, but the results that we see in provocations, the outcomes in cases where it operates in significantly different ways for males and females, we see that men, in a range of different Australian jurisdictions, have seemingly all too easily been able to access the defence – to find those ways to manipulate the language, the exceptions, to confuse, and they get that outcome of manslaughter. We see the ineffective nature of those tinkering with the law where different reviews, and the 2008 review in Queensland being one, tried very hard and in earnest to stop exactly the *Peniamina* type case from being able to access a partial defence.

At the same time, when we look at female defendants who kill their abusive partners after prolonged and sustained periods of abuse, they continue to find it incredibly difficult and, in most cases, impossible to access a partial defence. So, it has, over time, continued to operate in gendered ways. And I think in a jurisdiction like Queensland, where since 2011, since these defences were last amended significantly, what a huge, huge knowledge gain there's been in this state around women's experiences of domestic and family and sexual violence. So, I think the opportunity of this review is to ask how that knowledge can now be applied to better understand the operation of these criminal defences. How can we better account in criminal law for the circumstances within which women are killed, and kill in the context of domestic and family violence, because we haven't yet been able to account for that successfully in the criminal law.

Do these criminal defences stack up with our community standards and our expectations of behaviour? And, certainly, the outcry following *Peniamina* would suggest not. So, I think, absolutely, these defences are gendered. We've seen across a range of different jurisdictions in Australia and also the English reforms, where they brought in the partial defence, they abolished provocation, brought in the partial defence of loss of control, and specifically excluded sexual infidelity, and they had a case creep in 2, 3 years later, where a man killed his partner who was leaving him, but was able to get around those exceptions. So, I think I would just highlight the challenges of tinkering, and that we need to ask bigger questions around the ways in which these defences work, and who they work for, and who they punish.

Judge Anthony Rafter SC: Thanks Kate. Saul, your experience, including your experience in other jurisdictions.

Saul Holt KC: The question put is whether changes to the defences are needed to better reflect circumstances including domestic and family violence. The blindingly obvious answer to that question is yes, right? But it's much more nuanced than that, and I think the key point that Kate was making is incredibly important, which is what we just see time and time again is that tinkering doesn't work, and it doesn't work mostly because of people like me. So, you know, you tinker with a rule, we're going to find a way of running a case. That's the job, okay? I'm not going to shy away from it. It's what you do. Are these defences gendered? Well, of course they are. That's their history. Self-defence and provocation are concepts developed by men for men to explain male behaviour. That's what they are. And tinkering with them, adding things to them, pulling exceptions from them, just creates complexity for juries, opportunities for defences, without actually getting hold of the core issue.

So, Tony, without wanting to make this challenge too big for the Law Reform Commission, I just hate the word provocation. I can't even see why we're retaining it. But the fundamental question is in what circumstances should killing either be excused or made less significant in terms of penalty, or described by a different word? We should identify that as being the first question that we need to ask and answer, and then design the offences around it. We're also addicted to the words of Sir Samuel, of the Code, but they don't need to be the case. And I think there have been enough experiments demonstrating the failure of tinkering with existing

concepts that started their lives in a fundamentally gendered way, to make them non-gendered, to realise that it just doesn't work.

Can I just highlight the one thing that really, and I know it's the next topic, Tony, but we can't ignore it here, because it's critically important, and Todd mentioned it. There is a massive link between these defences and how they function and how they work, and the nature of the penalties for murder in this state, which is mandatory life with really significant minimum non-parole periods. For as long as there is a way of getting from murder to manslaughter, your job as defence counsel is to find it. I remember when I came to Queensland and I had my first client charged with murder, and I was chatting to my solicitor beforehand, and I said, 'Well, so are we thinking about a plea?' And he looks at me like I was completely mad and went, 'Why would we plead?' And I never had those conversations in Victoria or in New Zealand, where there are those options. So, you can't, disentangle, and I know it's a later topic, Tony, so I'm sorry, but you really can't disentangle the 2 questions.

Judge Anthony Rafter SC: It is linked, but I think the mandatory life for murder issue is not necessarily solely related to the removal of provocation, but we'll discuss that.

Saul Holt KC: I couldn't agree more. I think it's more that provocation and other partial defences and full defences get held onto because they serve a particular purpose in the system.

Judge Anthony Rafter SC: Exactly. Perhaps I'll bring Melia in, but, by all means, Saul, if you have a view on this, because you mentioned Carter's, and there is real reluctance to interfere with Carter's. It has a lot of respect in the State of Queensland, and elsewhere. There have been changes made to reflect particular situations. I've mentioned already the change to provocation following the *Sebo* case in 2007. And that might be an example of tinkering. You know, there was removal of words alone as provocation. But one interesting thing, and all panellists might have a view on this, provocation is defined in section 260. It needs to be a wrongful act or insult, but that definition does not apply to provocation for murder. So, in what is supposed to be a code, how does that arise? And I'm not inviting a detailed legal discussion on this, but it seems, in a criminal code, why is there not a definition of that? Because on one view, what happened in *Peniamina* could not have possibly been a wrongful act or insult, but do the panellists have a view on that?

Todd Fuller KC: Well, they're incongruous.

Judge Anthony Rafter SC: Yes. Seems to be.

Todd Fuller KC: They're a different standard, depending on what the nature of the offence is. And again, I think it comes back to the idea of mercy – around excusing what otherwise was murderous behaviour.

The Hon Margaret McMurdo AC: Could I add, by way of history, I remember reading that the history of provocation in the Griffith Code wasn't so much to find a defence for men to get off killing their wives, but because Queensland was such a rough and ready place in those days, there was a hell of a lot of brawling on the streets and it was, again, as you say, Saul, men designing laws to help men, but it was to get over the conviction for murder and the risk of — hanging for brawls in the street where people were killed. So that is what I understood was one of the reasons why Queensland was one of the few jurisdictions that had provocation as a defence. And again, there's that link between provocation and mandatory life imprisonment for murder.

Todd Fuller KC: And ironically, the first to get rid of the death penalty.

The Hon Margaret McMurdo AC: Yes. Well, that's Queensland, isn't it? It's full of incongruities.

Judge Anthony Rafter SC: Melia, your experience with the defences and First Nations people's experiences.

Melia Benn: I'll pick up on what Kate was saying about the difficulty of accessing the defences, and particularly for First Nations women who kill. And what you're saying, Saul, is that there is no incentive to plead to murder, but the risk is then for, in my experience with a First Nations client, they have to then tell their story, to be able to even try and convince a jury that they deserve that defence, and to be able to rely on it, just to have the partial defence, to be therefore then convicted of manslaughter. But for a First Nations person to tell their story in court is obviously very difficult. The courts were not set up in a way that First Nations people communicate, the way that we tell stories, and culturally, it's just not a safe place for a First Nations woman to give their story.

One of my experiences was we were able to still get a special witness application, have the woman give evidence from another room, but when you're accessing a part of your memory and a part of your trauma, the risk is you disassociate and you're unable to tell your story. So where does that leave that person? Where can they go to get their story told, or for a jury to understand the nuances of their relationship and the nuance of what happened? So that's, for me, that has been my experience. It is a difficult access point for First Nations people who are unable to express themselves in a courtroom.

Saul Holt KC: And it's also tied in with issues of language as well, and translation, and how that's dealt with, interpretation, how that's dealt with in court, and also just cultural understanding, too. I did an appeal from a murder conviction for a First Nations man who'd had a trial. There were defences of provocation and self-defence in the trial, and the reality is, as well as being gendered, our defences were designed for white folk and with particular ideas about the way in which people's relationships work and the dynamics that operate. And this whole trial seemed to operate on an alien planet as far as the defendant was concerned.

Melia Benn: And the juries aren't representative of that experience. So, the people who are able to sit on juries are obviously rarely First Nations people who have been either asked or are able to attend. How is one able to express their story and have it received by people who understand what their experiences were?

Todd Fuller KC: And that's a good example of the tinker, in shifting the onus. And again, First Nations people, their ability to produce to the court other evidence to support their relationship and what has occurred previously, is very difficult for them to do.

Melia Benn: Exactly.

Todd Fuller KC: And, so you end up in that circumstance as well.

Judge Anthony Rafter SC: Saul was keen to move on to discuss the mandatory life penalty for murder, having discovered that is the penalty in Queensland when you came to practise here.

Todd Fuller KC: I'd have looked it up —

Judge Anthony Rafter SC: The cases of murder all result in life imprisonment. There has been change over the years to the minimum period. A person with a previous conviction for murder, or someone convicted of more than one murder has a minimum of 30 years. That's the sentence. As Margaret demonstrated in her fascinating introduction, the fact that all cases

of murder result in a mandatory life can cause what people might regard as an injustice. A 17-year-old convicted of a felony murder, where they were not responsible for the death, receiving a life sentence is a very harsh result, on any view. And in Queensland, the definition of murder has been broadened, so now it includes acts caused by reckless indifference to human life. So, murder has been broadened. It covers cases of people who haven't physically killed someone, and so it's something to be looked at, not necessarily only in the context of the removal of any defences.

The retention of provocation as a defence has often been argued to be necessary and essential because we have mandatory life, but there are large questions to be considered in relation to the removal of the mandatory life for murder. So, we're interested in how the current mandatory penalty impacts the operation of the defences. And I might start at the other end, with you, Kate.

Professor Kate Fitz-Gibbon: I've always been quite critical of the mandatory life sentence for murder for exactly these reasons, that it means we hold on to aspects of the criminal law that we acknowledge are not working in the majority of cases or in key cases. But, we hold onto them for the exceptional when they may be needed because we need to move away from the mandatory. And, certainly, in the case of provocation, where we've seen provocation be retained, a key argument has been that it's required in case, to try and move away from murder where a woman has killed an abusive partner, where she's unable to access the complete defence of self-defence, or the partial defence of excessive self-defence, or killing in preservation, and so that she's not convicted of murder and receives that mandatory sentence. And Saul can probably talk about the case in Victoria, about where you have discretion in sentencing. If an exceptional case falls into that category of murder, you can give an exceptional sentence. And in Victoria there's precedent for that to be a non-custodial sentence.

What we also see with the mandatory life sentence is the lack of discretion that allows. I think let's let judges do their job. We let them do their job for a range of other offences, but also particularly that mandatory minimum. If we could remove the minimum at least, it would allow a lot more flexibility, and I think remove a key reason for retaining provocation.

Judge Anthony Rafter SC: Kate, can you comment on whether provocation, if it was removed as a defence, could nevertheless be relied on as a mitigating factor for sentence?

Professor Kate Fitz-Gibbon: Absolutely. I think it can always be part of a range of different factors raised in mitigation for sentencing. That's where, if you have the discretion, you can account for something like provocation, alongside other mitigating factors, in the way that you do for a range of other points of mitigation. Interestingly, there's a halfway point that wasn't proceeded with in England and Wales, but when Jeremy Horder was the UK Law Commissioner, he provided almost a tiered system, where you hold onto mandatory life for a smaller number of cases, and then you create some tiers down where you get more flexibility and discretion. So perhaps that will be a model that the Law Reform Commission might be interested in as well, if there is that appetite to retain the mandatory minimum, but have some wriggle room so you're not holding onto provocation for that reason in itself.

Judge Anthony Rafter SC: Thanks, Kate. Saul, can you comment generally, but also on how the mandatory penalty impacts decision-making in conducting proceedings.

Saul Holt KC: Profoundly. It's the most significant difference between practising criminal law in Queensland and everywhere else I've practised. And it's not actually the mandatory life sentence, it's the mandatory minimum. That's the thing that matters. And, of course, for reasons that are completely understandable from a political perspective, what goes into murder, into the definition of murder, broadens all the time. You know, we get a case and so

that's now got to be murder, and so we get reckless indifference. So, more conduct is caught by murder and, at the same time, again, for understandable political reasons, minimum mandatory penalties only ever get higher, they never get lower. They keep climbing. We're now in a position where not only are we talking about accessorial liability, so people who are responsible as parties, felony murder, even for reckless indifference, we're talking about a much broader range of people captured within, where their conduct can be captured within murder. But you're also talking about huge consequences. That's the thing that really matters.

I'm much less concerned about life, in terms of that decision-making process. I think murder as a word matters, and life imprisonment as a consequence is something which the community has a legitimate investment in as a response. I'm much more concerned though about what happens at the bottom and the effect that it has, because the net result truly is that you end up with murder trials, and having both prosecuted and defended murder trials over 25 years, they are the most traumatic things in the world. It doesn't matter how many you do, and for the people involved, they're horrendous. Anything we can do to avoid those is really important. The sentencing question you asked, Tony, I think is critical, because if we deal with those issues in a sentencing context, we don't have to label them provocation and worry about what exceptions you have or what exceptions you don't have. Judges can simply make decisions, can figure out whether this particular set of circumstances properly acts in mitigation of penalty or not, or whether no it doesn't, or maybe it does in a little way. And that can be done without the need for the kind of labels which are forced on you if you're making it a partial defence. So, it's less the mandatory life for me. It's more what happens at the bottom.

Professor Kate Fitz-Gibbon: And the perception that it's the victim on trial. I think in so many of these provocation cases, by virtue of it, and it was mentioned many times in *Peniamina* and the commentary around it. She's not there to defend herself, what the person that is accused of provoking that act did, is what is put on trial in a way that is incredibly traumatising for the deceased family members.

Judge Anthony Rafter SC: Saul, in jurisdictions where the mandatory life for murder doesn't apply, what would be the range of penalties imposed for murder? I appreciate it would be very broad, depending on the factual circumstances, but what would be the shortest that you've experienced, and perhaps the longest?

Saul Holt KC: Well, the shortest was a non-custodial outcome in Victoria where I was acting for a woman in circumstances of domestic violence, but it was obviously otherwise murder. And Justice Terry Forrest gave her a non-custodial sentence. But that's the most extreme example I've been involved in.

In New Zealand, head sentences for murder would start as low as 15 years and go up to life. But what you tend to see is a climb to a certain point. It's the same in Victoria, sort of mid-20s probably, and then once you get to that point on your head sentence, you might as well go to life anyway. There's kind of nothing in between. You just have that early phase and then nothing in between, is how it tends to work.

Judge Anthony Rafter SC: Thanks. Melia, the impact of mandatory life on conducting defences?

Melia Benn: The only comment I would make is when someone is convicted of murder and the mandatory is imposed, it doesn't just affect that person, especially if it's someone that's come out of a small community, it affects the whole community. If everything can be taken into account and it's not mandatory, it's obviously going to have a fairer outcome for the family. In Peniamina's case, there were 2 children who were also the victim, the murder of their mother. And if things are taken into account, then it better reflects the situation that got them up to that point.

Obviously, not necessarily for him and the way he was able to use provocation, but in other matters, where, or, example, for a mum who's had to kill in those circumstances and was given murder with the mandatory, where does that leave her? Where does it leave her family? Where does it leave her community when all of the circumstances aren't able to be taken into account?

Judge Anthony Rafter SC: Thanks Melia. Todd, the DPP must receive many submissions to reduce murder to manslaughter.

Todd Fuller KC: Yes.

Judge Anthony Rafter SC: And so there's decision-making on the prosecution side?

Todd Fuller KC: There's 2 things here. The first one is a policy decision from Parliament that recognises the taking of a life. From a community point of view, it creates a risk to the rest of the community, so it's a community safety point, number one, and it's discouraging people from committing offences. And 2, take that person out of the community for a long period of time. Added to that is prosecutorial discretion with respect to what we proceed with. We receive submissions where provocation is established, where there may be diminished responsibility established, where there is domestic violence on the part of, against the defendant. And those things can be taken into account in the determination of the offence that we proceed with.

Going back to the first point, though, about policy, and talking about accessories, again, the policy is to discourage people from being involved in incidents which will lead to death. And that's why people are captured by the felony murder rule. It's not their intention to kill somebody, but it's their intention to do a dangerous act or engage with somebody who is doing a dangerous act, and that puts the community and people at risk, and the terrible consequence of that is a death. And similarly, with respect to being a party to an offence, we are to discourage people from engaging as groups in violent offending, because it heightens the risk of somebody's death as a result.

And so, taking Saul's point, the issue at the top is that's a recognition of all of that. Whether a life sentence stops anybody at the moment of their violent assault on somebody and they think: ‘No, the consequence to me is going to be this,’ I mean, that's not the reality. Again, we're dealing with humanity.

But the issue then, I think, is the argument about the bottom and the parole system. And, again, a policy decision that was made in the '90s to increase it from 12 to 15, and then in the 2000s to take it up to 20, because of the nature of offending and the community's response to people being killed in the community. And the question then is somebody will say there's a disparity between 2 killings, but the disparity isn't the consequence, there is still somebody who's dead. And so, the question then becomes about the moral culpability of the actions of the person. And I accept Saul's argument with respect to, if you're not the person who pulls the trigger or the person who wields the knife, but you've participated in the home invasion, where does your liability begin and end? And part of that then becomes arguments around a probable consequence. And again, section 8 is a fairly good tool for the defence with respect to parties to offences, to speak of what's the probable consequence of the offending and whether they will be infused with the intention of the principal offender.

Judge Anthony Rafter SC: Margaret, do you have a view on this area?

The Hon Margaret McMurdo AC: I think I've said pretty much everything that I need to say. I thought it was, interestingly, the English approach that Kate mentioned, it would probably be more politically palatable.

Professor Kate Fitz-Gibbon: I think that was exactly the purpose at the time of its proposal.

Saul Holt KC: In response to what Todd was saying, is it true that people have ever stopped, have not committed a violent act because they think about what penalty had been imposed on someone else? The answer is no. Can we just name that elephant in the room? We base a whole lot of policy on the notion that general deterrence is real when, in fact it's not. All the evidence demonstrates that it's not. So, it kind of seems a bit silly to base decisions on a principle that has been empirically proved to be wrong.

The other aspect of it is that in jurisdictions where judges aren't curtailed by minimum mandatory penalties, judges are perfectly capable of identifying really bad murders and imposing really high non-parole periods. You know, Adrian Bailey got 38 years on the bottom of a life sentence in Victoria. And that range allows you to truly deal with those kinds of issues. And some accessories, are more culpable than the person who pulled the trigger. And so, it's not just about going one way or the other, it's about having the nuance to allow judges to deal with the proper consequences of the action.

The Hon Margaret McMurdo AC: It certainly makes sentencing for murder much longer proceedings.

Todd Fuller KC: And much harder for the prosecution. Could I just add, Judge, with respect to the youth justice system where that occurs. So, there's a maximum of up to life but, you can't impose greater than 10 years, unless you find that the offence was heinous. That leads to arguments around when is a murder heinous and when is it not. And having stood before the Court of Appeal and argued those sorts of things, there's a real difficulty in one person's death versus another person's death, and how you want to rate them against each other for the exercise of sentencing.

But of interest, there have been a couple of juveniles who've been sentenced to life imprisonment because of the nature of their offending. And most of the time, though, there's not a lot of difference between the penalties around the 10-year mark with respect to pleas to murder. But can I say that we get pleas to murder both from juveniles and from adults, and they rely upon that when they go before the parole board, to say: ‘I accepted responsibility for what I did.’ There's a benefit with respect to that. And we certainly have a policy that when there is a plea of guilty to murder, we don't seek for the non-parole period to be raised with respect to that.

Judge Anthony Rafter SC: We might move on to the next topic, which is whether any changes might be required to practice and procedure, including evidence and jury directions. And can I just introduce this by referring to the Taskforce recommendations that have been implemented around domestic violence and the admissibility of evidence, expert evidence, and particular jury directions dealing with that. Sometimes you hear the argument that why are those sorts of things required, it is all just common sense, however, experience does tend to show that there is stereotypical thinking around — you would expect a victim to leave an abuser, and this sort of thing. So, Margaret, clearly, your Taskforce recognised that changes were required to allow for expert evidence and particular jury directions around that. Can you comment on that, generally?

The Hon Margaret McMurdo AC: Well, it arose out of what victim-survivors and those who supported them were telling us about the experience in the courts, and also what was

happening in other jurisdictions. And the feeling was that they were necessary to get rid of those preconceptions.

Judge Anthony Rafter SC: How are those changes operating in practice then, Kate?

Professor Kate Fitz-Gibbon: Yes, it's incredibly important, for us to look at the whole operation of the criminal law. And I think there's been a much better move over the last 10 years in various reviews, including the Taskforce, to look at whole system reforms because, these defences don't operate in a vacuum. It's critical to consider evidence laws and how we can best ensure that, particularly around domestic and family violence, that the evidence can be led. We know that these defences are often raised in the context of histories of violence.

So, particularly in a state like Queensland, which has moved towards criminalising coercive control, how will that evidence be led? What will that mean for the operation of these offences for better understanding the histories of relationships, of power, of control, and how that brings those 2 people to the moment where one is killed and the other is arguing either a self-defence or a provocation defence is critical. In Victoria we've had social context evidence reforms, which have really sought to allow in a greater range of evidence to better understand the dynamics in an intimate partner relationship.

In New Zealand, they've been moving towards social entrapment, and looking at not only the abuse within the relationship, but also the role of the State. And it's particularly important in the context of First Nations relationships. What's been the role of the State in enabling control and a lack of accessibility of services and options that a woman may not have been able to leave an abusive relationship – and that killing her abusive partner was the only option that she had left.

I think exploring all that is really important. Jury directions are critical. Our laws have become so complicated for those involved in the law to understand, to follow and to practise, and then we expect juror members to apply them. So, that has to be considered as part of them, ensuring that jury directions are practical and can be applied – is really important for trying as hard as we can to negate against the unintended consequences because we see that complexity, allow space, as Saul's already said, for those unintended consequences.

Judge Anthony Rafter SC: Melia, what do you think the main priorities are for improvements that can be made to practice, procedure, evidence, and perhaps even jury directions, as relating to First Nations people?

Melia Benn: I think it goes a step further back, to practitioners having cultural competency. For example, if they're unaware of how their client is presenting to them, and there are flags that clearly indicate they need experts to be a part of their defence. That's one way that you can improve the way the legal profession treats First Nations people. And then once that is identified by someone who has that competency, the access to experts has to be there as well.

So there has to be experts who are willing to do the cultural competency work and have that as a part of their practice, so that it's not something that they're doing on the go each time that they have to represent a First Nations person. That's something that's going to be quite difficult, I think, to change though, because there aren’t a lot of First Nations practitioners in that area. It's more people who've probably had better access to education and are able to get that expertise. I think there's only a few First Nation psychologists, psychiatrists, and the like, so that's a big challenge for society as it is. I think policing is a big part of it as well. A lot of the times, like Kate's saying, the State has a role to play. First Nations women aren't going to go to the police every time they feel that they could or need to, because they're not the perfect victim. The perfect victim isn't always the way they'll present when a police officer comes knocking on their door to assist them, and they're either dismissed or charged. They're

dismissed as them overreacting, or not being truthful, or they're charged with domestic violence themselves. So, there's a big gap there for police to do better and for legal practitioners to do better as well.

Judge Anthony Rafter SC: Thanks.

The Hon Margaret McMurdo AC: There were lots of Taskforce recommendations about that.

Judge Anthony Rafter SC: Conscious of the time, and we want to make sure that there is time for questions, I was going to move on. Most of the defences that we are looking at in the review have been in the Criminal Code since 1901, and I think our discussion so far has probably answered this question, but I'm interested in the panellists' insights. Are the current defences fit for purpose, and do you think they remain fit for purpose and meet current contemporary standards? Todd?

Todd Fuller KC: Well, I'll go back to what I said about Sir Samuel putting the objective and subjective tests into the defences. They're supposed to be able to be contemporary. The issue is about language and concept. If you speak about the philosophy of what it is, you'll see that most advocates will convert what the Code says into submissions that they make to a jury so that they understand what they are. Then we have the advantage of the Benchbook, or the disadvantage of the Benchbook, in the structure and in the way that it's done. And then the other difficulty is, and it's again, it's a making of the law. If a potential defence is raised, then the jury have to be directed on it.

And so, we have this judicial imprimatur to a whole lot of things that, in everybody's view in the room, except the jury, are unimportant, but for the fact that the matter has been raised, they have to be addressed with respect to it. The recent matter, probably the matter you were talking about, Saul, of the young fellow in Aurukun who was convicted of murder. The defence tactically didn't want provocation left. With respect to it, the trial judge said: ‘I have to give this direction with respect to provocation.’ Who knows what impact that had, because special leave was refused to the High Court.

Saul Holt KC: Thanks for reminding me.

Todd Fuller KC: No, that's alright.
(audience laughing)

Todd Fuller KC: Oh, sorry, did you do the appeal there, too? I lost *Peniamina*. It's okay. So, you look at the context and the philosophy with respect to that. And if you look at the Code, the struggle I've always had is between compulsion and self-defence, how those 2 things need to be left, and there's some different tests with respect to it, but you're talking about the same event. So, the question is not so much about contemporary values of the community, but the contemporary nature of the people you are now talking to on a jury.

And juries have changed, and their expectations have changed. And I think that going back to the last point, when you were talking to Melia, one of the issues around that is we talk about jury of your peers, number one, but also them understanding the circumstances in which these events are occurring. And our juries aren't made up, necessarily, of people who have experienced, particularly community violence, and not understanding. So, we're allowed to call an expert to explain why somebody's arm is broken, but we weren’t previously able to call an expert to explain why somebody didn't leave a relationship, where they're both the subject of expertise and of underlying explanation for a jury to be able to understand, so that they can make the decision about what happened and why it happened.

Melia Benn: But also, Queensland is so big. The way that juries might think in Brisbane will be completely different to a jury in Cairns, potentially, depending on the experiences that they've had. So, they need to be flexible, to be able to adjust, but also then not be appealable, just because they've adjusted something for a particular case.

Saul Holt KC: Tony, I think I my answer to the very first question will answer this question, which is: Are the defences fit for purpose? I think as a matter of philosophy, the basic principle, the answer must be 'no'. But if I can just give a couple of examples. We're talking mostly about self-defence and provocation. Those are the 2 critical ones we're talking about.

Judge Anthony Rafter SC: I should mention, we are looking at domestic discipline. It hasn't received a lot of attention yet. It's not because it's unimportant, but if anyone's got a comment on that – by all means. But you're quite right, they are the main ones.

Saul Holt KC: Just on self-defence for a moment, confession time. I don't understand the law of self-defence in Queensland. I don't, I really don't. I don't understand its difference between provoked and unprovoked. Between the 2, there's this obvious big gap in the legislation that makes no sense. And trying to explain it to a jury, trying to fashion evidence around it is almost impossible. So, if we want to give juries sensible directions, the starting point, is to get rid of the clutter associated particularly with self-defence. And I think trust juries more, trust them, give them a basic framework within which we can get them to understand what's going on properly.

I did a trial, a murder trial in Bundaberg a few years ago, and Justice Applegarth was the trial judge. And, His Honour is wonderful with juries, and he spent 2 hours trying to explain self-defence to them. And none of us, including His Honour, understood it, right? None of us understood it. And then he went: 'But you might think it's really all about this,' and he just put it in 2 sentences and the jury went: 'Okay, we get that,' And it was, getting rid of some of that clutter that's still associated with it is important. And I know it's sacrilegious to say that there are problems with the Code, but it is now a really long time ago since it was drafted, and I think it's probably okay to think about what self-defence actually should look like in the modern world, and be prepared to trust juries with it.

Professor Kate Fitz-Gibbon: And just to give you somewhat of an out there, in doing interviews with legal practitioners across a range of Australian jurisdictions, England and Wales, more often than not, that is what they will say about self-defence or about the defence system. They kind of go: 'Oh, I brush up when I know I've got a trial coming up because it's really hard to understand,' and so applying that to a jury is just bonkers in many ways.

The other point, just to mention, because we haven't discussed it, is the way in which time comes up in these cases and the different impacts that has for male and female defendants and I was really struck in the *Peniamina* case, how the requirement of sudden provocation really got quite a stretching. Potentially it couldn't quite be quantified, but there was potentially quite a significant amount of time between when the provoking act allegedly occurred and the final blow to the victim. Yet then, when we see time and time again for women that raise self-defence where they've killed an abusive partner, questions are always asked about why there wasn't an immediate reason to raise self-defence. How did they think that a partner that was not immediately assaulting them, who was asleep or had passed out drunk, how did they think that they were? So again, we see ways in which men continue to benefit from these defences in a way that we have to pay attention to.

Judge Anthony Rafter SC: Thanks, Kate. Now we want to have questions. There are microphones in the room. Just raise your hand.

Audience: It concerns me that you, Saul, don't think that there's any benefit in the general deterrent notion. From my experience with traffickers, like serious commercial traffickers do know that they're up to 25 years, and they take that into account when they're looking at importing, or they're looking at that sort of commercial activity. Like, they're seriously aware, so that when you get them, it's all about getting them under 10 years. Because if they get under 10 years, they'll do a third and they're happy.

Saul Holt KC: Yeah. There are 2 categories of defendants where what I said before doesn't apply, the high-level drug trafficker and the high-level fraudster. So, I'm happy to put them to one side.

Audience: Oh, cool.

Saul Holt KC: I agree with you.

Audience: I don't know what murderers do. I guess if a serious murderer thought about doing something, like Baden Clay, if he'd thought about it, he didn't know that if he got pinched, he's going to do life. Surely? I mean, someone who contemplates, you know, malice aforethought, they'd have to know.

The Hon Margaret McMurdo AC: They never think they're going to get caught.

Melia Benn: Yes.

The Hon Margaret McMurdo AC: There's a difference.

Audience: Oh, you believe he didn't think he was going to get caught?

The Hon Margaret McMurdo AC: Well, that's why it's not usually a deterrent, because they don't think that's them. They won't get caught.

Todd Fuller KC: And, you think of professional killers, we don't have very many of them thankfully, but there are people who choose, who are engaged to go and kill other people and do serious acts of violence. They know that if they're caught, there are serious consequences to them, and they still go with it.

Audience: Sure.

Saul Holt KC: But murder rates still remain highest in places in the world where the death penalty is in place.

Audience: There were studies done in the 1970s in a number of jurisdictions where that very point was researched, and they found that when they introduced the death penalty for murder, there was an initial drop away, not much, but then it went back to the other level. So, I suppose that supports the argument that increasing the penalty doesn't necessarily act as a general deterrence.

Saul Holt KC: Yes. I'm not sure that's going to determine the review though.

Audience: No, I know, but, but it might tie into what you were saying before, about avoiding trials for murder. And if you speak to counsel in Sydney, they are astounded that we have mandatory life for murder. Because quite often in Sydney, particularly, there are people who plead to murder. And sometimes they get a lot more than the minimum of 20 years, but sometimes they get less. My view is that if there was a discretion, I think we would end up with more pleas to murder.

Judge Anthony Rafter SC: I'm sure that's right. Andrew Hall.

Audience: Can I ask the new Director of Public Prosecutions, which is now being announced, as I understand it. I've been involved in a number of manslaughter cases, which the defendant has been a victim of profound and significant domestic abuse. The plea has always proceeded as a manslaughter and not a preservation case, and there seems to be a resistance to accept s 304B as a compromise in those cases. And I'm wondering whether that's because it's an evidentiary matter, which is not established by the defendant to the prosecution's satisfaction, or whether there's resistance from the family, who I understand you'd consult with the family of the deceased, that they're not perceived to be responsible for their own death in any way.

Todd Fuller KC: I don't think it's influenced with respect to that. The issue is what's the evidential basis for it? And often, in those sort of cases, the only evidence comes from the defendant themselves because of the nature of it, that it's often hidden from their families. And, therefore, the issue for us is what is the factual matrix that's going to be put up before the court that we can accept? And what's the basis upon which it is pitched to us? And why do we go to the point of s 304B when we can accept a manslaughter plea on an agreed factual basis as to the circumstances that led to the offending? So, I'm not aware of too many submissions that have been made under s 304B. You obviously had a matter in Rockhampton that Melia was speaking of. And Robyn Kina took some time before that story came out and she was able to tell that story, but there were a number of steps which were taken as the exercise of discretion once that was established.

Audience: Well, if I speak about Rockhampton, that was an Indigenous woman who, because of the trauma she had suffered, was unable to articulate a basis for s 304B to be raised. But, that was why I was raising in that context. Thank you.

Todd Fuller KC: And if you look at the factual circumstances that were confronted there, the nature of the way the killing occurred, without some factual background with respect to that, that created real difficulties for us. But once that factual background was established, the plea was accepted on that basis.

Judge Anthony Rafter SC: Thanks for that question, Andrew. Thanks, Todd. Now, any other questions?

Judge Anthony Rafter SC: Oh, there's someone at the back.

Audience: I really do think that general deterrence, I hate to hark on it, but it does disturb me. I think though I'm sort of half with you, in that the average crim won't worry about it because they don't know about it. But it's a bit like this fight that the Premier's having with youth crime, and trying to work out what's an appropriate thing there. Mandatory sentences are good for society, because society generally, you know, Mr and Mrs Suburbia, are happy that it's life imprisonment. Don't make it less than life imprisonment. You'll have murders everywhere, murders in the streets. So, it's good for the community to know, generally. Don't you think?

Saul Holt KC: No, I don't, but I'm not sure it's relevant for today's discussion. I think there was another question up the back.

Judge Anthony Rafter SC: Lucy, you've got a question.

Lucy: Thank you. My question just related, given that the definition of murder has been broadened to include reckless indifference, will the review specifically be considering how these defences could apply to reckless indifference as a separate consideration from what

people would consider the standard definition of murder? Or will that all be considered under the same umbrella of murder?

Judge Anthony Rafter SC: We are not considering reckless indifference specifically. We are looking at the mandatory life sentence for murder. If that is removed, then the removal would apply to all forms of murder. But as murder is currently defined, that will remain the definition.

Saul Holt KC: There is something really important about that that comes out of it, which is, it's really important to understand, that murder is not defined the same way in different jurisdictions. In Victoria, for example, murder is either an intention, an intention to kill, intention to cause grievous bodily harm, or reckless as to death, or reckless as to grievous bodily harm. You can suddenly imagine how that changes the field completely, and it's the same kind of issues that arise here. And so, when you have more captured in it, that those questions we've been talking about become more important.

Todd Fuller KC: And it'll be difficult to see how a number of those defences actually apply to a reckless indifference killing. So, you're not acting in self-defence, you're not provoked. You're doing another act knowing the probable outcome is somebody's death, but you're indifferent to the fact that you're going to cause somebody's death. We've yet to prosecute a matter under reckless indifference in this state yet.

Judge Anthony Rafter SC: Thanks for that question. Zoe's got a question.

Zoe: I do just want to register the complete importance of the fact that you are looking at mandatory life. We know that murder is such a different crime and takes place in very different circumstances to so many other things and that nobody's thinking about the penalty. One of the issues is I don't think duress is on the list, and perhaps it could be. One of the important matters to continue to think about is who are the people who can give expert evidence in relevant trials, and that the right person mightn't always be a psychiatrist. We do tend to have hierarchies of who's an expert in Australia, and sometimes in a situation of domestic family violence, some of the best evidences do not come from people who do not hold those kinds of qualifications. I think it will be very useful if the law makes it clear that there's a variety of expertise. Someone's still going to have to establish that they have appropriate expertise in the situation, but it certainly may not be a degree in psychiatry, they may have a lifetime of working in a refuge, for example. And I don't know how clear that has become so far in the screeds of legislative change. My final point is we do sometimes have to be careful in law about the length of definitions. Sometimes it goes on for pages and pages and I don't think it's going to help people. I do think sometimes in our attempts to cover off on everything (whether it's jury directions, or definitions, for example) we do in the end want to keep things so that we don't create more complexity. You know, we stop the provoked and unprovoked distinction in self-defence but instead create such a complex set of jury directions that we might as well go back to it.

Judge Anthony Rafter SC: Thanks for that, Zoe. We've got time probably for one more question.

Facilitator: We've just got an online question, Tony. So, this is a question for Saul. And the question is: Wasn't one of the real problems in the Ngakyunkwokka case, and I apologise if I don't have the pronunciation correct, that the offending was all caught on CCTV? Do you think that the directions on provocation were made more difficult because of that?

Saul Holt KC: I think all the directions were made more difficult than that. CCTV is wonderful in so many ways. We see so much stuff, but it also creates such a sterile view of the situation. This was chaos in Aurukun on that day, and it resulted in riots, and there were family disputes. But we just were watching it from this sort of elevated CCTV perch, looking at the whole thing.

And, I think it became a real problem there, because it became a frame-by-frame analysis of what was happening, and the defendant didn't have an opportunity to stop and pause the video. Only the people watching later did. So, I think it was a real issue in that context, trying to bring life to it. Josh Treviño, now Judge Treviño, was the trial judge in that, and if you ever get a chance to read the transcript of his closing, it was brilliant, trying to undo that problem, you know, trying to create some life around it. But the key thing in that case, I think, was that no one could really, no one on the jury, how on earth could they understand what the community of Aurukun was like and what the dynamics were? And trying to find witnesses with those kind of lived experiences practically to come to a trial and give evidence in Cairns is so difficult. So those are the kind of challenges I think we're facing.

Judge Anthony Rafter SC: Alright. Thanks for that, and thanks for that online question. We're at the end of the question-and-answer session. Unless someone's got something, in particular, they feel they need to raise, we'll probably move to the closing remarks now by our Chair.

Chair Fleur Kingham: One of the privileges of being Chair is that I get the last word, but the last words should be brief, and they will be. I've only got a couple of points that I want to make. My first point is, thank you. Thank you all for giving up your time and coming to this launch. We're absolutely delighted by the degree of engagement so early in this incredibly important review.

Thank you to Margaret for your introduction, and putting the review in the context that's so important for us to bear in mind as we do our work. Thank you to the panellists, all of you, who brought such experience to the panel, but also, you were so generous and open in your comments. I really appreciate that. And thank you to Tony, who is leading the review, and also to Cathy Green who is our Director, leading the team that's working on this review.

And the final point I want to make is don't be a stranger. You've got this piece of paper here that's got information. The most important information from my perspective is how you can maintain contact with the Commission about this review. So, sign up to be on the mailing list, and you'll be kept informed. And to echo something that Margaret said at the end of her introduction, the quality of the work of the Commission will only be enhanced by your involvement. So please, there'll be many opportunities for you. As well as a formal submission period, you can contact us any time and raise issues you think should be considered within the review. Today was the beginning of a conversation which will continue throughout this review. Thank you.