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Ms Fleur Kingham
Queensland Law Reform Commission
Level 30, 400 George Street
Brisbane QLD 4000

By email: qlrccriminaldefence@justice.qld.gov.au

Dear Ms Kingham

Review of particular criminal defences

The Queensland Law Society (the **Society**) thanks the Queensland Law Reform Commission (the **Commission**) for the opportunity to provide a submission for the purposes of the Commission's review of particular criminal defences in Queensland. Our response to the proposals and questions proposed in the consultation paper are set out below with the assistance of the Society's Criminal Law and Domestic and Family Violence Committees.

We also take this opportunity to commend the Commission for the significant work undertaken as part of this review and the way in which you have consulted with key stakeholders and communities. This thoughtful process has led to a comprehensive consultation paper.

We wish to preface this submission by highlighting the necessity for any reform in relation to the application or availability of criminal defences to be viewed holistically. Each recommendation is influenced by the view taken in relation to another and therefore, if reforms are to be made, the position of the Society is that there ought to be an 'all or nothing' approach when it comes to adopting those recommendations through legislative reform. To take a piecemeal approach to adopting recommendations of the Commission would risk grave injustice through unintended consequences.

The Society acknowledges the desire to ensure the current application of criminal law defences in Queensland is sufficient to adequately and appropriately respond to contemporary understandings of domestic and family violence in Queensland, however the Society urges the impact of any recommendations for reform be considered across the full spectrum of criminal offences to which the defences may apply. To focus solely on the application of these laws to offences involving domestic and family violence risks grave injustice arising in circumstances where the parties are not in a domestic relationship.

We also wish to highlight the importance of considering whether the operation and application of the defences fully reflect or accommodate the lived experiences of individuals from diverse backgrounds, including members of LGBTI+ communities and people from culturally and linguistically diverse communities.

The Society supports reform which aims to simplify what can presently be a very complex consideration of the application of defences, in a manner flexible enough to allow the application of the law to the many unique circumstances in which it may apply.

Proposal 1 Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

(a) the person believes that the conduct was necessary –

i. in self-defence or in defence of another or

ii. to prevent or terminate the unlawful deprivation of liberty of themselves or another and

(b) the conduct is a reasonable response in the circumstances as the person perceives them.

The provision should also provide:

(c) Self-defence should only be available as a defence to murder where the person believes their conduct is necessary to defend themselves or another from death or serious injury.

(d) Self-defence does not apply if -

i. the person is responding to lawful conduct and

ii. the person knew the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

Question 1: What are you views on proposal 1?

The Society supports proposal one, including the repeal of sections 271, 272 and 273 in favour of a simpler version of self-defence.

The application of multiple limbs of the defence, particularly where they involve the intersection of other defences such as mistake of fact or accident, is complex and difficult to follow for practitioners, let alone jurors. Oftentimes, directions in such matters are required to be accompanied by aids such as flow charts to explain the application of the defence.

The proposed form of the defence contained in P1 is largely apt to resolve these issues and should be supported, however the Society advocates for one amendment; to remove the words '*as the person perceives them*' limiting the application of the defence to '*conduct (that) is a reasonable response in the circumstances*'.

We are concerned that evidence of the circumstances, as they were perceived by the accused person, may be difficult to illicit from other sources (i.e. evidence of other witnesses, CCTV etc) as it relates to the state of mind of the accused. The current proposed wording may have the unintended effect of forcing an accused person to give evidence to establish the defence, rather than being able to rely upon evidence raised in the Crown case to support the application of the defence.

This raises a significant access to justice issue, for a number of reasons. The requirement for there to be evidence of the state of mind of the accused risks an unintended shifting of the burden of proof to a defendant. This is a significant change in the wording of a defence which applies to a very wide range of offending and factual circumstances, beyond just murder or manslaughter. Further, there may be any number of reasons why a defendant may be unable or unwilling to give evidence in his or her own defence. Vulnerable defendants, including victims of domestic violence, who cannot properly articulate their experience from the witness box will be particularly disadvantaged.

While the Society supports the proposal to reconceptualise the contours of self-defence, whatever drafting is used must, in our submission, retain the onus on the Crown to disprove the application of the defence, not for the defendant to prove that it applies.

In this regard, we note that it may be prudent to insert words similar to those which appear in section 149 of the *Crimes Act* 1900 (NSW) namely that "*in any criminal proceeding in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence*".

In addition to the above, we query the articulation of 'termination of unlawful deprivation of liberty' as a separate basis for self-defence (P1(a)(ii) rather than being encapsulated within the general concept of defending oneself or another (P1(a)(i)).

Where the aim is to simplify the defence, and where it is proposed that proof of an assault will no longer be required, we consider the separate reference to deprivation of liberty unnecessarily complicates the defence.

Question 2: For the purposes of proposal 1:

(a) how should 'serious injury' be defined?

The Society's position is that what constitutes serious injury ought to be defined broadly, to allow for its application in a factually appropriate case. We suggest a definition such as '*an injury that causes significant harm, requires immediate medical attention or has long term or permanent consequences. It must be more than a minor inconvenience and has the potential for a lasting impact on a person's health or wellbeing*'.

At the roundtable, discussion was had in relation to the potential to include psychological injury. Our position is the definition of '*serious injury*' ought be drafted broadly to capture this possibility in an appropriate case, but reference to psychological injury ought not be expressly included as it may not be appropriate in every case. Taking this approach to defining serious injury would also allow for self-defence to be available to a charge of murder where the conduct was a reasonable response in the circumstances to serious sexual assault/threatened sexual assault.

(b) should a non-exhaustive list of factors be included to assist in determining whether the person claiming self-defence has acted reasonably?

The Society does not support the inclusion of a non-exhaustive list of factors to determine whether a person has acted reasonably. The defence ought be broadly drafted to ensure it captures the infinite number of factual scenarios to which it may apply.

Rather than incorporating a list of factors to ensure self-defence is applicable to primary victims of DFV who are charged for conduct harming the perpetrator, attention should be focussed on ensuring that Part 6A of the *Evidence Act 1977* is working appropriately with the Criminal Code to ensure evidence of domestic violence and its effects is taken into account in assessing reasonableness.

Proposal 2 The new self-defence provision should provide that evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence. It should further provide that the person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:

(a) the person is responding to a non-imminent threat of harm or

(b) the use of force is in excess of the force involved in the harm or threatened harm.

Question 3: What are you views on proposal 2?

The Society supports proposal 2, provided the same amendment is made as in relation to proposal 1 (remove the words 'as the person perceives them').

If the words 'as the person perceives them' remain in Proposal 1, the inclusion of Proposal 2 would be irrelevant. The fact the defendant had experienced domestic violence would already be admissible as part of the 'circumstances as the person perceived them'.

Proposal 3 The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

Question 4: What are your views on proposal 3?

The Society does not support proposal 3.

Many vulnerable persons who are victims of DFV, also suffer from alcohol and substance misuse issues. Proposal 3 may unfairly exclude an otherwise available defence for those persons. Further, proposal 3 may impact upon the willingness of an expert to give evidence in relation to the impact of DFV on a person (i.e. Under 103CA) if the person was intoxicated at the time of the offence (i.e. an expert may be unwilling to give evidence that the accused person behaved a certain way as a result of their experience with DFV, as a result of their self-induced intoxication).

Safeguards in relation to the application of this defence are already built into the wording of the defence, namely the requirement that the conduct is a reasonable response in the circumstances. Further, there remains a prohibition on reliance upon voluntary intoxication as a defence under section 28 of the Code.

Question 5: In light of proposals 1 and 2 (about self-defence), should the defence of compulsion in section 31(1)(c) of the Criminal Code be repealed?

No.

Compulsion remains an important defence as it extends to a number of scenarios that would not be covered by the current proposal contained in P1 and P2. An example of where the defence of compulsion may apply is a scenario where a person is compelled by person A to do something to person B, to avoid unlawful violence being visited upon person C. e.g. person A threatens to kill person C's wife, unless person C assaults person B.

That potential scenario is not covered by P1 or P2, whereas compulsion would cover this scenario.

Question 6: In light of proposals 1 and 2 (about self-defence), are changes to the defence of duress in section 31(1)(d), and the exclusions in section 31(2), of the Criminal Code required?

No.

Duress remains an important defence as it extends to:

1. doing or omitting to do an act to save his/her *property* or the *property* of another person; and
2. covers a scenario where a person is compelled by person A to do something to person B, in order to avoid unlawful violence being visited upon person C. e.g. person A threatens to kill person C's wife, unless person C assaults person B.
3. a broad range of charges and scenarios to which self-defence is not relevant, for example involvement in drug dealing to avoid threats of physical violence.

These scenarios are not covered by P1 or P2.

Regarding the exclusions in s 31(2), there is a divergence of views as to whether those limitations on the availability of duress should be removed, with some members favouring a scenario in which duress does not offer less coverage than self-defence. While recognising the seriousness of murder and causing/intending to cause grievous bodily harm, there are circumstances in which it may be arguable the duress to which a person has been subjected - including in the context of long term DFV/coercive control - should form the basis for a defence to even the most serious of crimes. This is particularly relevant where the mandatory life sentence for murder remains, noting that if mandatory life is removed then DFV experienced by the offender can be taken into account on sentencing.

Proposal 4 The partial defence of killing for preservation in an abusive domestic relationship in section 304B of the Criminal Code should be repealed.

Question 7: What are your views on proposal 4?

The Society does not support proposal 4.

There are a seemingly endless number of factual scenarios arising in criminal matters – the more defences available to ensure just outcomes, the better. Just because the defence is raised infrequently (according to statistics), does not mean it is not important or significant to avoid injustice in those few circumstances in which it applies. The existence of the defence is also anecdotally helpful in conducting negotiations to resolve matters prior to trial (i.e. accepting a plea to manslaughter rather than murder). Consideration might be given to amending 304B so as not to require evidence of the state of mind of the accused in order to enliven the defence. For example, s304B(1) may be amended to read:

(a) the deceased has committed acts of serious DV against the person in the course of an abusive domestic relationship; and
(b) in the circumstances of the abusive domestic relationship, it was reasonable for the accused to fear that the actions of the deceased were capable of causing serious harm to the accused; and
(c) the accused acted reasonably in the circumstances.

Such an amendment would likely result in an increase in the application of the defence in criminal trials. Allowing an accused to rely upon evidence of domestic violence (such as DV orders, police reports, criminal history, DV history etc) which may be led in the Crown case, and requiring a jury only to assess whether it was reasonable for the accused to fear serious harm and whether they acted reasonably in the circumstances, may result in more frequent application of the defence. It would mean an accused person would not be forced into the dangerous position of giving evidence that he/she did an act that caused death or grievous bodily harm in pursuit of the defence.

Proposal 5 The partial defence of killing on provocation in section 304 of the Criminal Code should be repealed.

Question 8: What are your views on proposal 5?

The Society does not support the repeal of section 304.

This position may be reconsidered if mandatory sentencing for murder is abolished, and provocation may be considered as a mitigating factor at sentence. Furthermore, or in the alternative, for the reasons outlined below, further consideration may be warranted in regards to the amendment of section 304.

We observe this partial defence is still available to perpetrators of DFV in a way that is no longer in line with community attitudes or current understanding of the dynamics of DFV. Attempts over the years to improve section 304 and limit its applicability have resulted in a provision that contains a number of

exclusions and exceptions to those exclusions, complicating the provision and directions to juries but not ultimately achieving the desired legislative outcome.[1]

We are also aware that the availability of the defence is of concern to the LGBTIQ+ community, such concern does not appear to have been addressed in the consultation paper. While the 2017 reforms were heralded as removing the archaic 'gay panic' defence, the structure of the provision does not completely address that issue.[2]

However, it is noted the defence has also been important for some primary victims of DFV and repealing it in circumstances where murder carries a mandatory life sentence may have unintended consequences.

Question 9: Should the Criminal Code be amended to add a new trauma-based partial defence to murder that applies when a victim-survivor of domestic violence kills their abuser? How should this be framed?

The Society does not support the inclusion of such a defence, in circumstances where it appears to simply redraf s304B. Further, the proposed reform of the self defence provisions of the Code would appear to widen the application of the defence sufficiently to include defensive action in a domestic violence context.

This concept may instead be considered when the Commission looks at s304B, in the context of a potential redrafting of that provision to ensure various factual circumstances are captured and the defence is more readily available.

This partial defence may also be unnecessary if mandatory life sentences for murder are replaced with a sentencing discretion.

Question 10: Should the Criminal Code be amended to add a new partial defence to murder that applies where the defendant has acted excessively in self-defence and, if so, should the defence apply: (a) only in the context of DFV where the person in most need of protection kills their abuser or (b) generally?

No.

Whether a person acted with excessive self-defence should be considered as a mitigating factor on sentence if mandatory sentencing for murder is abolished. Again, this is effectively seeking a redrafting of s304B. Further, self-defence would not be particularly beneficial for victims of DFV as it is focussed on proportionality, which may not be apparent where there is a complex history of DFV.

Question 11: Should the mandatory life sentence for murder be: (a) retained for all murders (b) retained but only for particular cases (c) replaced with a presumptive life sentence or (d) replaced with a maximum life sentence?

The Society supports the mandatory life sentence for murder be replaced with a maximum life sentence. Allowing for the broadest possible sentencing discretion to be exercised by the Court serves to:

a) Ensure a just outcome by allowing the sentencing court to take into account the individual circumstances of a matter in coming to an appropriate sentence.
b) Encourage pleas of guilty, saving victims and families the trauma of a trial; and
c) Ensure the efficient and effective conduct of the matter by the Court.

The view of the Society in relation to mandatory sentencing is well-established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing

[1] See discussion by Hon Justice Peter Davis *Ongoing issues with the defence of provocation* and *Provocation—where to now? The implications of the Peniamina case*
[2] Again see Hon Justice Peter Davis *Ongoing issues with the defence of provocation*

policy paper.[3] In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our previous Call to Parties Statements.

It is in line with this position that the Society reemphasises the need to maintain flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child. This requires the preservation of judicial discretion in sentencing for these offences.

Mandatory sentencing regimes undermine sentencing guidelines as set out in section 9 of the *Penalties and Sentences Act 1992* (the Act). The Act states that sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances. In circumstances where judicial discretion is fettered by the mandating of a sentence, the court is unable to impose a sentence that is just in all the circumstances and is transparent.

It is essential that judicial discretion be maintained for sentencing in all criminal matters, including those arising from the death of a child. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case. A civilised society should put its trust in judicial officers to use their discretion based on individual circumstances.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study published by Her Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said the judge's sentence was (very or fairly) appropriate.

Question 12: Should the minimum non-parole periods for murder be: (a) retained (b) amended to allow a discount for a guilty plea or cooperation with law enforcement authorities, or both (c) replaced with a presumptive non-parole period or (d) replaced with an entirely discretionary approach to setting the non-parole period?

The Society supports replacing the minimum non-parole period with an entirely discretionary approach to setting the non-parole period.

If absolute discretion is given to the sentencing judge in relation to the head sentence and the non-parole period, it would be appropriate for murder to be included in the schedule of serious violent offences. In any scenario involving the imposition of a mandatory penalty, murder should not be included as a serious violent offence.

Question 13: Do you have a preferred approach when combining reforms to the head sentence and non-parole period?

Leaving discretion to the sentencing Judge should always be preferred. This allows for the imposition of a sentence that is just *in all the circumstances*, encourages pleas of guilty/cooperation with administration of justice, achieves faster outcomes and reduces trauma to victim's families.

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

[3] Accessible at: http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

Question 14: What are your views on proposal 6?

The Society does not support this proposal. It will almost certainly have the unintended consequence of depriving victims of domestic violence, who react to the behaviour of their abuser, from a defence that would otherwise excuse them of criminal liability for their conduct. The danger of removing the application of this defence is in part caused by the incredibly broad spectrum of offending which may constitute a 'domestic violence offence'.

Proposal 7 The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Question 15: What are your views on proposal 7?

The Society is supportive of the proposal that the defence only applies to offences of which assault is an element. We are not supportive of excluding the application of the defence to domestic violence offences as defined in section 1 of the Criminal Code. As outlined above, it will almost certainly have the unintended consequence of depriving victims of domestic violence, who react to the behaviour of their abuser, from a defence that would otherwise excuse them of criminal liability for their conduct. The danger of removing the application of this defence is in part caused by the incredibly broad spectrum of offending which may constitute a 'domestic violence offence'.

Question 16: What reforms are needed to criminal law practice and procedure to improve access to appropriate defences by DFV victim-survivors who offend?

The Society supports the inclusion of as many defences as possible, in order to preserve the discretion of the trial judge to leave a defence to a jury in an appropriate case.

Further, it is suggested that disclosure obligations on police and the Crown be broadened to include material which might indicate a history of domestic violence perpetrated against a person who later offends against their abuser. This is outlined in more detail at 17 below.

Finally, increasing access to prisoners, as well as improving the facilities to which prisoners have access (computers, email, facilities for playing electronic evidence) would improve the ability of lawyers to obtain instructions and mount defences on behalf of their clients.

Question 17: What reforms are needed to criminal law practice and procedure to facilitate: (a) early identification of self-defence in criminal investigations and prosecutions (b) early resolution of criminal prosecutions?

The Society would suggest amending the disclosure provisions of the Code to provide that the Crown is obliged to disclose the following material in relation to a deceased and/or complainant in a DFV matter:

1. criminal history
2. DFV history
3. QPRIME occurrence history in relation to DFV involving the person
4. Video recorded evidence statements taken by police from the person – consider pending VREC reforms. Interpretation – on request, not mandatory. Discretion on who you are dealing with.
5. Help identify SD, POs to take statements of witness as requested by the legal representatives. Will assist in identifying whether a defence is available.

We also recommend that consideration be given to evaluating the adequacy and efficacy of current safeguards governing police practices and procedures in the context of obtaining evidence from witnesses and alleged offenders in circumstances where potential defences may be relevant. It is crucial that all witnesses, particularly those who may be vulnerable or potentially exposed to legal risk, are made

aware of their right to seek independent legal advice before providing statements or participating in police interviews.

The need for informed policing practices is heighted in situations where a history of domestic violence may be a relevant factor in determining criminal culpability. Investigative procedures must be sensitive to the complexities of such cases and avoid unintentionally undermining defences that may be available to those who have experienced prolonged abuse or coercive control.

Question 18: What reforms are needed to criminal law practice and procedure to facilitate the admission of evidence about the nature and impact of DFV on victim-survivors who offend?

The Society acknowledges the importance of ensuring that the criminal justice system appropriately recognises and responds to the complex dynamics of domestic and family violence, particularly in relation to victim survivors who engage in offending behaviour in response to those circumstances.

In our view, significant reforms addressing these concerns have already been implemented following the Hear Her Voice reports - see Div 1A of the Evidence Act (ss 103CA – 103CD). These reforms seek to improve the admissibility and understanding of evidence relating to the nature and impact of domestic violence on victim survivors in the criminal law framework.

Given the breadth and significance of these recent changes, we recommend a period of observation and evaluation to gauge the efficacy of current reforms before considering additional changes to the evidentiary framework.

Question 19: What reforms are needed to criminal law practice and procedure to improve access to justice for Aboriginal peoples and Torres Strait Islander peoples?

The Society has had the benefit of considering the Aboriginal and Torres Strait Islander Legal Service's submission in response to the consultation paper and supports the views contained therein in respect of this question.

Question 20: Are reforms needed to majority verdicts in murder and manslaughter cases?

No.

Question 21: Do you support: (a) option 1: repeal section 280 of the Criminal Code or (b) option 2: limiting the application of section 280 (and if so, how) or (c) some other approach?

The Society's Criminal Law Committee does not support the repeal of section 280.

The requirement that the force be reasonable in the circumstances is sufficient to ensure it is applied appropriately. If there were to be any limitation of the application of section 280, it may be to exclude the application of the defence where the force used causes death or grievous bodily harm.

The Domestic and Family Violence Committee has concerns about the availability of a defence to corporal punishment and considers this review provides an opportunity to bring Queensland in line with many other jurisdictions across the world and to recognise the United Nations Declaration on the Rights of the Child by protecting children from violence.

The experience of members of the DFV Committee is that inappropriate discipline of children goes hand in hand with other violence in the home. The DFV Committee views it as an artefact of an outmoded and old-fashioned community that uses violence to navigate human relationships and should not be a characteristic of our modern Queensland society. As outlined in the QLRC paper, the literature supports the idea that the use of corporal punishment is associated with increased risk of physical abuse. Physical abuse has been reported by 58% of young people aged 16-24 in the Australian Child Maltreatment Study.

Corporal punishment is an ineffective way to guide children and young people in their behaviour and reinforces the idea that problems can be solved through violence. It also carries a risk of escalation on the part of the parent. Studies suggest that parents who use corporal punishment are at heightened risk

of perpetrating severe maltreatment.[4] These effects are also well documented in the QFCC paper on Corporal Punishment.[5] The DFV committee notes the inconsistency between social norms that say violence, including within the home, against adults is illegal and against community standards but not afford the same protection to young people and children.

The DFV Committee is also mindful and supportive of the recommendations/views of the Child Death Review Board who have suggested the abolition of the defence. The other points made in the QLRC paper in paras 409 and 410 are also acknowledged and supported.

Considering the above, the DFV Committee sees significant merit in repealing the defence, at least in so far as it relates to corporal punishment, and introducing diversion options, with the repeal coming into force two years after the initiation of a statewide community education and awareness campaign.

A diversion scheme would give a suitable option to sentencing magistrates for parents who are charged with an offence. A statutory review could be required after a period of time to ensure the efficacy of any legislative intervention in this area.

The DFV Committee notes, however, that the defence may still have some place in relation to reasonable use of force for management or control if that conduct is not otherwise protected by law. On that basis, there may be merit in considering retention of some form of defence in relation to the use of reasonable force for limited purposes, as discussed in paragraphs 432 and 433 of the consultation paper.

Thank you for considering this feedback. If you have any questions or wish to discuss, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

[redacted]

Genevieve Dee
President

[4] Corporal punishment and health – downloaded 3 April 2025 @ 3:55PM
[5] Corporal punishment - Corporal punishment research paper – downloaded 4 April 2025 @ 3:55PM