SUBMISSION TO THE QUEENSLAND LAW REFORM COMMISSION

REVIEW OF PARTICULAR CRIMINAL DEFENCES

EQUALITY AND INTEGRITY: REFORMING CRIMINAL DEFENCES IN QUEENSLAND

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OVERVIEW

The whole reference is misconceived with the emphasis being on reforming criminal defences in Queensland from an equality and integrity perspective. It should go without saying that everyone is equal before the law but drilling down into the five guiding principles in figure 2 on page 9 of the February 2025 Consultation Paper, it would appear there is an agenda to tilt the level playing field of equality before the law in favour of victims of domestic and family violence. This would appear to be the purpose of: (a) guiding principle 2 'reflect community standards and be fit for purpose'; (b) guiding principle 4 'better reflect circumstances involving domestic and family violence'; and (c) guiding principle 5 'informed by evidence including expert knowledge and lived experience'.

The law is not a social solvent and, in an age of diversity typified by the LGBTQIA+ community, the law should not be tailored to engineer particular gender based or context specific legal outcomes. There is a danger in crafting defences based on gender, as Victoria discovered. When Victoria abolished the partial defence to murder of provocation in 2004 it also introduced a new defence of defensive homicide designed to protect women - *Crimes (Homicide) Act 2005* (Vic), s 9AD Defensive Homicide of the *Crimes Act 1958* (Vic), which was an alternative verdict of manslaughter available where a jury was 'not satisfied that [the accused] is guilty of murder, but are satisfied that he or she is guilty of an offence against section 9AD'.

According to the Victorian Department of Justice's Review of the Offence of Defensive Homicide, Discussion Paper (August 2010) at 33 [120], in the period between the introduction of s 9AD in 2005 and the Review in 2010, there were thirteen defensive homicide cases, and all the offenders were male. Twelve cases involved a male victim, and one involved a female victim. The case that triggered the Review was *R v Middendorp* [2010] VSC 202. Luke Middendorp who stood 186-centimetres tall and weighed more than 90 kilograms stabbed Jade Bownds, who weighed 50 kilograms, four times in the back. Middendorp's sentence for manslaughter was 12 years imprisonment with a non-parole period of 8 years. In 2014, Victoria abolished the offence of defensive homicide following a 'widely held perception that it was being abused by violent men'. The legal history of s 9AD was one of unintended consequences.

A further study by Ulbrick, Flynn and Tyson published in the Melbourne University Law Review in 2016 identified 33 defensive homicide convictions. 'Eighty-two per cent (n=27) of the cases involved a male perpetrator and male victim; 15 per cent (n=5) involved a female perpetrator and a male victim; and one case involved a male perpetrator and female victim.' Interestingly, the article focused on the '15 cases that involved male perpetrators who presented evidence of a history of mental illness and impairment' and argued that because these cases did not meet the criteria for the defence of mental impairment without defensive homicide 'these offenders would (likely) not have been able to access a mental impairment defence'. This is because Victoria does not recognise diminished responsibility as a partial defence to murder.

The last defensive homicide case to be decided under s 9AD, *The Queen v Sawyer-Thompson* [2016] VSC 767 (Croucher J), was the most bizarre because the victim, who was not in a relationship with the defendant, was killed on the instructions of the defendant's violent boyfriend. This was more properly a case of duress, but the defendant elected to plead guilty

to defensive homicide by agreement with the Crown. The reason the defence of duress was not pleaded is that under s 322O of the *Crimes Act 1958* (Vic) the test for the defence of duress is objective: 'the person reasonably believes that a threat of harm has been made that will be carried out unless an offence is committed and carrying out the conduct is the only reasonable way that the threatened harm can be avoided and the conduct is a reasonable response to the threat.'

In other words, defensive homicide in Victoria was used as potpourri defence where self-defence was unlikely to succeed, where the criteria for a mental impairment defence would not be met, and as a substitute for the onerous objective test for the defence of duress. This legal mishmash could have been readily avoided if Victoria had enacted excessive self-defence for everyone rather than attempting to introduce defensive homicide for victims of domestic and family violence. The real lesson from the Victorian experience with defensive homicide is that all defences have unintended consequences. This means there is a need for vigilance in the form of objective tests to protect society from the abuse of worthy defences.

However, Victoria is to be commended for not introducing the partial defence to murder of diminished responsibility when it abolished the partial defence to murder of provocation in 2004 because of fears that defendants who utilise the partial defence of provocation would instead seek to utilise the partial defence of diminished responsibility. The Victorian Law Reform Commission ('VLRC'), Defences to Homicide, Final Report (2004) [5.114], was concerned that if the defence of diminished responsibility was introduced into Victoria it would become the new mental impairment defence because of the perceived stigma of a not guilty verdict by reason of mental impairment and the 25-year nominal term. A further issue was that people who really should have pleaded mental impairment would have been assured hospital care but with diminished responsibility may not receive the same system of care. Similarly, the VLRC was also concerned that if the defence of provocation were to be abolished, diminished responsibility could be used as a replacement defence and therefore it would be illogical to create a new defence which might have many of the same defects to take its place [5.131].

The relevance of Victoria's decision not to introduce the partial defence to murder of diminished responsibility when it abolished the partial defence to murder of provocation to the present review of criminal defences in Queensland is that were Queensland to abolish the partial defence to murder of provocation by repealing s 304 of the *Criminal Code 1899* (Qld), then it is inevitable that defendants will instead seek to utilise the partial defence to murder of diminished responsibility under s 304A of the *Criminal Code 1899* (Qld). Unfortunately, due to the narrow terms of reference, the Queensland Law Reform Commission is apparently precluded from making recommendations regarding the retention of s 304A, which is a significant omission.

However, the narrow terms of reference have not prevented the Queensland Law Reform Commission from canvassing views on whether additional partial defences should be considered as part of the review (page 43 [216]), in particular a bespoke trauma-based partial defence which is a close sister to the partial defence of diminished responsibility under s 304A of the *Criminal Code 1899* (Qld). This would appear to be an attempt to canvas a replacement to s 304B Killing for preservation in an abusive domestic relationship which the Commission in Proposal 4 is proposing should be repealed, notwithstanding the Commission's Proposals 1

and 2 so widen the self-defence provisions as to effectively encompass the reach s 304B was originally intended to cover.

Thus, rather than at least address the valid concerns the VLRC raised for the increased use of the partial defence of diminished responsibility if the partial defence to murder of provocation were abolished, the QLRC has instead canvassed a sister partial defence to s 304A of a bespoke trauma-based partial defence (figure 5, page 49). The better approach for the proposed option in figure 5 would simply have only self-defence and excessive self-defence, but the test for self-defence would be objective and apply to all cases of self-defence.

In any examination of defences, the homicide rate by gender should be borne in mind. In 2022-23, 87% of homicide offenders were male, while 69% of homicide victims were male. Predominantly, men are killing men. Consequently, the word 'victim' should be seen in the broader context of families who are having to deal with the loss of a loved one, who is in all probability going to be male. Those families are expecting the criminal justice system to appropriately punish the offender. 'Victims' are not solely 'survivors' but encompass families who must cope with the actions of the defendant.

By way of example, in *The Queen v Sawyer-Thompson* [2016] VSC 767 mentioned above, the defendant attacked the defenceless and innocent victim, Mr Nankervis, with a mattock and a knife inflicting 70 separate injuries which caused the victim's face to cave in to the point he was unrecognisable. On appeal on the ground that the sentence of 10 years' imprisonment with a non-parole period of 7 years was manifestly excessive, in *Sawyer-Thompson v the Queen* [2018] VSCA 161 the applicant was resentenced to 6 years and 6 months with a non-parole period of 5 years. As the trial judge said: 'Ms Sawyer-Thompson's behaviour has taken the life of a young man in the most horrendous of circumstances. Her behaviour has deprived a mother of her son, a sister of her brother, a wife of her husband and a son of his father. Mr Nankervis's family will never be the same.'

CONSULTATION PROPOSALS AND QUESTIONS

P1 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.

Q1 What are your views on proposal 1?

Self-defence is a highly emotive but necessary defence of long standing. Nevertheless, like all defences it is open to abuse, particularly in circumstances where the alleged aggressor is dead and there were no other witnesses than the defendant

The main problem with proposal 1, which is based on the Model Criminal Code provisions, is (b) the conduct is a reasonable response in the circumstances as the person perceives them. The phrase 'as the person perceives them' is subjective and dilutes the objective component of 'the conduct is a reasonable response in the circumstances'.

The key point is that the above test for self-defence is heavily subjective. Under (a) above, the first limb of the test, the person must believe the conduct is necessary, is wholly subjective. Under (b) above, the second limb of the test waters down the common law objective component of a reasonable response in the circumstances by the subjective qualification of the person's perception of those circumstances. There is no requirement that the perception of the circumstances be reasonable. It is contended that the weakening of the objective limb needs to be rectified as follows:

A person carries out conduct in self-defence only if:

(a) the person *reasonably* believes the conduct is necessary to defend himself or herself or another person; and

(b) the conduct is a *reasonable* response in that it is *reasonably* proportional in the circumstances as he or she *reasonably* perceives them.

Such a test is similar to the current objective tests for an unprovoked assault in s 271(2) in the *Criminal Code 1899* (Qld) which Proposal 1 is proposing should be repealed.

> S 271(2) If the nature of the assault is such as to cause *reasonable apprehension* of death or grievous bodily harm, and the person using force by way of defence believes, on *reasonable grounds*, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

In many homicide cases the victim is a silent witness. The case for the adoption of a purely objective test for self-defence is justified, firstly, on the ground of the inherent confusion in instructing juries based on a two-part subjective and objective test, and secondly, because of the danger of the subjective test overwhelming the objective component, leading in turn to the victim's family being left with a sense of justice denied.

Take the example of two males drinking in a bar, with person A being much bigger and stronger than person B. They fall into an argument and in B's mind A is about to punch him. B reacts with the only weapon that in his mind he has to hand, namely, his glass, and thrusts the glass into A's face. A bleeds out before medical help arrives and B is charged with murder. B's lawyer pleads self-defence. Under Proposal 1, B will have little difficulty in meeting the subjective test in (a) of the person believes that the conduct was necessary. Turning to the combined objective and subjective test in (b), the conduct is a reasonable response in the circumstances as the person perceives them, the Crown is faced with a legal onus and will have to negative beyond reasonable doubt that B perceived that his glassing response to A's perceived threat of a punch was a reasonable response in the circumstances.

Contrast this situation with the task the Crown faces to negative self-defence under either the existing s 271(2) *Criminal Code 1899* (Qld) or under the proposed wholly objective tests of (a) reasonably believes conduct is necessary; (b) reasonable response that is reasonably proportional; (c) reasonable perception of circumstances faced.

In the event both person A and person B were intoxicated, then the author contends that the appropriate test should be objective and taken from the perspective of the ordinary person who is not intoxicated. Such a test is based on public policy that it is common knowledge voluntarily ingesting alcohol or drugs impairs judgment (as for example with drinking and driving) and a person cannot avoid criminal responsibility by pleading intoxication as a defence to a voluntary choice. (See answer to **Q4**.)

Q2 For the purposes of proposal 1:

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

In principle, the inclusion of (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, is a positive step in trying to limit the reach of self-defence. However,

again the difficulty with the value of (c) is the subjective word 'believes' which results in (c) being otiose, as in the glassing example above because the same work is being done in (b) with (b) the conduct is a reasonable response in the circumstances as the person perceives them.

The better phrasing of (c) would be: Self-defence should only be available as a defence to murder where a reasonable person in the position of the person perceived the conduct of the person to be necessary to defend themselves or another from death or serious injury, including whether the person retreated from the potential conflict as far as was practicable.

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

In principle, Criminal Codes should be as comprehensive and give as much guidance as possible to the judiciary as to the legislature's purpose. Clarity is an essential drafting characteristic of Criminal Codes and does not just apply to defences. Thus, in drafting a possible list of factors to assist in determining whether the person claiming self-defence has acted reasonably, it depends on the legislature's purpose as to whether it was intended to tighten or loosen the defence of self-defence.

Clearly, it follows from the foregoing, that the author supports a narrowing of the defence of self-defence whereas the QLRC's Consultation Paper is directed at a widening of the defence of self-defence. Consequently, the author's list of factors going to the person acting reasonably would be confined to the traditional common law factors based on whether the person did everything reasonably open to avoid the conflict such as retreating and quitting the field as far as was practicable.

Factors:

- whether the person provoked the assault
- whether the person was in imminent danger of death or grievous bodily harm
- whether the force used by the person was proportionate to the perceived threat
- whether the person could have safely retreated from the situation.

P2 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.

Q3

What are your views on proposal 2.

It follows from the author's answers to Q1 and Q2 that the author is completely opposed to proposal 2. Part (a) is effectively based on cases where the victim was watching television,

asleep, sedated or otherwise incapacitated. In the case of *R v Secretary* (1996) 107 NTR 1, a long-term victim of domestic violence shot and killed her de facto partner while he slept. The deceased had assaulted the accused prior to falling asleep and had threatened to continue the assault upon awakening. The trial judge ruled that self-defence was not available as a threat had to be occurring at the time that the act in self-defence was performed and that a sleeping person could not present the requisite threat. This ruling was overturned by a majority of the Court of Appeal who held that an assault 'is a continuing one so long as the threat remains and the factors relevant to the apparent authority to carry out the threat … have not changed' (at 9).

The majority of the Court of Appeal was motivated by a natural desire to recognise the defendant had been a long-term victim of domestic violence. However, self-defence is an all or nothing defence following the High Court's decision in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 which overruled its own previous authority in *Viro v R* (1978) 141 CLR 88, unless a jurisdiction has statutorily overruled *Zecevic* by introducing the partial defence to murder of excessive self-defence. Thus, had the Northern Territory legislated to include excessive self-defence in the *Criminal Code 1983* (NT), which effectively restores *Viro*, then in all likelihood Secretary would have been found guilty of manslaughter. Sentencing would then have taken into account her sad history of domestic violence. The author contends excessive self-defence should be introduced into the *Criminal Code 1899* (Qld) [see answer to **Q10**].

Part (b) of proposal 2 seeks to introduce excessive force into the all or nothing defence of self-defence which the author contends is completely inappropriate and would lead to unintended consequences given the homicide figures quoted in the Overview.

The author respectfully agrees with the trial judge in *R v R* (1981) 28 SASR 321, 325.

> [S]ociety (cannot) countenance killing as a means of averting some apprehended harm in the future. The law … permits the use by a person of force … if that is necessary to defend that person against immediately threatened harm. But the law has always and must always set its face against killing by way of prevention of harm which is merely feared for the future. Other measures which are peaceful and lawful must be resorted to in order to deal with threats of future harm.

In *R v R*, the defendant had killed her sleeping husband with an axe after enduring years of abuse and learning that he had sexually assaulted their daughters. South Australia has now introduced excessive self-defence by virtue of s 15(2) of *Criminal Law Consolidation Act 1935* (SA).

> (2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if
>
> (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but
>
> (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

The failure to meet the criterion in s 15(2)(b) above of the conduct being reasonably proportionate to the threat triggers the operation of excessive self-defence.

P3 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.

Q4 What are your views on proposal 3?

One of the difficulties with narrow law reform reviews is that they touch on a major building block of a Criminal Code but are not asked to consider the major building block itself. Such is the case here with self-induced intoxication. Queensland has chosen to follow *DPP v Majewski* [1976] UKHL 2 by virtue of s 28(3) of the *Criminal Code 1899* (Qld), which divides offences into basic and specific intent for the purposes of whether the defendant can use intoxication as a defence.

> (3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

Unlike New South Wales in s 428B of the *Crimes Act 1900* (NSW), Queensland has not chosen to list those offences that are deemed to be offences of specific intent and therefore covered by s 28(3) above, which is a major omission for legislation purporting to be a Criminal Code. For a crime of specific intent under s 28(3) it does not matter whether intoxication was intentional or unintentional. This means that in a case of murder, a crime of specific intent to kill or cause grievous bodily harm, evidence of intoxication is relevant to the subjective test in the first limb of self-defence that the person believed that the conduct was necessary.

The author contends that evidence of intoxication should be inadmissible for all offences, including murder. Such an argument is justified on public policy grounds, and by the proposition that principles of criminal law relating to voluntariness and intention should be secondary to the morally correct position that a person who is voluntarily intoxicated is criminally responsible for any conduct he or she causes whilst in such a condition. Such public policy grounds place primary importance on public safety, supported by evidence of a very significant statistical relationship between alcohol consumption and homicide in Australia.

In effect, under this policy position, society is saying to every individual: 'If you choose to get drunk then you must face the full consequences of all your actions.' The clash between principles of criminal liability and public policy has been neatly summed up one commentator who has observed that 'the issue presents a choice of whether the magnitude of an offence should be measured from the objective perspective of the community or the subjective perspective of the offender' (M. Keiter, 'Just say no excuse: the rise and fall of the Intoxication Defence' (1997) 87 Journal of Criminal Law and Criminology 482). The author endorses the objective perspective.

Thus, the author would delete s 28(3) above and substitute with the following:

> Evidence of self-induced intoxication cannot be considered in determining whether a fault element of specific intent or of basic intent existed.

Consequently, evidence of intoxication would not be relevant to the subjective test in the first limb of self-defence that the person believed that the conduct was necessary. Neither would intoxication be relevant to the subjective component of the second limb of self-defence under

the proposed new self-defence provision, namely, 'in the circumstances as the person perceives them'.

As to intoxication and mistake of fact, the author respectfully agrees with the judgment of Lord Lane CJ in *O'Grady* [1987] QB 995, 999.

> [W]here the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence [of self-defence] must fail. We do not consider that any distinction should be drawn on this aspect of the matter between offences involving what is called specific intent, such as murder, and offences of so-called basic intent, such as manslaughter.

To clarify the relationship between mistake of fact and self-defence where evidence of intoxication is raised (assuming the present s 28(3) is extant), then the following could be usefully incorporated into s 24 Mistake of fact:

> If any part of an excuse of mistaken belief as to the existence of facts is based on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

See also answer to **Q10** where the author discusses self-induced intoxication and excessive self-defence.

Q5 In light of proposals 1 and 2 (about self-defence), should the defence of compulsion in s 31(1)(c) of the Criminal Code be repealed?

> Section 31 Justification and excuse - compulsion
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> Section 31(1)(c) is as follows:
>
> > (1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say -
> >
> > > (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence.

The test in s 31(1)(c) of the 'act is reasonably necessary' is objective which is not consistent with the QLRC's proposals 1 and 2 for self-defence which contain predominantly subjective tests. However, the objective test in s 31(1)(c) is consistent with the author's proposed objective tests for self-defence. As such, the author considers there is no pressing need to repeal s 31(1)(c), especially as it does not apply to murder or grievous bodily harm by virtue of s 31(2).

> (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

Q6 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?

> Section 31 Justification and excuse - compulsion

Section 31(1)(d) is as follows:

when -

(i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and

(ii) the person doing the act or making the omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

The same arguments made for Q5 apply to Q6, the more so as the tests for duress are unequivocally objective and completely consistent with the author's proposed objective tests for self-defence. In sum, a defence lawyer would gain little traction in trying to 'shop around' for the best defence plea if faced with consistent objective tests for self-defence, compulsion or duress. By the same token, the complete defence of s 25 Extraordinary emergencies is also subject to an objective test of 'an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise'.

If the partial defences to murder of provocation in s 304, diminished responsibility in 304A and killing for preservation in an abusive domestic relationship in 304B were repealed, then a lawyer defending a client charged with murder seeking defences where the Crown has refused to accept a manslaughter plea based on lack of intention, would have to select from sane automatism (acquittal if successful), self-defence (acquittal if successful), excessive self-defence (manslaughter if successful and if introduced into the *Criminal Code 1899* (Qld)) and insanity under s 27 (qualified acquittal and may be made subject to a Forensic Order or a Treatment Support Order under the *Mental Health Act 2016* (Qld)).

P4 The partial defence of killing for preservation in an abusive domestic relationship in section 304B of the Criminal Code should be repealed.

Q7 What are your views on proposal 4?

It follows from the observations in the Overview and the experience with similar legislation in Victoria that author supports proposal 4. As the QLRC has pointed out on page 37 [181-182], the partial defence is rarely used, there are challenges gathering evidence to support the defence, and the Crown is more disposed to accept a manslaughter plea based on lack of intention.

P5 The partial defence of killing on provocation in section 304 of the Criminal Code should be repealed.

Q8 What are your views on proposal 5?

The QLRC kindly quoted the author's article 'Provocation: A totally flawed defence that has no place in Australian criminal law irrespective of sentencing regime' (2010) 14 University of Western Sydney Law Review 1, in the Consultation Paper. As the title states, the partial defence to murder of provocation is totally flawed and should be abolished.

The reversal of the onus of proof in s 304(9) and the laudable attempts to narrow the partial defence in sub-sections (2) to (8) are sound steps in the right direction. The fact that this partial defence still exists in Queensland, New South Wales, the ACT and the NT is most regrettable.

In a 'sister' article entitled 'Impermissibly importing the common law into criminal codes: *Pollock v the Queen*' (2011) 18 James Cook University Law Review 113, the author attacked the High Court's jurisprudence on Code interpretation summarily expressed in the Abstract.

> In the recent case of *Pollock v The Queen*, the High Court stated that: 'In interpreting the language of s 304 [of the *Criminal Code 1899* (Qld) which deals with the partial defence to murder of provocation] it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment.' This paper takes issue with the purported 'permissibility' of importing into a section originally drafted in 1897 and which reflected the law as expressed by Chief Justice Tindal in the 1833 case of *R v Hayward*, the current common law test for provocation in Australia as per *Stingel v The Queen* and *Masciantonio v The Queen*. The basis for this attack on the High Court's jurisprudence on Code interpretation is both specific and general. Specifically, this paper argues that the High Court impermissibly imported the current common law test for provocation into s 304 in a strained manner by relying on a contrived reading of the phrase 'and before there is time for the person's passion to cool', whilst simultaneously ignoring the use of 'the person' not 'an ordinary person', in s 304. More generally, it is respectfully argued that the High Court has broken the golden rule of code interpretation of not looking outside of the code to the common law unless the meaning is either unclear or has a prior technical meaning. The wider implication of such an approach is that the courts are infusing the common law into Criminal Codes despite the stated intention of codification being the replacement of 'all existing law and becomes the sole source of the law on the particular topic'.

In other words, when s 304 was originally drafted an objective test was intended not the common law two part subjective and objective test for provocation that the author argued was impermissibly imported into s 304 by the High Court in *Pollock v The Queen* (2010) 242 CLR 233. In an attempt to reinsert an objective test into s 304, the author proposed the following in the 2010 article cited by the QLRC.

> The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant's age and of ordinary temperament, defined as ordinary tolerance and self-restraint, to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

Thus, in the event that s 304 is retained and proposal 5 above is not accepted by the Queensland government, the author proposes that s 304(1) should be amended to include the above objective test, thereby further narrowing the partial defence to murder of provocation.

Q9 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?

It follows from the foregoing that the author does not support a new trauma-based partial defence to murder. First, such a partial defence is allied to the partial defence to diminished

responsibility which the author has previously criticised in an article entitled: 'It's time to abolish diminished responsibility, the coach and horses defence through criminal responsibility for murder' (2008) 10 University of Notre Dame Australia Law Review 1. The article argued that given the vagueness, uncertainty and practical difficulties associated with the defence of diminished responsibility, it should be abolished completely in Australia as the very breadth of the defence allows a coach and horses to be driven through criminal responsibility for murder.

Secondly, a new trauma-based partial defence to murder that applies when a victim-survivor of domestic violence kills their abuser is effectively an attempt to reintroduce s 304B killing for preservation in an abusive domestic relationship in a different guise.

Thirdly, all the difficulties associated with the definition of diminished responsibility would apply to defining trauma.

Fourthly, no defence should only apply to a specified or identified group of potential defendants. The reach of a defence should apply generally following the principle that everyone is equal under the law.

Q10 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?

It follows from previous responses that the author supports the introduction of a partial defence to murder of excessive self-defence to apply generally, effectively statutorily reintroducing *Viro v R* (1978) 141 CLR 88, along the lines of s 248(3) of the *Criminal Code 1913* (WA) below.

> (3) If -
>
> (a) a person unlawfully kills another person in circumstances which, but for this section, would constitute murder; and
>
> (b) the person's act that causes the other person's death would be an act done in self-defence under subsection (4) but for the fact that the act is not a reasonable response by the person in the circumstances as the person believes them to be,
>
> the person is guilty of manslaughter and not murder.

In drafting the form of excessive self-defence, one error to be avoided is allowing alleged violent offenders an ability to rely on the partial defence of excessive self-defence when their mental state is substantially affected by self-induced intoxication.

For example, in South Australia under s 268(3) of the *Criminal Law Consolidation Act 1935* (SA) it does not matter that the defendant's belief was mistakenly based on delusions resulting from, for example, the influence of alcohol or drugs, if it is established that the defendant held a genuine belief that their actions were necessary and reasonable for a defensive purpose. The following example is given in s 268(3) above.

> A, whose consciousness is impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, beats B up and B dies of the injuries. In this case, A could be convicted of manslaughter but not of murder (because A is taken to have intended to do the act that results in death but not the death).

Under the author's proposals for the treatment of self-induced intoxication and criminal responsibility set out in the answer to **Q4** above, s 28(3) would be deleted and substituted with the following:

> Evidence of self-induced intoxication cannot be considered in determining whether a fault element of specific intent or of basic intent existed.

If excessive self-defence were to be introduced into the *Criminal Code 1899* (Qld), it would provide the legal fallback position intended to be filled by s 304B and make a partial trauma-based defence unnecessary. As previously mentioned, the danger is that if the partial defence to murder of provocation is repealed but the partial defence of diminished responsibility is retained, then defence lawyers will switch focus from s 304 to s 304A. Hence, excessive self-defence will become the 'go to' section if the proportionality test for self-defence is not met and s 304 and 304A are repealed.

The key point is that the terms of reference of the QLRC's review of particular defences prevents a comprehensive approach to defences and overlooks the linkages and connections between all defences. Any lawyer defending a client charged with a homicide offence will naturally review all possible defences available. The QLRC should have received the same brief from the Queensland government.

Q11 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 author prefers (a) retained for all murders as it is clear and easy to understand. Be found guilty of murder and the trial judge has no discretion. The legislature sets the tariff.

Option (b) requires the specification by the legislature of types of cases which is unnecessarily restrictive and seeks to artificially divide cases into degrees of murder. If a murder is particularly heinous, then this should be dealt with by giving the trial judge the discretion to set a non-parole period in excess of the specified mandatory minimum.

Option (c) introduces judicial discretion, which is to be avoided for murder convictions, as opposed to the wide judicial discretion for manslaughter convictions.

Option (d) is unnecessarily restrictive as a particular case may call for a never to be released sentence (the previous 'for the term of his natural life') and prevents the trial judge from adding a further period of imprisonment in excess of the specified mandatory minimum.

Thus, the sentence for murder should presumptively be a mandatory life sentence with a minimum parole period. Beyond that minimum, the trial judge should be able to sentence the convicted murderer to a period anywhere between the minimum parole period and never to be released.

The author considers the Northern Territory's sentence regime for murder is one Queensland should adopt.

> Prisoners who are convicted of murder in the Northern Territory (NT) are automatically given a life sentence under the law.
>
> This essentially means they are not entitled to parole for at least 20 years. However, in some cases a judge can order a longer non-parole period.
>
> In some cases, the judge can refuse to give a non-parole period which means the prisoner could spend the rest of their life in prison.
>
> Prisoners can be given a longer non-parole period in any of the following circumstances: premeditated murder; contract killing; multiple or serial murder; murder of a child under 18 years old; murder with sexual motivation; murder of police officer or public official.

Q12 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?

It follows from the answer given to Q11 above, that the author favours (a).

P6 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.

P7 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.

Q14 What are your views on proposal 6?

It follows from previous answers that the author does not support any proposal to separate out classes of defendants. Defences should apply to everyone.

Q15 What are your views on proposal 7?

It follows from previous answers that the author does not support any proposal to separate out classes of defendants. Defences should apply to everyone.

Q16 What reforms are needed to criminal law practice and procedure to improve access to appropriate defences by DFV victim-survivors who offend?

This question rather puts the cart before the horse. The thrust of the QLRC review appears to be directed at widening the scope of defences to a particular class of defendants, which from previous answers the author opposes on both counts. The author supports a narrowing of defences by repealing s 304, s 304A and s 304B, the adoption of objective tests for self-defence, the introduction of excessive self-defence, and the principle of the application of all defences to everyone.

The question in relation 'to criminal law practice and procedure to improve access' appears to be a bookend to widening the scope of defences to a particular class of defendants which the author opposes.

Q17 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?

See answer to Q16 above. However, if the author's proposed narrowing of defences is accepted, then there could be early resolution of criminal prosecutions if the Crown accepts excessive self-defence and a plea of manslaughter.

Q18 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?

See answer to Q16 above.

Q19 What reforms are needed to criminal law practice and procedure to improve access to justice for Aboriginal peoples and Torres Strait Islander peoples?

See answer to Q16 above.

Q20 Are reforms needed to majority verdicts in murder and manslaughter cases?

No. Queensland has the best majority verdicts legislation in Australia in terms of requiring near unanimity in jury verdicts. Under s 59(3) of the *Jury Act 1995* (Qld), for a murder trial the verdict must be unanimous. Under s 59A(6) of the *Jury Act 1995* (Qld), for a manslaughter case a majority verdict is either 11 to 1 if the jury consists of 12 jurors or 10 to 1 if the jury consists of 11 jurors.

The author opposes any attempt to further water down the requirement for unanimity in jury verdicts. Unanimity is required for all offences against a law of the Commonwealth, and this should be the standard against which states and territories should be held accountable.

Q21 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?

Section 280 Domestic Discipline

> It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances.

The test is objective: such force as is reasonable under the circumstances. On its face, the test appears fair and depends for its operation on (a) how the police make decisions as to whether to prosecute, and (b) how the courts interpret the word 'reasonable'. It would appear from the QLRC Consultation Report that s 280 has been used as the basis for the decision by police not to charge a parent in 571 cases (pages 73-74 [402]), which indicates that cases under s 280 rarely come before the courts.

The foregoing would tend to show that rather than repeal s 280 and open a Pandora's Box of what constitutes 'reasonable under the circumstances' in an attempt to limit the application of s 280, the better approach would be to focus on police procedures and bringing more cases before the courts to test judicial interpretation of 'reasonable under the circumstances'.

CONCLUSION

There are three threads than run through the author's responses to the 21 questions posed by the QLRC's review of particular defences.

First, the very title of 'particular defences' is problematic as all defences are interconnected and dependent for their interaction on the particular circumstances of the case. As is well-known defence lawyers often seek to engage multiple defences and even if for tactical reasons a defence lawyer does not utilise an alternative defence, the trial judge is obliged to address the jury on the alternative defence if it is open on the evidence. For example, the interaction between the partial defences to murder of provocation and diminished responsibility was rightly recognised by the VLRC, but the QLRC's terms of reference were apparently narrowed to exclude the partial defence of diminished responsibility. This has weakened the value of the QLRC's work. Another example is the omission of consideration of intoxication in s 28(3) of the *Criminal Code 1899* (Qld) which should not confined to the partial defence to murder of excessive self-defence.

Second, the fundamental principle of equality before the law is not compatible with attempts to single out victims of domestic violence for special consideration in terms of availability of defences. The dangers of tailoring defences to gender have been well documented with Victoria's experience with defensive homicide. All defences are overlaid with the statistical fact that predominantly men kill men and defence lawyers will utilise all defences on the statute book of the particular jurisdiction. As stated in the Overview, the law is not a social solvent and, in an age of diversity typified by the LGBTQIA+ community, the law should not be tailored to engineer particular gender based or context specific legal outcomes. The word 'victim' has a broad meaning and encompasses the family of the person killed.

Third, defences to homicide should be tightly drawn. The author supports greater application of objective tests, replacing the subjective test of the perception of the defendant with the objective test of the reasonable person similarly circumstanced. Most recently, the author has argued that the subjective common law test for murder by reckless indifference to human life (an awareness that death will probably arise from the act or omission) that applies to s 302(1)(aa) in the *Criminal Code 1899* (Qld), should be replaced by an objective test based on the natural and probable consequences test. See: 'Is leaving God to make the choice an answer to a charge of murder by reckless indifference to human life or manslaughter? A case study of Queensland criminal law' (2023) 3 *Australian Journal of Law and Religion* 69. The guiding principle is that defendants are accountable for their actions and choices, and any justification or excuse should reflect the community standards of ordinary reasonable Australians.