Submission to Queensland Law Reform Commission:

Review of Particular Criminal Offences

Dr Zoe Rathus AM
Associate Professor
Griffith University Law School
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Introduction

I am an associate professor of law at Griffith University. I have worked in the area of domestic and family violence (DFV) and the law since becoming an articled clerk in 1981. I have worked in private practice as a solicitor, was coordinator of the Women's Legal Service from 1989 to 2004 and have been in academia since then. Although most of my academic writing is in the area of family violence and family law, I have been thinking about and researching the issues under consideration in this review since writing a submission to the Taskforce on Domestic Violence chaired by Ruth Matchett in 1987-88.[1] I was the lead author of the published response of Women's Legal Service to the reviews of the *Qld Criminal Code* in the first half of the 1990s[2] and Deputy Chair of the Taskforce on Women and the Criminal Code which published its report in 2000.[3] Since being in academia I have participated in many reviews about domestic violence and the law in Queensland, including submissions to the review of defences led by Bond University in 2009,[4] the Special Taskforce on Domestic Violence led by Dame Quentin Bryce and the Women's Safety and Justice Taskforce chaired by the Honourable Margaret McMurdo. I have been active in the process of the current review by the QLRC, including attending the Academic Roundtable.

The QLRC is to be commended for producing such a comprehensive paper. It incorporates a wide range of useful and thought-provoking research and information, including original research commissioned, or undertaken directly, by the Commission. The issues dealt with are complex in terms of human nature, human relationships, written law and the legal system more broadly.

[1] Queensland Domestic Violence Task Force (1988) *Beyond These Walls: Report of the Queensland Domestic Violence Task Force to the Honourable Peter McKechnie, M.L.A, Minister for Family Services and Welfare Housing,* Department of Family Services.
[2] Zoe Rathus (1993) *Rougher than Usual Handling: Women and the Criminal Justice System*, Women's Legal Service.
[3] Taskforce on Women and the Criminal Code (2000) *Report of the Taskforce on Women and the Criminal Code*, Queensland Government.
[4] Geraldine Mackenzie and Eric Colvin (2009) *Homicide in Abusive Relationships: A Report on Defences,* Attorney General and Minister for Industrial Relations.

In my submission I have tried to consider how the proposed reforms may impact on victims and survivors or domestic and family violence - to what extent they might be assisted or where may they be disadvantaged. In particular I was conscious of the possibility of opening up defences which may be used by perpetrators of DFV against their victims. I have also tried to consider areas not covered in this review that require attention.

I note that, although the circumstances faced by First Nations peoples are discussed at times, there is little consideration of how the proposals may operate in LGBTIQA+ communities or in culturally and linguistically diverse (CALD) communities.

Finally, as must be, there are many links between the proposals, so some of my answers or suggestions are dependent on what happens with other proposals.

Overall Comments

My answers in respect of proposals to repeal existing partial defences and replace them with new partial defences are dependent on mandatory life for murder being abolished. The repeal of partial defences is also dependent on new partial defences being enacted. For example, although the partial defence of provocation is highly problematic, I submit that it should not repealed unless a new partial defence, likely to be helpful to women who kill or seriously injure abusive partners, is enacted.

It may be that the defence of self-defence should be amended whether or not mandatory life for murder is repealed. However, I still habour a concern that experimenting with long-held defences to murder, while retaining life imprisonment for a conviction, is likely to mean that partial defences will continue to be under-utilised in trials (although they will be employed in pleas) and the intentions of any reform will be stunted.

I also consider that there is a need for full review of how victims are dealt with in the criminal justice system, particularly victims of gender-based violence and vulnerable victims such as people from First Nations, CALD and LGBITQ+ communities. Such a review should include victims of violence who respond to their abuse by offending and becoming defendants.

Responses to 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?

Q2 For the purposes of proposal 1:

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

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

This proposal simplifies the existing complicated self-defence laws and would bring Qld into alignment with other jurisdictions – although there are some variations across states. It usefully removes the distinction between a provoked and an unprovoked assault and does not have to be in response to an *assault.* These ideas are commended.

I do not consider the currently self-referential drafting to the best possible – ie that a person acts in *self-defence* if [they] believe that the conduct was necessary … in *self-defence* … . I would prefer to follow the model from a number of the other states where there is a shift in the language:

A person acts in self-defence if:

1 the person believes the conduct is necessary to defend himself or herself or another person (or other prescribed purpose)

2 the conduct was a reasonable response in the circumstances as the person perceives them.

I am still undecided about whether or not (a)(ii) should be included. On the one hand I am concerned that it complicates the section again – and that the general wording of (a)(i) should cover the relevant circumstances, however, I note that other jurisdictions have included this provision. Deprivation of liberty is a terrifying situation for the victim, and it may be difficult for a jury to understand this. Including it specifically could allow a limited, but 'deserving', group of defendants to argue self-defence more confidently.

Again, in terms of sub-section (c) I am somewhat undecided. Most other jurisdictions do not have it because it is considered that the need for necessity and a reasonable response as the defendant perceived the situation (the objective /subjective test) is sufficient. The sub-section is only applicable when the defendant is facing a charge of murder. The current s 271(2) contains a similar (but much more wordy) limitation but the words are 'death or GBH'. This has changed to 'death or serious injury'.

An important consideration here is that Victoria has legislated a similar provision and that defines 'serious injury' ('really serious injury' in Victoria) to include 'serious sexual assault'.[5] In fact that is the only definition given (ie. that 'really serious injury includes sexual assault'). Arguably homicide in response to sexual assault might be an unclear situation in Qld. If a woman killed a man who was raping her or attempting to, would she be covered by the proposed law? Despite the fact that rape causes all kinds of serous injuries, it is strange and artificial to define 'really serious injury' as including serious sexual assault. Injury is the consequence of rape, not the act of it. If we want to ensure that self-defence of homicide in the face serious sexual assault is available at law, then it would be more logical to list it under (or above) deprivation of liberty. That may then obviate the need for (c).

A new sub-section (a)(iii) could say: 'to prevent or terminate a serious sexual assault'. No doubt serious sexual assault would need a definition. This is not about inappropriate touching, but about sexual assault with the potential to cause long-term physical and/or psychological and emotional harm. Again, I do not want to overcomplicate self-defence, but there are circumstances where the level of fear of death experienced by a victim may not be apparent to a jury. Many victims of rape report thinking that they are going to die.

[5] s 322H *Crimes Act 1958* (Vic)

The idea for a non-exhaustive list of factors to be included to assist with determining reasonableness has come from Canada. The Canadian list is:

Factors which may be relevant to an assessment of reasonableness

- the nature of the force or threat
- ~~the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force~~
- ~~whether retreat was a viable option~~
- the person's role in the incident
- whether any party to the incident used or threatened to use a weapon
- the size, age, gender and physical capabilities of the parties to the incident
- the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat
- any history of interaction or communication between the parties to the incident
- the nature and proportionality of the person's response to the use or threat of force.

I consider that some of these factors would be dangerous for women who have responded to violence. In particular, although the 2nd and 3rd factors may be intended to allow evidence of the difficulties for a woman directly fighting a man, or leaving an abusive relationship, they equally invite questions about why she killed him while he was sleeping etc, or why she had not left.

It is also important to remember the changes to the *Evidence Act* which allow judges to give extensive directions to a jury where DVF is involved in a case and when a DVF victim is relying on self-defence (Part 6 A, ss 103A to 103ZD). Because the amendments are so recent, there is no information about how they are working in practice. But some of the *Evidence Act* provisions are intended to deal with some of the issues which seem to be intended to be dealt with here. Further, P2 also sets out additional provisions to be included in self-defence which may also intersect these factors. The net result of all this might be a list of factors about 'reasonableness' in one sub-section, an additional different sub-section on self-defence and other provisions in the *Evidence Act*, all trying to achieve something of the same result. There could be a benefit in consolidating all of these provisions into one place, or at least clearly flagging the *Evidence Act* provisions relevant to self-defence and DFV in the *Criminal Code*. If we want our laws to be accessible to, and understandable by, the community, a streamlined structure should be a goal.

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?

Proposal 2 would presumably take the shape of an additional sub-section in self-defence or a new section after self-defence. I consider the imminence question to be central to any reform of self-defence. This has been a barrier to women victims of DFV for centuries. I fully support both these ideas. The question is where they should go.

Section 103CA of the *Evidence Act* sets out a list of complex matters that can be evidence of DVF, and the Dictionary to the Act links the definition of DV to the DV Act.

- ***domestic violence*** see the *Domestic and Family Violence Protection Act 2012*, section 8.

Again, I make the point that there are already many places in various Acts where the relevant laws and evidentiary provisions regarding defences to violence and DFV reside. Thinking carefully about to how to consolidate these ideas will be beneficial.

Finally, I am not sure how P2(b) would be different to the proposal for the partial defence of excessive self-defence. This one is specific to victims of DFV – but it might be confusing to have two different sections saying what seems to be the same thing.

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?

Unfortunately this is likely to be a dangerous restriction for women victims of DFV who respond to the violence. For example, a woman may consume alcohol of her free will (apparently) to keep happy a violent partner who wants her to join him drinking. It is also known that some people who are victims of DFV may use alcohol to excess at times as a way of self-medicating. I do not support this provision.

Q5 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?

I do not have a clear view on this. It seems unlikely to be necessary if self-defence is appropriately amended.

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?

The defence of duress has been vital to some women victims of DFV who have killed / seriously injured others under the influence of their violent partner. The first case in Australia that used 'battered woman syndrome' was a duress situation.[6] I am aware of other more recent cases where the defence has been important to women victims of DFV. I believe it is important to retain a defence of duress that will apply to women acting under the duress of an abusive partner. That may require changes to the existing duress law which are consistent with the kinds of changes suggested for self-defence – clarifying the position of a victim of DFV. I see no reason for the limitations in s 31(2) and believe that duress should be available as a defence to murder or GBH.

Victoria has enacted a provision specifically regarding duress and DFV. It is worthy of consideration.

> **Family violence and duress**
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> Without limiting the evidence that may be adduced, in circumstances where duress in the context of family violence is in issue, evidence of family violence may be relevant in determining whether a person has carried out conduct under duress.[7]

[6] Julie Stubbs, 'Battered Woman Syndrome: An Advance for Women or Further Evidence of the Legal System's Inability to Comprehend Women's Experience?' (1991) 3(2) *Current Issues in Criminal Justice* 267.
[7] s 322P *Crimes Act 1958* (Vic)

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

As I understand, the suggestion that this section be repealed in based on the fact that it has rarely been used effectively and that other defences (including defences and other provisions that are proposed in this CP) may do a better job. Of course, one problem is that if this defence is repealed but other ones are not introduced, then a useful option for some women has been lost. And if this is repealed but mandatory life for murder is retained that is also a problem. However, I have never thought this defence was very helpful and argued against its introduction at the time. It only ever provided a partial defence in circumstances that may well support a full defence. I recommend its repeal providing that mandatory life for murder is repealed and that new partial defences are enacted.

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 issue here is that, despite amendments to try to narrow the partial defence of provocation, it is still used successfully by angry perpetrators of DFV to reduce murder to manslaughter and in some cases of homophobic violence. Again – the risks of repealing it are that we know that some women victims of DFV have used this defence successfully to reduce murder to manslaughter, particularly on a plea. It is my view that it should only be repealed if other partial defences are unacted and mandatory life for murder is repealed.

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?

I take the view that this is not the right way to go. The defence is not that the person is traumatised. The defence is self-defence or other partial defences based on matters we already accept as relevant in the law – with the evidence of DFV being used to show how that is relevant to understanding how the defences apply. The defence is not 'I am a battered

woman'. The defence is self-defence or something else, and it applies here because 'my history as a battered woman helps explain why the defence / partial defence is applicable'.

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?

I am quite attracted to this idea. There is a subjective / objective test: the person perceives the conduct was necessary in self-defence, but the conduct was an unreasonable response to the circumstances as the defendant perceived them.

It is a way to provide an alternative plea or charge for women who kill abusive partners without having to use provocation. Although they should be different concepts, excessive self-defense seems to be a way of possibility replacing the benefits of the partial defence of provocation with a partial defence that abusive male perpetrators cannot so easily take advantage of. However, there may be situations where this defence may not be applicable to the facts – or difficult to explain how it is. Again, the effectiveness of the new sections of the *Evidence Act 1977* (Qld) need to be understood. Limiting the defence to circumstances of DFV could be one way to limit inappropriate application, but one can imagine a range of circumstances beyond DFV where such a defence may provide the kind of morally just outcome juries sometimes seek. It also provides a mechanism for a plea bargain that may be favourable to victims of DFV, but it would be naive to imagine it will not be misused abusive men and others.

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?

Replace with a maximum life sentence.

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?

Entirely discretionary.

Q13 Do you have a preferred approach when combining reforms to the head sentence and non-parole period?

This is outside my expertise.

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?

Q15 What are your views on proposal 7?

I see merit in these suggestions.

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

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?

Although it has been said before, questions 16 and 17 are partly about better training for lawyers (defence and prosecution) in interviewing and recognition of DFV and how to respond. Training in how to bring a trauma informed response to client / complainant work. Some training needs to be very practical, learning what evidence is relevant and how to collect it and how to argue its relevance.

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?

It is difficult to comment on this when the impacts of the reforms to Part 6A of the *Evidence Act* regarding evidence of DFV, jury directions and expert evidence are not known. Perhaps there needs to be comprehensive review of the effectiveness of those laws after 2 years of operation to determine whether further legislative guidance would be helpful.

I note that the section relating to expert evidence on DFV in the *Evidence Act* (s 103CC) is limited in the scope it offers. It says that an expert 'may' give evidence on certain matters and lists two sub-sections. The factors described in those two sub-sections are considerably narrower than the matters listed in s 103CA. There should be no suggestion that the content that can discussed by an expert should be limited. The prosecution should not be given bases for objecting to an expert or their content, because it is known that some prosecutors will take up such opportunities to the potential detriment of defendant victims of DFV.

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

So many things … education for lawyers and judges, increased funding for ATSILS, interpreters, cultural experts, more liaison officer funding and training, more First Nations judicial officers. Universities also need funding and support to encourage and support First Nations law students and law academics. People with much more expertise than I will address this question.