



Review of particular criminal defences

Understanding domestic and family violence and its role in criminal defences

Background paper 3

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THE
CRIMINAL CODE
OF QUEENSLAND,

AND THE

PRACTICE RULES OF 1900.

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Introduction

1. We have been asked to review the following aspects of the criminal law:¹
 - self-defence (ss 271 and 272 of the Criminal Code)
 - provocation as a partial defence to murder (s 304)
 - the partial defence of killing for preservation in an abusive domestic relationship (s 304B)
 - the mandatory penalty of life imprisonment for the offence of murder (s 305)
 - provocation as a defence to assault (ss 268 and 269)
 - the defence of domestic discipline (s 280)
 - practice or procedure for these defences.

Box 1: Explaining the defences we are reviewing

What is self-defence? A person is allowed to defend themselves (or another person) against imminent harm.

What is provocation? Provocation is an act or insult which causes a person to 'lose self-control' and respond violently 'in the heat of passion', usually anger (legal elements discussed in our Consultation Paper). In Queensland it is a complete defence to an assault (resulting in an acquittal) and a partial defence to murder (resulting in a conviction for manslaughter).

What is the partial defence of killing for preservation? Killing for preservation in an abusive domestic relationship is a partial defence that exists only in Queensland and reduces murder to manslaughter. The defence applies where a victim-survivor of serious domestic violence kills their abuser to preserve themselves from death or really serious injury. It does not require a 'triggering assault' (imminent threat) and allows consideration of the cumulative nature of domestic and family violence ('DFV').

What is mandatory life? A person convicted of murder in Queensland must be sentenced to life imprisonment. Usually, they must spend at least 20 years in prison before they may be released on parole. If they are released on parole, they will be supervised in the community for the rest of their life.

What is domestic discipline? Parents, persons in their place (like step-parents or foster carers), or school teachers may use reasonable force to correct, discipline, manage or control a child in their care.

2. We have been specifically asked to examine how the defences are operating in the context of DFV, considering:
 - the findings of the Women's Safety and Justice Taskforce (the Taskforce)
 - the nature and impacts of DFV on victim-survivors
 - the experience of victims and survivors, and their families, in the criminal justice system
 - the need for laws to balance the interests of victims and accused persons.
3. This paper supports our consultation paper by exploring:
 - the nature of DFV and coercive control

- how the legal system responds to DFV
- the impact of DFV on victim-survivors, their children, and the broader community
- community attitudes towards DFV
- how a history of DFV may be relevant to assessing the availability of particular criminal defences.

What is DFV?

Box 2: DFV Statistical snapshot

- 1 in 4 Australian women and 1 in 14 Australian men report experiencing intimate partner violence since the age of 15²
- In 2023-24, Queensland courts made 52,999 domestic violence orders. In the first half of the 2024-5 financial year, 71.9% of protection orders were for intimate personal relationships, 27.8% were for family relationships, and 0.3% were for informal care relationships³
- In the first half of the 2024-5 financial year, 83% of domestic violence orders made in Queensland were to protect a female.
- 40,470 charges were lodged in Queensland Magistrates Courts in 2023-4 for breach of a domestic violence order
- From 2006-21, 76.5% of DFV homicide offenders (intimate partner, family and collateral DFV homicides) were male⁴
- From 2006-21, 75.8% of intimate partner homicide deceased were female⁵

4. DFV and coercive control are commonly used terms when discussing violence in intimate and family relationships. The definitions in the box below are included in the Queensland Government's Common Risk Assessment Framework, which is a 'whole of system framework ... to **enhance the safety of victim-survivors and their children**, and to **hold perpetrators to account**'.⁶ It is consistent with the definition of 'domestic violence' that applies to Queensland's civil protection order scheme under the Domestic and Family Violence Protection Act, which is adopted by the Criminal Code.⁷

Box 3: Defining 'DFV' and 'coercive control'

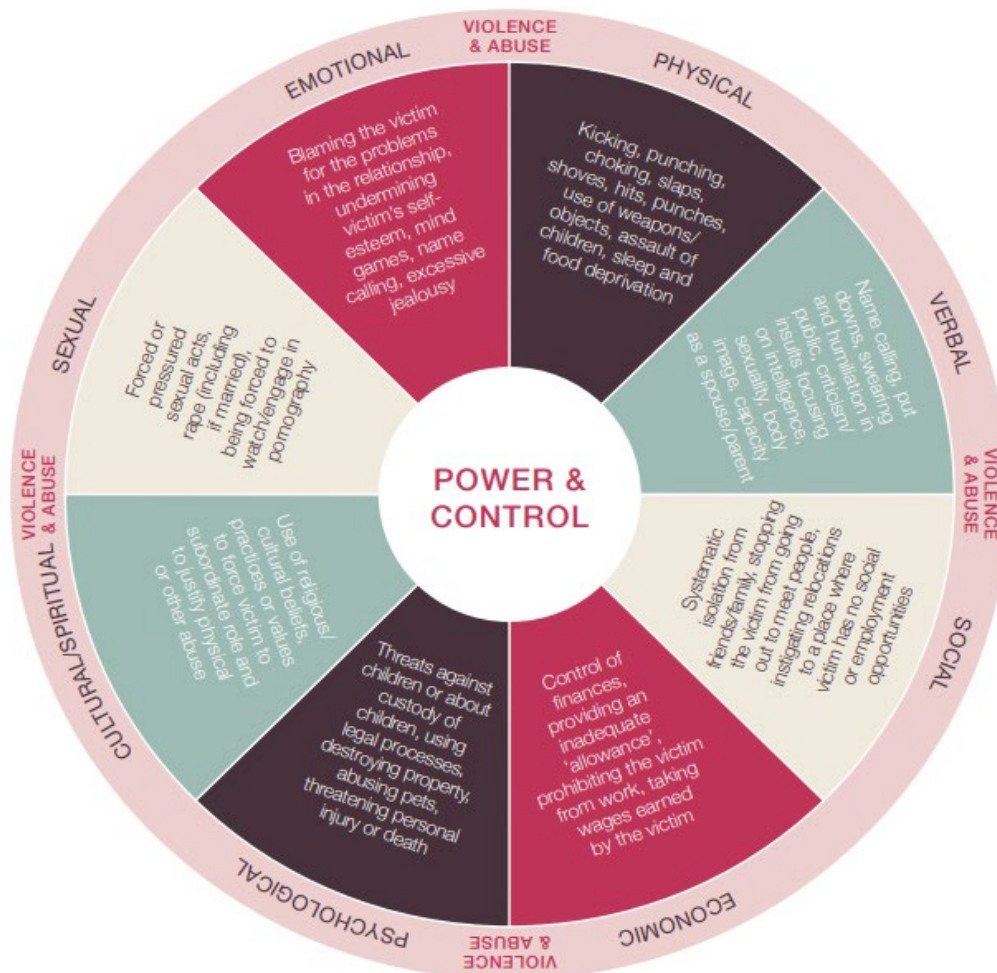
DFV includes behaviour that is physically, sexually, emotionally, psychologically, economically, spiritually or culturally abusive, threatening, coercive or aimed at controlling or dominating another person through fear. The violence or abuse can take many forms ranging from physical, emotional and sexual assault through to financial control, isolation from family and friends, threats of self-harm or harm to pets or loved ones, or constant monitoring of whereabouts or stalking.⁸

Coercive control is a pattern of controlling and abusive behaviour designed to exercise domination and control over the victim-survivor. It can include an extensive range of abusive behaviours that, over time, isolates the victim-survivor from their friends and family and erodes their autonomy.⁹

5. The Taskforce recognised that coercive control is an intrinsic part of DFV and used the terms 'coercive control' and 'domestic violence' interchangeably.¹⁰ References to DFV in this paper include coercive control.

6. DFV includes a broad range of physical and non-physical forms of abuse (see figure 1, below). It can happen in a variety of relationships. 'Domestic violence' usually refers to violence against an intimate partner or ex-partner. 'Family violence' may include violence perpetrated against children, older people, by children against parents and other kin or family members, as well as by a person who has unpaid carer responsibilities.¹¹
7. For abusive behaviours to amount to DFV, they must occur within a 'relevant relationship'. A relevant relationship is an intimate partner relationship, family relationship, or informal care relationship.¹²
8. Conceptualising DFV as coercive control promotes consideration of the pattern of behaviour within the context of the relationship as a whole and its impact on the victim-survivor over time. It shifts the focus away from individual incidents of violence to a broader understanding of the various strategies used by perpetrators to entrap their victim and deprive them of their autonomy. It also provides a proper framework to understand 'violent resistance'¹³ — where an individual uses violence in response to their partner's coercive control — which is essential when considering defences that may be available to victim-survivors who are charged with criminal offences.

Figure 1: Range of power and control dynamics – from Not Now, Not Ever¹⁴



9. DFV needs to be understood as follows:
 - It is gendered.

- It is hidden.
 - It is a pattern of behaviour.
 - It doesn't require physical violence.
 - It entraps victims.
 - Victims manage their risk.
 - Some people and groups are more vulnerable to victimisation (intersectionality).
10. Each of these aspects of DFV is discussed in more detail below.

It is gendered

11. Research consistently demonstrates that DFV is gendered: it is most often used by men against their female intimate partners.¹⁵ There are also significant gender differences between the way men and women use violence within intimate partner relationships. These differences relate to:¹⁶
- the severity of violence
 - the presence of coercive control
 - the motives for using violence
 - the impacts of being victimised.
12. However, people who use violence and their victims can be any gender and abuse can occur within broader family relationships. In some relationships more than one person uses violence. DFV can occur in LGBTIQ+ relationships, between parents and children and siblings and in informal care relationships.
13. The Taskforce considered the gendered nature of DFV and noted ongoing debates about whether men and women experienced DFV at the same rates. It drew a distinction between 'situational violence' and the use of threats and violence to dominate and control. Situational violence is linked to relationship or situational stressors and is more likely associated with fights and arguments rather than dominating or controlling the other person. It may be perpetrated by both men and women at similar rates. However, the Taskforce concluded that coercive control is highly gendered.¹⁷ Most victims of intimate partner homicide are women, and where women kill a male intimate partner, they have almost always been subjected to extended and serious abuse by the deceased.¹⁸
14. Men's use of intimate partner violence is more likely to be motivated by power and control. Men's reasons for aggression are more likely to be directed at specific goals, for example, 'to get her to stop nagging and leave me alone'.¹⁹ Men's use of intimate partner violence is less likely to occur in the context of, or in reaction to, the use of violence by their female partner.²⁰
15. Women's use of intimate partner violence is more likely to be motivated by self-defence and tends to occur in the context of DFV by the woman's male partner.²¹ In 14 studies of women's motivations for use of physical intimate partner violence, none identified control as the primary motive.²² Women's most common reason for physical violence was self-defence, with other common motivations including fear, anger, desire for attention or retaliation.²³

It is hidden

16. DFV usually occurs in private locations and victim-survivors and perpetrators may not disclose it to anyone. A significant proportion of DFV is not reported to police.²⁴ Factors contributing to under-reporting include:²⁵

- Victim-survivors may choose not to report out of fear of not being believed.
- People who experience only non-physical abusive behaviours such as financial abuse and emotional abuse, and women who have experienced sexual violence, may not recognise it as DFV.
- Behaviours which are now recognised as DFV may be 'normal' in some cultural contexts.
- Victim-survivors may choose not to report abuse because they feel ashamed or embarrassed.
- People who use violence may not recognise their behaviours as abusive or may be highly skilled at hiding their abuse and portraying the victim-survivor as the abuser.
- Victim-survivors may deny to others that DFV has occurred, refuse to cooperate with police or seek to have applications for protection orders made by police for their protection withdrawn to protect the person using violence, or prevent adverse impacts to them or their children. This may be motivated by a number of things, including fear for their safety, the safety of their children and safety of those around them as a result of possible retaliation by the abuser, preservation of their identity, shame and desire to protect their abuser.

It is a pattern of behaviour

17. Since 2012, Queensland's civil protection order scheme has recognised that DFV is more than individual incidents of physical violence; it is 'characterised by one person being subjected to an ongoing pattern of abuse by another person who is motivated by the desire to dominate and control them'.²⁶ Despite this, the Taskforce observed that legal and other agency and service systems continue to deal with DFV as isolated incidents, which when viewed in isolation may seem small and insignificant.²⁷ A failure to recognise the patterned nature of DFV can mean that a victim-survivor's response to DFV can be viewed as DFV perpetration.

[P]olice and courts' continued reliance on incident-based approaches to DFV, rather than gender-sensitive assessments of the context of violence, is a significant factor in inappropriate legal responses.²⁸

18. The policy intent of the Domestic and Family Violence Protection Act is to provide protection against future violence in the context of coercive control. However, the broad definition of domestic violence means a single violent incident, or abuse not grounded in power and control, may be described as 'domestic violence'. The Domestic and Family Violence Protection Act is intended to recognise that:²⁹

Both people in a relationship cannot be a victim and perpetrator of this type of violence at the same time ... violence used in self-defence and to protect children can be misconstrued as domestic violence if a broader view of circumstances is not taken.
19. Nancarrow highlights this concern, describing a 'formulaic approach' to domestic violence by police, practitioners and courts where 'proscribed action + relevant relationship = domestic violence'.³⁰ The most significant problem of this approach is its failure to properly consider the broader context of the relationship, the power and control dynamics which may exist, and its potential to contribute to misidentification of the person most in need of protection (described further below). When that occurs, a victim-survivor may be charged and convicted of a criminal

offence and there is a failure to hold the perpetrator accountable. Further, it may lead to, a failure to identify the risk of future harm faced by the victim-survivor and her children.

It doesn't require physical violence

20. Understanding DFV as coercive control challenges widely held views that DFV is only about physical abuse.³¹ It is not. A victim-survivor can experience a climate of fear even if there has not been physical violence. Sometimes fear is established by psychological and emotional abuse. Sometimes a single incident of violence may establish fear that is maintained through continuing psychological and emotional abuse.
21. Treating physical violence as a more serious form of abuse 'disaggregates, trivialises, normalises or renders invisible the ongoing oppression [victim-survivors of coercive control] experience.'³²
22. DFV is often targeted to the individual victim-survivor, chosen for its effectiveness at controlling and dominating them.³³ It can be difficult for people outside the abusive relationship to recognise.³⁴ The victim-survivor themselves may not recognise what is happening to them as DFV, particularly in the absence of physical violence.³⁵

It can trap victims

23. Victim-survivors may feel they are unable to leave an abusive relationship for many reasons. Barriers to leaving an abusive relationship can include:
 - shame of disclosing abuse
 - a lack of financial independence
 - concerns for their children, pets and extended family, and their ability to care for children on their own
 - difficulties accessing safe, affordable accommodation
 - inadequate formal supports, such as affordable childcare
 - lack of social supports and networks
 - religious and cultural beliefs and pressures
 - fear of retaliation by the person using violence or others.
24. Perpetrators may coerce or manipulate the victim-survivor to actively prevent them from leaving and to diminish their self-worth, so they are unable to leave. Victim-survivors may also be deterred from leaving because of poor responses by police and other services providers to their prior attempts to seek help.
25. Leaving an abusive intimate partner relationship can significantly increase the risk a victim-survivor faces. Separation may cause the perpetrator to respond violently, with life-threatening or lethal violence.³⁶ Death reviews have identified strong correlations between separation and male perpetrated intimate partner homicide.³⁷

Victims understand and manage risk

26. Victim-survivors often inherently understand the risks their abuser poses to their own and their children's safety. Their fear is often a strong indicator of the threat they face.³⁸ A victim's intuitive sense of being in danger was a key lethality indicator in 53.2 % of intimate partner deaths examined between 2011 and 2018.³⁹ This means that just over half of deceased people killed by an intimate partner knew they were facing lethal danger.

27. A range of strategies may be used by victim-survivors to manage risk. Understanding these strategies, including resistive violence, can reduce misidentification, improve system responses, increase the safety of victim-survivors and promote greater perpetrator accountability. It also helps challenge 'ideal victim' narratives.

Box 4: Violent resistance by victims of DFV – Domestic and Family Violence Death Review and Advisory Board⁴⁰

While victims are often stereotypically viewed as passive and submissive, whenever an individual experiences violence or abuse they resist. The way in which victims of domestic and family violence resist, is dependent on their individual circumstances and perceived level of risk. ...

In their day to day lives, victims resist violence in many ways that may be unsuccessful in stopping the abuse, but are important expressions of dignity, self-respect and their efforts to protect themselves and others, particularly their children. ...

Victim resistance is often overlooked or misunderstood across the system. Frequently, it is invisible to services unless it is overt or successful in stopping the violence, such as when women use **physical violence for self-defence or self-protection**. This is known as resistive violence. ...

To effectively respond, services need to understand the gendered nature of domestic and family violence and consider women's use of physical violence in context, such as by identifying any underlying patterns of coercive control. This is particularly important to avoid the misidentification of female victims as perpetrators of domestic and family violence when they have tried to resist their abusers overtly.

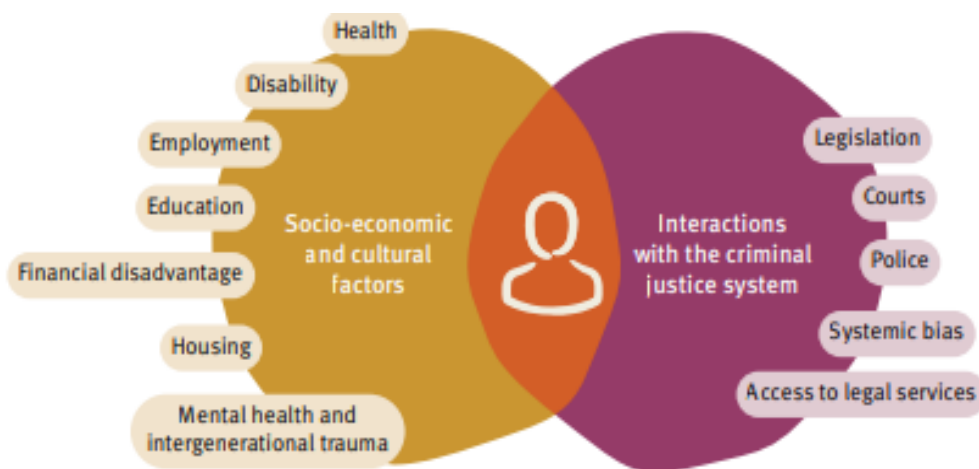
Intersectionality

28. DFV can happen to anyone. An individual's experience of DFV may intersect with and be affected by their life experiences, including of sexism, racism, homophobia and ableism.⁴¹ It may also be affected by their personal, cultural, social and structural experiences of trauma, and those of their abuser. All these factors can impact a person's ability to escape or employ strategies to reduce the impact of the abuse.
29. Certain groups within the broader population are particularly vulnerable to DFV. These known vulnerabilities are reflected in the 'person most in need of protection' provision (discussed below).
30. Significant vulnerabilities to DFV victimisation are experienced by women, children, pregnant people, young people, older people, people affected by substance misuse, people who are culturally and linguistically diverse, people who primarily speak a language other than English, people with poor literacy skills and people who are misidentified or offend because of their experiences of DFV.⁴² Poverty, lack of secure housing and socio-economic disadvantage can also increase the impacts of DFV.⁴³ LGBTIQ+ peoples may also experience increased vulnerability.
31. When people belong to more than one vulnerable population the impact of their vulnerabilities can magnify their experiences of discrimination and marginalisation. It also impacts the responses they experience from services and agencies they interact with, including police, social services, and child safety. In the context of DFV, this may mean they face significant vulnerability to abuse, barriers to seeking help, and entrapment in abusive relationships. All vulnerabilities may significantly impact how an individual experiences DFV. We have considered some significant vulnerabilities in more detail below.

Aboriginal peoples and Torres Strait Islander peoples

32. Aboriginal peoples and Torres Strait Islander peoples may experience DFV perpetrated by Indigenous and non-Indigenous family members. Broad understandings of family and kinship expand the range of relationships in which DFV may occur.⁴⁴
33. Aboriginal and Torres Strait Islander women are at greater risk of all forms of violence and violence related death than non-Indigenous women.⁴⁵ Often by the time an Aboriginal victim-survivor or Torres Strait Islander victim-survivor seeks help they have already experienced extended abuse and the risk they face may be extreme.⁴⁶
34. Many factors contribute to the very high rates of DFV and the difficulty Aboriginal peoples and Torres Strait Islander peoples and their communities experience in seeking help. Past acts of dispossession, settlement and discriminatory policies and government acts have contributed to 'economic and social disadvantage and mistrust in the justice system'.⁴⁷
35. Policies and laws intended to respond to DFV abuse and to protect victim-survivors, and how they are enforced, have and continue to contribute to the over-representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system as both offenders and victim survivors.
36. The drivers of the disproportionate representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system also drive vulnerability to DFV and its impacts.

Figure 2: Drivers of disproportionate representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, Queensland's Aboriginal and Torres Strait Islander justice strategy⁴⁸



Box 5: Key findings of the Independent Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence relevant to Aboriginal peoples and Torres Strait Islander peoples and their communities⁴⁹

- Aboriginal and Torres Strait Islander peoples are both over-policed and under-policed in the context of DFV. These practices, combined with an increased focus on policing DFV, have contributed to the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

- Common police practices, attitudes and beliefs particularly disadvantage Aboriginal and Torres Strait Islander women, who may be misidentified as the perpetrator of DFV.
- Protection orders that are not tailored to the needs of the specific relationship can become counter-productive. Impractical or unnecessarily onerous conditions, and conditions which are not properly understood by the parties (either because of complex language, or because the parties were not involved in the legal process which saw the conditions being imposed), are more likely to lead to breaches and subsequent criminalisation.
- Inadequate access to legal representation and assistance is more prevalent in regional and remote communities. This compounds the systemic disadvantages faced by Aboriginal and Torres Strait Islander people who live in these communities.

37. Research has recognised that violence is significantly underreported by Aboriginal people and Torres Strait Islander people who are victim-survivors.⁵⁰ Reasons for under-reporting include:
- fear of police⁵¹
 - limited access to culturally safe services and responses⁵²
 - not wanting their partner exposed to the risk of being imprisoned and becoming a casualty of a death in custody⁵³
 - fear their children will be removed⁵⁴
 - fear they will be arrested⁵⁵
 - language and communication barriers.⁵⁶
38. During preliminary consultations we heard that coercive control does not adequately explain the diversity of violence experienced by Aboriginal peoples and Torres Strait Islander peoples, particularly in rural and remote communities. In these communities, both persons may use violence and abuse may not be underpinned by power and control. This often arises in the context of life 'chaos' and sometimes to resolve disputes between families and groups within a community. These views are consistent with Nancarrow's analysis, which studied prosecutions in Queensland of civil protection order breaches and identified three broad types of violence: coercive control, violent resistance, and 'fights'.⁵⁷

Children

39. Understanding children's experiences of DFV is important for this review. We are required to consider whether changes are required to the defence of domestic discipline. We are also required to consider how the other defences under review are operating from the perspective of victim-survivors, which includes children.
40. Children are particularly vulnerable to DFV for various reasons, including their immature age and dependence on caregivers for safety, security and other basic needs. Children may be direct victims of DFV and personally experience physical, emotional, psychological or sexual violence or neglect at the hands of parents, caregivers or other relatives. They may also be victimised through exposure to DFV in the family home. Children, particularly teenagers, may also experience DFV in intimate partner relationships. It is important to recognise children as DFV victim survivors in their own right.⁵⁸ Doing so helps to develop laws and policies which address children's needs and unique experiences.
41. There are five recognised categories of child maltreatment: physical abuse, sexual abuse, emotional abuse, neglect and exposure to domestic violence.⁵⁹ When maltreatment happens in the context of a 'relevant relationship', it may amount to DFV.

42. The Australian Child Maltreatment Study (ACMS) found that exposure to DFV is the most common form of child maltreatment.⁶⁰ However, 'child maltreatment is rarely limited to a single type' and maltreatment in many forms is common.⁶¹ 'Most maltreatment is chronic, occurring multiple times, or over a period of years.'⁶² This reinforces the need to recognise and investigate DFV as a pattern of behaviour and consider cumulative harm.⁶³
43. Exposure to DFV appears widespread in cases of reportable child deaths.⁶⁴ Research also establishes that a history of DFV is present in a majority of cases where parents are charged with killing their own children.⁶⁵
44. Domestic discipline, also known as corporal punishment, is not considered physical abuse because it is legally permissible. However, corporal punishment can increase the risk of physical abuse and may co-exist with other types of maltreatment. The Child Death Review Board considered several cases where it appears there was evidence of the use of physical violence for disciplinary purposes and the child subsequently died.⁶⁶ It noted:

For child protection workers tasked with assessing harm and risk, it can be difficult to determine whether a disclosure from a child is describing physical abuse or legal levels of domestic discipline.⁶⁷
45. Our research is consistent with this and suggests that the defence of domestic discipline may be contributing to failures to identify child abuse and properly assess risk (see our consultation paper for preliminary findings from our research).
46. Children may face additional barriers to disclosing abuse. The Child Death Review Board noted that in some child death cases they considered, 'children had tried to tell the adults around them they were being hurt or feeling unsafe and scared' but many were not believed, particularly where their disclosure was contradicted by others.⁶⁸ Children may also try to cover for abusive parents and caregivers.⁶⁹

People with disability

47. People with disability or impairment may be particularly vulnerable to DFV. Women with psychosocial disabilities are significantly more likely to have experienced DFV than other women.⁷⁰ The experience of disability may make it harder for a person to leave an abusive relationship or to seek help.
48. Individual experiences of disability or impairment can be complex and intersecting. The World Health Organisation's International Classification of Functioning, Disability and Health views disability as an 'umbrella term for impairments of body function or structure, activity limitations or participation restrictions'.⁷¹ Health conditions interact with environmental and/or personal factors to impact an individual's experience of disability.⁷²

Rural and remote communities

49. Queensland is vast and many Queenslanders live in rural and remote areas. Small communities and geographic isolation can compound the impacts of DFV. Additional factors include limited access to services, privacy and confidentiality concerns, increased prevalence of traditional gender norms, and greater access to firearms.

Legal system responses to DFV

50. There are both civil and criminal laws which address DFV.

51. The criminal law addresses past acts of DFV. When there is sufficient evidence, police may charge the perpetrator with a criminal offence, for example, assault or strangulation. The Taskforce recognised that the criminal law often neglected non-physical types of abuse. It recommended changes be made to the offence of stalking, and that an offence of coercive control be introduced, to better reflect the ongoing, patterned nature of DFV and a more nuanced understanding that many types of abuse are not physical. Criminal charges must be proved beyond a reasonable doubt. The victim-survivor is not a party to court proceedings, which are brought by the state. Instead, they are a witness.
52. Civil protection order schemes are designed to address future risk and protect victim-survivors and their children from future harm through the making of a 'protection order'.⁷³ Protection orders impose a variety of conditions on the 'respondent' (perpetrator) with respect to the 'aggrieved' (the victim-survivor). Orders may be temporary or permanent. When contested, orders are made only if there is proof, on the balance of probabilities, of DFV in a relevant relationship and when the order is necessary or desirable to protect the aggrieved and named persons. Respondents to an application for a protection order may consent to a protection order being made without admitting to any of the allegations of DFV. Most applications for protection orders are made by police, but individuals may apply for an order without the help of police. Queensland's civil protection order scheme is governed by the Domestic and Family Violence Protection Act.
53. There is intersection between the criminal law and civil protection order scheme: breaching the conditions of a protection order is a criminal offence. If a person is subject to a protection order when they commit a criminal offence related to the aggrieved or DFV generally, the offence may be determined to be more serious.
54. The powers given to police by the Domestic and Family Violence Protection Act are considered unusual given they limit a person's civil liberties and criminal consequences follow from a breach.⁷⁴ However, the laws were considered necessary to address abuse of unequal power relationships exercised predominantly by men over their female partners.⁷⁵ Nancarrow et al note:⁷⁶

The idiosyncratic DFV civil laws were designed, and are justifiable, for coercive controlling abuse. ... While no abuse is ever acceptable, incident-based abuse does not result in the same barriers to help-seeking as coercive control. It is, thus, more difficult to justify the use of exceptional state power (and resources) in civil DFV laws for abuse that is not an expression of coercive control.

Criminalisation of DFV has had unintended consequences

55. Unfortunately, the criminalisation of violence against women has had unintended consequences.⁷⁷ Most significantly, it has increased arrest of women victim-survivors and led to their subsequent incarceration.⁷⁸ This is particularly so for Aboriginal and Torres Strait Islander women. In conducting this review, we are focused on ensuring that the criminal defences under review respond to the lived experience of victim-survivors and do not contribute to the further criminalisation of victim-survivors.

The person most in need of protection

56. Policy and legislation have evolved to recognise that DFV is patterned and that, in most cases, even where there is 'mutual violence', one party will be the **primary aggressor** and the other person will be **the person most in need of protection**.

57. In 2023, section 22A of the Domestic and Family Violence Protection Act was enacted which defines the person most in need of protection.

Box 6: Identifying the primary aggressor and the person most in need of protection

The behaviour of the primary aggressor towards the person most in need of protection is more likely than not to be:

- abusive, threatening or coercive
- controlling or dominating, causing the person most in need of protection to fear for the safety of themselves, their child, another person or an animal.

The person most in need of protection is more likely than not to use abusive behaviours:

- for protection of themselves, their child, another person or an animal
- in retaliation for the primary aggressor's behaviour towards themselves, their child, another person or an animal
- because of the cumulative effect of the primary aggressor's DFV towards the person most in need of protection.

Factors relevant to an assessment of who is the person most in need of protection:

- the history of the relationship including any previous domestic violence
- the nature and severity of the harm caused to each person by the behaviour of the other person
- the level of fear experienced by each person because of the behaviour of the other person
- which person has the capacity to seriously harm the other person
- which person has the capacity to control or dominate the other person and cause the other person to fear for their own safety and wellbeing (or that of a child or pet)
- whether the person has characteristics that make them particularly vulnerable to DFV (examples include women, children, Aboriginal peoples and Torres Strait Islander peoples, peoples from a culturally and linguistically diverse background, people with a disability, LGBTQIA+ people, elderly people).

58. This legislative change, while important, must be supported by training and education campaigns to ensure police, legal practitioners, judicial officers and the community all have a better understanding of DFV.

59. We have also seen potential problems that may arise when courts are required to determine the person most in need of protection. In *MAS v FEM*, Magistrate Sinclair noted:⁷⁹

The court has no power to conduct an investigation; only to determine the applications the parties bring as best it can from the evidence that is produced. ...As is common, the Court has little more to go on than the versions recorded by police attending to isolated events.

Misidentification and criminalisation of victim-survivors

60. Misidentification refers to a victim-survivor of abuse being wrongly labelled a perpetrator. It may occur where a victim-survivor has used 'resistive violence', in cases involving 'mutual violence' or where there are conflicting stories about what occurred. 'Incident-based' policing, discussed above, contributes to misidentification.

61. Misidentification generally starts with a victim-survivor being named as a respondent on a protection order or when cross-orders are made. 'Cross-orders' are when both parties in a DFV situation apply for, and obtain, a protection order naming the other person as the 'respondent'. This means they are simultaneously recognised as both a 'victim' and 'perpetrator'. It may lead to criminalisation where 'the DFV victim-survivor breaches the civil protection order, or if other criminal charges are laid'.⁸⁰
62. The Domestic and Family Violence Protection Act is intended to recognise that, except in exceptional circumstances, both people in a relationship cannot be the person most in need of protection.⁸¹ Changes were recently made to the civil protection order scheme to address the problem of misidentification and the high incidence of cross-orders.
63. Misidentification can have lifelong consequences for victim-survivors, undermining confidence in the legal system, removing access to support and protection, and unintentionally supporting systems abuse and coercive control by the primary aggressor.⁸² Criminalisation resulting from misidentification can have devastating consequences including imprisonment and separation from children. It also means that the primary perpetrator of abuse is not held accountable.
64. Risk of misidentification is greater where victim-survivors have alcohol or drug misuse and mental health issues, and where victim-survivors have used resistive violence,⁸³ and do not present as the 'ideal victim'.⁸⁴ Aboriginal and Torres Strait Islander women risk being misidentified because they are more likely to use resistive violence and don't present as a stereotypical 'ideal victim';⁸⁵ they are more likely to be charged with breaching a protection order and are more likely to be imprisoned for a breach offence.⁸⁶

Box 7: The 'ideal victim'

The 'ideal victim' refers to a stereotype of a victim who is perceived as more deserving of sympathy and support.

'Ideal victimhood is highly gendered, with research showing that women are more likely to be blamed for their experiences of violence if they are seen to be challenging or not conforming with societal gender norms.'⁸⁷

Women are more likely to be recognised as 'deserving victims' if they:

- are white. Aboriginal and Torres Strait Islander women are misidentified at much higher rates than other women. Aboriginal and Torres Strait Islander women whose partners are white may be particularly vulnerable to misidentification
- are smaller than their abuser. Women who are larger than their abuser may be seen as not needing to physically defend themselves
- do not fight back or have a criminal record. Women who respond to abuse with violence are seen as not requiring protection and risk being made the respondent to protection orders and charged with criminal offences
- are monogamous and 'good' mothers who actively protect their children from the abuser. Women who are unable to protect their children, or whose children are removed from their care can be 'demonised' as 'bad mothers' or 'bad women'; consultees have told us they are judged against higher standards than men in sentencing

- do not have drug or alcohol or mental health issues, and are able to effectively communicate with police and support services. Women who are intoxicated and 'hysterical' may be seen as not requiring protection
- are not homeless or otherwise marginalised
- experience physical rather than non-physical forms of DFV

65. The Taskforce was concerned about the rates of police misidentification of the person most in need of protection.⁸⁸ In just under half of cases of DFV related female deaths, the woman had been wrongly identified as the respondent on a domestic violence order.⁸⁹ Moving away from incident-based policing and properly identifying the person most in need of protection from the beginning of a police investigation can help reduce misidentification and improve justice system outcomes.
66. Misidentification in cases of criminal charges may limit access to defences or contribute to a decision to plead guilty on a negotiated basis rather than contesting a matter and potentially accessing a complete defence of self-defence. Where a woman has been previously named as a respondent on a protection order, or where she has criminal convictions relating to breaches or for using resistive violence, these may be used to undermine her credibility and suggest that she was the aggressor.
67. Police, lawyers and judicial officers play a critical role in ensuring the primary aggressor and person most in need of protection are accurately identified. This highlights the importance of police gathering relevant information and making an evidence-based determination regarding who is the person most in need of protection when applying for orders and issuing police protection notices. It also demonstrates the importance of lawyers taking a proper history from their clients and appropriate inquiries being made during the court process.

Language matters

68. The Domestic and Family Violence Death Review Advisory Board explored how 'mutualising or minimising language', reflected in poor or inaccurate record keeping, contributes to simplistic responses that do not keep victim-survivors and their children safe or hold perpetrators to account. In our research, we have seen this type of language used during criminal trials and sentencing.⁹⁰
69. Mutualising or minimising language may describe DFV or episodes of violence as 'communication issues', 'relationship issues', 'toxic' relationships, 'domestic situations' or 'anger management' issues.⁹¹ Such language 'implies that the victim-survivor is at least partly to blame, minimising the perpetrator's choice to use violence, distorting the reality of who did what to whom, and re-framing women's lived experience of violence'.⁹²
70. Failure to properly understand and record DFV may increase the risk faced by victim-survivors, conceal the dangerousness of the perpetrator, and impact how the use of resistive violence is interpreted.⁹³

Impacts of DFV

71. The National Plan to End Violence against Women and Children 2022-2032 noted the substantial impact of DFV on individuals and the broader community:⁹⁴

The impact of this violence ripples out across Australian families, communities and society as a whole. Intimate partner violence is the main preventable risk factor that

contributes to illness and death in women aged 18 to 44. It is the leading driver of homelessness and incarceration for women. Children exposed to violence experience long-lasting effects on their development, health and well-being. Violence against women and children also costs the economy \$26 billion each year, with victim-survivors bearing approximately 50% of that cost. (footnotes omitted)

Impact on individuals

72. At the extreme end, DFV can cause or contribute to the death of victims, perpetrators, bystanders, new partners, and children.
73. There are also significant physical and health impacts associated with experiencing DFV. Given the gendered nature of DFV, the health consequences are disproportionately experienced by women. Victim-survivors of DFV may suffer injuries such as bruises, fractures and chronic pain. DFV has also been associated with long term health conditions including gastrointestinal issues, cardiovascular disease and reproductive health problems.⁹⁵ Victim-survivors of DFV are also more likely to experience mental health issues such as depression, anxiety, post-traumatic stress disorder ('PTSD') and suicidal ideation.
74. Research suggests that intimate partner violence contributes to 9% of the total disease burden for women aged 15-44 years, with 60% being attributable to mental health problems. DFV is a leading contributor to illness, disability and premature death for this cohort.⁹⁶
75. The impacts of DFV in Aboriginal and Torres Strait Islander communities are even more stark. Hospitalisations for non-fatal incidents involving DFV were 34.2 times higher for Aboriginal and Torres Strait Islander women, compared to non-indigenous women, and 28.3 times higher for Aboriginal and Torres Strait Islander men compared to the rate for non-indigenous men.⁹⁷ Aboriginal and Torres Strait Islander peoples also experience mental health problems associated with DFV, and these are compounded by intergenerational trauma, cultural dislocation and barriers to accessing culturally appropriate services.
76. An emerging area of research is exploring the link between DFV and acquired brain injury. A 2018 study led by Brain Injury Australia found that DFV is a major cause of brain injury.⁹⁸ Forty per cent of victim-survivors of DFV attending Victorian hospitals from 2006 to 2016 had sustained a brain injury.⁹⁹ This study included a literature review, which found that brain injury is seldom diagnosed in the 80 per cent of female victim-survivors of DFV attending hospital with facial injuries. It is likely that brain injury in victim-survivors of DFV is significantly unreported or undiagnosed.
77. People who are victim-survivors of DFV may experience multiple traumatic brain injuries over time. Any assault to the head, neck or airways, including strangulation, can cause a brain injury. Brain injury can lead to physical, cognitive and behavioural disability, which may impact their ability to leave the relationship or seek help.¹⁰⁰ Acquired brain injury has also been linked to increased perpetration of violent crime generally.¹⁰¹ It may also contribute to various long term consequences, including cognitive impairment, early onset dementia, and psychiatric disorders, which may affect how a victim-survivor engages with police and their ability to participate in criminal justice processes.

Impact on children

78. More than one million children experience DFV directly or indirectly.¹⁰² The impacts on children are seen across various systems including:¹⁰³
 - health systems — children may be injured during DFV incidents¹⁰⁴ and experience significant mental health issues because of DFV (mental health impacts noted below)

- child safety and other social support services — DFV contributes to and occurs alongside housing instability, homelessness and child removal¹⁰⁵
- criminal justice system — boys who witness DFV are more likely to approve of violence and may become offenders in the future.¹⁰⁶

Box 8: ANROWS – Mental health impacts on children who experience DFV¹⁰⁷

Children who experience DFV are more likely to be diagnosed with many mental health issues:

- 1.2 times more likely to be diagnosed with a psychological development disorder
- 1.4 times more likely to be diagnosed with a depressive disorder
- 1.4 times more likely to be diagnosed with schizophrenia and psychoses
- 1.4 times more likely to be diagnosed with an organic disorder
- 1.5 times more likely to be diagnosed with an anxiety disorder
- 1.6 times more likely to be diagnosed with intentional self-harm
- 1.8 times more likely to be diagnosed with a personality disorder
- twice as likely to be diagnosed with a substance use disorder

79. The use of reasonable force to discipline a child is not considered to be DFV (which is explored further above and in our consultation paper) and is legally permissible. Despite this, the use of corporal punishment has been associated with a variety of detrimental outcomes including increased risk of physical harm, mental health issues, behavioural problems, negative impacts on cognitive and social-emotional development, poor academic performance and perpetuation of the cycle of violence (with those who experience corporal punishment more likely to use or be the victim of future DFV).¹⁰⁸ In many respects the impacts of corporal punishment on children mirror the adverse impacts of experiencing or exposure to DFV noted above.

What are community attitudes towards DFV?

80. In this section we look at community attitudes to DFV as relevant to our review. Our community attitudes survey has helped us understand how Queenslanders' attitudes and understanding of DFV aligns with the laws we are reviewing. It supplements extensive work done at a national level to better understand community attitudes towards DFV and increase community awareness and understanding.¹⁰⁹ The findings of that research project are explored further in [Research Report 1: Community attitudes to defences and sentences in cases of homicide and assault in Queensland](#).
81. Community understandings of DFV may impact decisions made by police, prosecutors, defence lawyers and judges. They also impact jury deliberations. This occurs where a victim-survivor is the complainant and in cases where the victim-survivor is charged with a criminal offence in response to DFV victimisation. Community attitudes may influence the availability of defences and decisions about whether to proceed to trial or plead guilty.
82. The results of the community attitudes survey have informed the reform proposals in our consultation paper. A key finding of our community attitudes survey was that 'individual attitudes and knowledge about DFV influenced whether people thought DFV defendants should have a defence'.¹¹⁰ The survey shows that the community does not support provocation as a defence or any defence based on anger, jealousy and control. The research also shows that men and women understand DFV differently and that further work is required

to educate the community about how DFV may entrap victim-survivors and impact their behaviour.

Community attitudes are changing

83. The survey results demonstrate growing awareness and understanding of DFV in the Queensland community. Most participants did not minimise DFV or blame victim-survivors for their abuse (key finding 1).¹¹¹ This is broadly consistent with the most recent National Community Attitudes Survey, both for Queensland and Australia generally, which found significant improvements in understanding and rejection of violence and inequality in Queensland and across Australia between 2009 and 2021.¹¹²
84. There are still some gaps in understanding. Individual attitudes and knowledge of DFV influenced whether people thought DFV victim-offenders should have a defence (see further, key finding 2).¹¹³

Community attitudes to the defences in the context of DFV

85. To find out what the community thinks about complete and partial defences, community members were presented with scenarios where one person seriously harmed or killed another person, and asked what they thought would be an appropriate outcome in each case. A number of the scenarios included factual circumstances of DFV assaults or homicides.
86. Key findings 2, 8 and 10 demonstrate ways the community thinks DFV should impact the availability of defences. Key finding 10 found 'strong community support for partial and complete defences and consideration of abuse for victim-survivors of DFV who kill an abusive partner.'¹¹⁴

Self-defence

87. The research demonstrates that when women kill their male partners, in most cases they are the primary victim of DFV, face significant risk of being victims of intimate partner homicide,¹¹⁵ and are using force defensively, regardless of whether their response to a threat is immediate or delayed.¹¹⁶ Despite this, most women plead guilty to manslaughter instead of proceeding to trial in an attempt to achieve an acquittal to murder, even when they may have acted in self-defence. This decision is likely influenced by several factors, including the current legal test for self-defence, the certainty of facing life imprisonment if convicted of murder, previous experience of being misidentified as the perpetrator of DFV, and not conforming to the stereotype of an 'ideal victim'.
88. The findings from the survey suggest community members have a sound understanding of the traditional conceptions of self-defence. Participants were able to decide whether self-defence should be available by considering factors such as necessity and proportionality (key finding 5).¹¹⁷
89. However, the results suggest self-defence does not work well for victim-survivors of self-defence who act in response to abuse. In a scenario which involved a woman who killed an abusive intimate partner, 64% of respondents thought manslaughter was appropriate, 19% murder, and 16% thought she should be not guilty of any offence.¹¹⁸
90. Where participants said murder or manslaughter was appropriate instead of an acquittal, some explained the defendant could have left rather than kill her abuser, and some said her response was disproportionate to the threat posed by the abuser.¹¹⁹ This suggests 'a lack of understanding of the cumulative and longer-term impacts of DFV on victim-survivors, including of social entrapment within relationships'.¹²⁰

91. The changes to self-defence proposed in our consultation paper may help counter some of these misconceptions and facilitate self-defence being more readily available where victim-survivors of DFV kill for self-preservation or to protect children.
92. Sexual assault is common in DFV. The most recent report of Domestic and Family Violence Death Review Advisory Board observed that '[c]ultural myths about 'real rape' and cultural norms about DFV as 'private' continue to strongly influence societal responses to [intimate partner sexual violence]'.¹²¹ Rape is seen as something committed by a 'deviant perpetrator' stranger, which contradicts the empirical evidence that 'most sexual assaults are perpetrated by an intimate partner or someone else known to the victim.'¹²² However, under existing laws self-defence is not available in homicide cases where the triggering assault is a sexual assault.¹²³
93. When presented with a scenario where a victim of sexual assault killed the perpetrator to stop the sexual assault, only 21% of participants thought the defendant should be acquitted based on self-defence. This suggests that the serious and ongoing harms of sexual violence, and how sexual violence undermines physical and psychological autonomy, may not be well understood by the community. Amending self-defence to apply to use of force in response to sexual assault may be warranted.¹²⁴
94. The persistence of community misunderstandings of DFV, even amongst a minority of participants, also demonstrates a need for careful consideration of changes to practice and procedure to support improved access to self-defence by victim-survivors.

Partial defences generally

95. The availability of partial defences — which may act as a 'safety net' where an accused person chooses to go to trial for murder — is likely a significant factor in Queensland having the highest number of acquittals for victim-survivors who kill their abuser.¹²⁵ Community attitudes support a partial defence being available to victim-survivors who kill their abuser. Nearly two thirds of survey respondents thought the female defendant should be convicted of manslaughter.

Killing on provocation

96. The community did not support provocation defences where the response to provocation was seen as disproportionate (key finding 3),¹²⁶ where the provocative conduct was seen as 'mere words'¹²⁷ or where the response was motivated by anger, jealousy or a desire for control, particularly in DFV matters (key Finding 8).¹²⁸ The community also focused on perceptions of threat and availability of other options in deciding whether a defence of provocation or self-defence should apply.¹²⁹ This suggests the community sees defences as having greater merit where the victim poses a threat to the defendant, rather than where the defendant loses control of their emotions.
97. In circumstances where a male defendant killed their female intimate partner because she was having an affair, 83.6% of respondents thought the defendant should be found guilty of murder and 15.1% said he should be guilty of manslaughter. Less than 1% said he should be found not guilty.¹³⁰ Participants described the defendant's responses to both the victim's taunts about his sexual prowess or spitting as 'an overreaction and an extreme expression of control.'¹³¹ His motivations were described as 'jealousy, revenge and a desire to control' and the manner of killing (strangulation) demonstrative of a desire to control the victim.¹³² Significantly, very few participants thought there were factors which should reduce this defendant's culpability. Many respondents expressed the view that the defendant's response was completely unacceptable.

Assault provocation

98. There was very little community support for a complete defence of assault provocation in cases involving DFV.¹³³ 95.6% of respondents were against the assault provocation defence applying in the DFV scenario, regardless of either the victim-survivor's conduct or degree of injury.¹³⁴ Where participants were told the victim-survivor was having an affair a small proportion of participants (mainly men) thought there should be a defence,¹³⁵ with perceptions of reduced culpability associated with victim-blaming and minimising attitudes to DFV.¹³⁶ Many also saw the defendant's response as disproportionate to any provocation.¹³⁷ Some expressed the view that excusing the behaviour condoned DFV.¹³⁸
99. Proposal 6 in our consultation paper, to exclude assault provocation in cases involving domestic violence, is consistent with community attitudes.

Domestic discipline

100. In some circumstances a parent's use of force to correct, discipline, manage or control a child may be an assault and a DFV offence. Responses to our community attitudes survey suggest the community support alternatives to criminal prosecution where parents use minimal force to discipline children.¹³⁹ However, the nature of the violence and any resulting injury affected views as to whether criminal charges should be a consequence. Where more serious force was used, or where injury resulted, there was greater support for criminalising the use of corporal punishment. A number of participants who thought a criminal conviction should result also expressed the view that using physical force against a child was never justified.¹⁴⁰
101. In response to a scenario where a mother slapped her 14-year-old daughter's face when she refused to hand over her mobile phone after being caught using it contrary to family rules, a majority thought the mother should be guilty of assault (56.6%). In contrast, where the mother grabbed the child's hand tightly to encourage her to hand over the phone, only 6.7% said the mother should be convicted of assault.¹⁴¹
102. A number of participants observed that 'if the incident was part of a broader pattern of abuse, then [the mother's] culpability increased and she should be guilty of assault.'¹⁴² A number of participants thought an educational or social services approach was more appropriate, with some suggesting criminal justice responses were not the best approach in this sort of matter.¹⁴³ Some suggested that 'violent or aggressive disciplinary actions may teach young people that these behaviours are appropriate for resolving conflicts within families,' and could normalise intimate partner violence and family violence.¹⁴⁴ Participants who demonstrated victim-blaming attitudes to DFV were less likely to think the mother should be guilty of assault.¹⁴⁵
103. The approaches taken by participants to considering culpability are consistent with 'a broader body of research which has attempted to identify a criterion for differentiating between physical forms of corporal punishment, and violence against children (i.e. child abuse)'. However, there is not a clear consensus on which criteria would be appropriate. Many 'child protection researchers and advocates have argued all forms of corporal punishment, regardless of intention and whether they result in actual harm, should constitute violence against children'.¹⁴⁶ For the community, 'understanding the consequences of the conduct for the young person was crucial for determining culpability, and interrelatedly, whether the conduct constituted assault.'¹⁴⁷

Men and women have different attitudes

104. There were significant differences in the attitudes of male and female participants, with men:¹⁴⁸
- having higher minimising and victim-blaming attitudes (though this difference was minor with most participants, both men and women, having low levels of minimising and victim-blaming attitudes)
 - more likely to minimise the impact of non-physical forms of abuse
 - more likely to underestimate the gendered impact of DFV.

Some still do not understand how DFV impacts victims

105. Responses to the community attitudes survey and focus groups suggest that some in the community still do not understand how DFV can entrap a victim-survivor, nor the significant lethality risk faced by victim-survivors of coercive control. Such misconceptions can limit the availability of appropriate defences.
106. The responses of a small number of participants suggest that gendered norms and narratives of 'ideal victimhood' persist in Queensland.¹⁴⁹ For example, when a victim-survivor was described as admitting to an affair some participants 'believed [the defendant's] culpability was reduced.'
107. Many focus group participants could not understand why the female defendant who killed her abusive partner did not leave. Our research indicates that victim-survivor participants were 'able to articulate and describe the barriers that Diana would have experienced to leaving her abuser and why she may have felt that she had to kill him to escape'. They note that these participants used their own experience to explain how abuse closed their 'avenues for effective help-seeking'.¹⁵⁰

Defences and DFV

108. Queensland's DFV framework, including the criminal law and civil protection order scheme, is designed to keep victim-survivors and their children safe while holding perpetrators accountable for their use of violence. Defences should not operate as a tool to excuse DFV or reduce or eliminate criminal culpability in cases where perpetrators commit violent offences. They should also be readily accessible to victim-survivors who are trapped in abusive relationships, who may use violent resistance to protect themselves or their children, or who may commit criminal offences under duress.
109. As part of our review, we have sought to understand how defences may be used by perpetrators and victim-survivors of DFV. Any change to criminal defences we recommend must reflect contemporary knowledge and community attitudes towards DFV.
110. Tolmie et al note that DFV victimisation may contribute to offending in several ways, including:¹⁵¹
- offending in accordance with an abusive partner's demands
 - using physical violence to resist violence or defend themselves or their children
 - assisting or encouraging their violent partner to offend because it is unsafe to do otherwise
 - making unlawful claims for income support because of financial abuse

- killing their children while in a state of extreme dissociation or because of violent victimisation.

Taskforce findings

111. The Taskforce expressed concerns that criminal defences can operate to reduce or remove criminal responsibility for male defendants who kill their female partner in anger or jealousy. It was also concerned that criminal defences do not operate effectively for female defendants who are victim-survivors of DFV, including female defendants who kill in the context of a controlling and abusive relationship.¹⁵²
112. The Taskforce found that:¹⁵³
- The existing defences and excuses in the Criminal Code are urgently in need of review to ensure they meet our current knowledge about the effects of domestic and family violence — including coercive control over time. They must evolve beyond outdated, gendered understandings about the types of behaviour that cause fear and create an imminent threat to safety. These provisions require review not only to ensure that they reflect the impact of domestic violence on victims but also to ensure that they do not reinforce stereotypes that inappropriately reduce the culpability of perpetrators.
113. The Taskforce acknowledged that ‘breaking the law must have consequences...All people who offend must be held accountable for their behaviour’.¹⁵⁴ However, it is equally important that criminal justice system, which largely developed around the experiences of men who offend, evolves to reflect the lived experiences of women and incorporates an understanding of how DFV victimisation contributes to offending by women and girls. This is particularly important given the Taskforce reported that 87% of women in custody have been victims of childhood sexual abuse, physical violence or sexual violence.¹⁵⁵

Recent changes

114. In response to the findings and recommendations of the Taskforce, various changes were made to law, as well as practice and procedure, to reflect contemporary understandings of coercive control and ensure relevant evidence could be provided to the court in criminal proceedings. Changes relevant to our review that may support changes to defences include:
- Amendments to the Domestic and Family Violence Protection Act definitions of domestic violence, emotional and psychological abuse, and economic abuse to include reference to a ‘pattern of behaviour’ to better reflect the cumulative nature of abusive behaviour and the need to consider it in the context of a relationship as a whole. The new section 22A, who is the person most in need of protection, was also inserted.¹⁵⁶
 - Amendments to the Evidence Act to better facilitate admission of relevant evidence of the history of domestic relationship, and a non-exhaustive list of what may constitute evidence of domestic violence.¹⁵⁷
 - Amendments to the Evidence Act to facilitate the admission of expert evidence in criminal proceedings about the nature and effects of domestic violence.¹⁵⁸ Expert evidence may include evidence about the effects of domestic violence on any person or on a particular person. This responded to Taskforce findings that the patterned and cumulative nature of coercive control is not well understood, particularly with regards to the emotional and psychological harm caused by domestic violence.

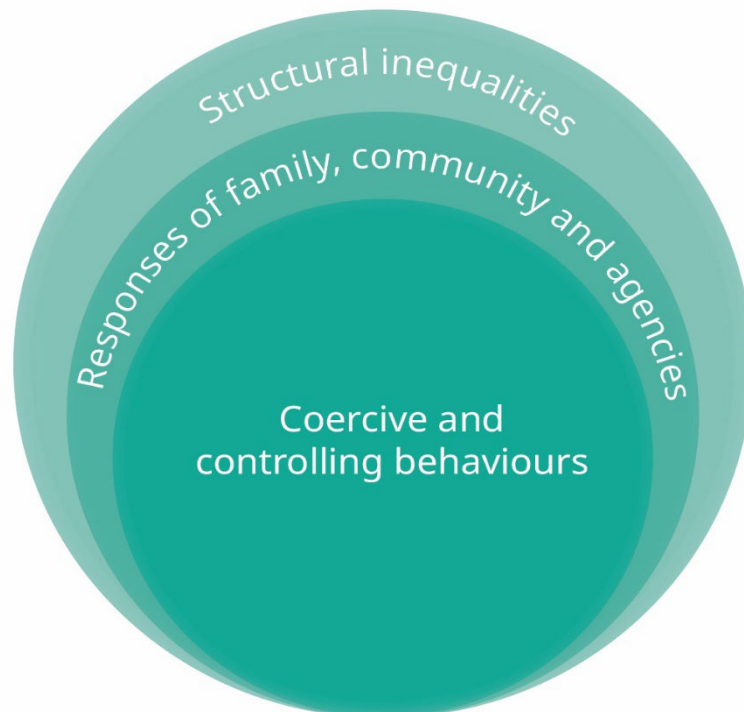
- Amendments to the Evidence Act to provide judicial discretion to give jury directions to address misconceptions and stereotypes about domestic violence, ¹⁵⁹ including a direction about self-defence in response to domestic violence (section 103ZA) and factors that may influence how a person addresses, responds to or avoids domestic violence (section 103ZC).
- Amendments to allow preliminary complaint evidence to be admitted in proceedings related to domestic violence.¹⁶⁰
- Changes to the rules regarding the admissibility of propensity and tendency evidence (yet to commence).¹⁶¹

115. Our terms of reference require us to consider whether additional changes to practice and procedure are required to support any amendments to the substantive law of defences and excuses. We have considered the evidence supporting the need for additional changes to practice and procedure below and have made various suggestions in our consultation paper. We are considering the need for additional changes in light of these recent changes.

Social framework evidence

116. In examining coercive control, the Taskforce found that ‘social entrapment theory’ is the best tool for understanding the experiences of women who are victim-survivors of domestic violence and who may offend because of their victimisation.¹⁶² We agree with this finding.
117. The recent amendments to the Evidence Act allow social framework evidence to be admitted in criminal proceedings where there is a history of domestic violence.

Figure 3: What is social entrapment?



118. Social entrapment theory is a conceptual framework that ‘renders visible the predominant aggressor’s pattern of abusive behaviour and [helps understanding] how it constrains the primary victim’s resistance and ability to escape abuse, while simultaneously considering the broader power and societal factors which influence behaviour and decisions in her life.’¹⁶³

119. Victim-survivors of DFV can be entrapped in abusive relationships by:¹⁶⁴
- The impact of the primary aggressor's coercive and controlling tactics over time.
 - Inadequate institutional and community responses when a victim-survivor seeks help. Such responses may include disbelief, minimisation of the violence and fear held by the victim-survivor, misidentification, or lack of appropriate response when a primary aggressor breaches a DVO. Lack of access to realistic safety options (calling police, seeking a protection order and leaving the relationship) can increase risk rather than preventing further abuse or ensuring the safety of the victim-survivor.
 - Intersectional inequity. Experiences of racism, sexism, poverty, colonisation, homophobia, ageism, disability and other forms of disadvantage and inequity can aggravate the above two dimensions of entrapment and further undermine a victim-survivor's ability to seek help.
120. Myths and misconceptions about DFV may render a woman's experience invisible. Police, lawyers, judges and juries may think a victim-survivor's failure to seek help or to leave means that the abuse they have experienced is not serious.¹⁶⁵ Non-physical forms of abuse may be minimised or not investigated, particularly where there is an absence of physical violence.¹⁶⁶ A failure to leave may be presented as illogical, rather than a rational response to real and significant risks.¹⁶⁷ Such perceptions may make it difficult to rely on defences or lead evidence of DFV as a mitigating factor.
121. Evidence of social entrapment, including expert evidence, may support a victim-survivor's access to various defences, particularly self-defence by providing 'a rational basis...for determining questions about the [victim-survivor's] conduct and beliefs'.¹⁶⁸ Where offending occurs in the context of DFV, it is essential to consider the relevant facts of each case across these three dimensions and inquire into each sphere to gain a true understanding of the victim-survivor's circumstances.¹⁶⁹

What needs to be documented by all those involved in the case is how the predominant aggressor has hurt, intimidated and frightened the primary victim and her children, isolated her from potential support, undermined her relationships with those around her, punished her acts of resistance, undermined her stability and independence and fostered a dependence on him.¹⁷⁰

122. Traditionally, cases where victim-survivors kill their abusers are framed by outdated understandings of DFV, including 'battered woman syndrome' or a 'bad relationship with incidents of violence'.¹⁷¹
- Battered woman syndrome may undermine a claim of self-defence by pathologising a victim-survivor as mentally ill and making her resort to lethal violence seem like the response of an unreasonable person.
 - Describing the history of DFV as a 'bad relationship with incidents of violence' risks minimising the seriousness of the range of violence experienced by the victim-survivor, including controlling behaviours, and suggests the woman was free to leave or to make other choices in response to the violence.¹⁷²
123. Conceptualising DFV as 'battered woman syndrome' or 'bad relationship with incidents of violence' does not recognise the complexity of intersecting factors which contribute to the use of lethal force. Both place undue emphasis on the ability to prove incidents of physical

violence, divorced from other coercive control tactics and more systemic factors contributing to entrapment. Tolmie et al observe: ¹⁷³

When outdated and inaccurate conceptual models are used to understand intimate partner violence (IPV), then the factual context within which offenders who are primary victims are located, and the meaning of their behaviour in response to that context, is misunderstood by those involved in the case.

Box 9: What is Battered Woman Syndrome?¹⁷⁴

Developed in the 1980s, battered woman syndrome is a psychological theory which suggests a three-phase cycle of domestic abuse which creates an environment of 'learned helplessness' which impedes a woman's ability to leave the abusive relationship or control the violence.

The three phases are:

1. Tension building period – tension builds over the relationship with the abuser becoming increasingly irritable, angry and frustrated. The victim-survivor tries to placate the abuser using various strategies.
2. Acute battering period – the build-up of tension is released through abusive behaviour (causing physical, emotional or psychological harm).
3. Honeymoon period – the abuser may apologise and show remorse, tell the woman that it won't happen again, and show love and affection, starting the cycle again.

Learned helplessness is a psychological condition where a person feels powerless to change their situation after experiencing repeated negative events.

Battered woman syndrome was first used in Australian law in 1991 in *R v Runjanjic and Kontinnen*,¹⁷⁵ a South Australian case which raised the defence of duress. The High Court noted the admissibility of battered woman syndrome evidence in *Osland v The Queen*.¹⁷⁶ Evidence of battered woman syndrome was most recently considered by the High Court in *R v Rowan – a Pseudonym*.¹⁷⁷

Battered woman syndrome evidence may assist a victim-survivor who is charged with an offence to raise a defence in various ways including:

- to demonstrate the reasonableness of her apprehension of serious injury by showing her unique ability to perceive danger throughout the cycles of violence, even though it may appear relatively minor
- to demonstrate the reasonableness of responding with lethal force
- to demonstrate the reasonableness of her belief that there was no other way of escaping the violence, including by leaving the relationship

Battered woman syndrome has been the subject of extensive criticisms, including critiques about its scientific legitimacy and that the concept of learned helplessness improperly medicalises the woman and misrepresents the reality of domestic violence. It can be difficult for victim-survivors from diverse cultural backgrounds, or who may not fit the 'ideal victim' narrative, to use battered woman syndrome evidence to support a defence.

DFV in homicide cases

124. The defences we are reviewing have particular significance in homicide cases. Given the range of relevant DFV relationships in which homicide might occur, understanding how defences may be used in the context of specific relationships is particularly relevant to our work.

Box 10: Domestic and Family Violence Death Review and Advisory Board Findings: DFV Homicides from 1 July 2006 to 30 June 2021 in Queensland¹⁷⁸

- 141 women and girls were killed by an intimate partner.
- 45 men were killed by an intimate partner (and in all cases, the male deceased was identified as the primary perpetrator of violence in the relationship).
- 89 children were killed by a parent or caregiver.
- 75 women were killed within a family relationship.
- 85 men were killed within a family relationship.
- 27 men and 2 women were killed in 'collateral homicides' (where a person who intervenes in a domestic dispute or new partner is killed by their current partner's former abusive partner).
- Males were the homicide offender in 76.5% of all DFV homicides.
- A history of DFV was able to be established in 55.2% of DFV homicides (but this likely under-represents the prevalence of a history of DFV in such cases given the underreporting of DFV).

125. We are undertaking original research to better understand how defences are being used in such cases; our findings will be published in our forthcoming Case Analysis Research Report and Women Who Kill Research Report.
126. However, there is a significant body of existing research examining the circumstances in which men and women kill in the context of DFV. It concludes that men and women kill in different circumstances and for different reasons.¹⁷⁹
- Approximately 1 in 5 homicides are intimate partner homicides.
 - Men are significantly more likely to kill a spouse. More than three quarters of intimate partner homicides are men killing their current or former female partner.
 - Men are typically motivated by jealousy or their spouse leaving the relationship. In most cases, the killing is typically the final act in a relationship characterised by their use of DFV.
 - Women typically kill male partners as an act of self-preservation against a history of DFV victimisation.
127. Tarrant best expresses the significance of these findings:¹⁸⁰
- [W]omen who kill and the women who are killed are, in many instances, members of the same group of citizens as it were – those subject to ongoing and severe domestic violence. This has important implications for the legal analysis of the killings under discussion. Specifically, the connection speaks to:
- The seriousness of the danger women who kill in a domestic violence context are likely to have faced; and
 - The reality that leaving a spousal relationship can be very dangerous.
128. The history of DFV, including physical violence, is only one factor relevant to assessing the lethality risk experienced by a victim-survivor. In many DFV homicides, a history of DFV cannot be established because of high rates of underreporting. The DFVDRAB report that in DFV homicide cases where there was a history of DFV, there was no history of physical violence in

41.4% of cases.¹⁸¹ This highlights that a person can be at risk of death, and respond reasonably to that threat, even if they have never been physically assaulted. Other common lethality risk indicators include the perpetrator's attempt to isolate the victim, history of violence outside the family, failure to comply with authority and prior threats to kill the victim.¹⁸² It is essential that this broader understanding be applied when considering the availability of defences in cases involving a history of DFV.

129. A proper understanding of DFV generally, and the history of DFV in a specific relationship, is also important when considering other DFV homicides where various defences may apply. For example, a child may kill an abusive parent to protect themselves, their parents or their sibling from future abuse.
130. A history of DFV may also be relevant to cases where children are killed by their parents. A research report completed by Australia's National Research Organisations for Women's Safety Ltd ('ANROWS') and the Australian Domestic and Family Violence Death Review Network considered 'DFV-context filicides' (filicide being where a parent kills their child) and found that:¹⁸³
 - in 88% of cases, there was a history of intimate partner violence
 - in 78% of cases, there was a history of child abuse (physical, sexual or emotional violence)
 - where there was a history of intimate partner violence, when fathers killed their children, 97% had been the primary perpetrator of intimate partner violence, and when mothers killed their children 96% had been the primary victim of intimate partner violence.
131. These findings demonstrate that properly understanding DFV is also important in filicide cases where the mother is charged with causing the death of the child given that she is likely to be a victim-survivor of DFV. The preliminary findings of our own analysis suggests that in most cases where a woman is charged with filicide, she is charged as a party to the offending in circumstances where the male partner is the principal offender. This will be considered in more detail in our forthcoming Women Who Kill Research Report.
132. Our preliminary research also indicates that an assessment of the history of DFV may be important in homicide cases where the offence itself is not a domestic violence offence. Our preliminary research suggests that in most cases where a woman is charged with a non-DFV related homicide, she is charged as a party to the offence. Often her male partner is the principal offender. Our preliminary analysis suggests that most of these women are charged with murder but plead guilty to manslaughter. A few have the homicide charges discontinued, some upon entering a plea to perverting the course of justice or to being an accessory after the fact. Other women have been convicted of murder after trial. A review of some of these cases suggests that a history of DFV victimisation by the principal male offender may have caused or contributed to the woman's offending. Two examples are included below. Applying a social entrapment lens to such cases would be essential in assessing the availability of relevant defences and would also be relevant to the issue of culpability at sentence.

Box 11: Women who kill with violent partners: R v Lorang-Goubran¹⁸⁴

In August 2016, Lorang-Goubran pleaded guilty to the manslaughter of Spencer, an acquaintance and client of hers. Lourang-Goubran had been charged with murder. She also pleaded guilty to attempted armed robbery and other minor offences including driving without a licence. Spencer

was killed by Lourang-Goubran's partner, Dayney, in a violent altercation during a break in at the deceased's home,

Lorang-Goubran was a sex worker. She and Dayney had an arrangement whereby she would offer her services over the internet and arrange to meet clients. Dayney would rob the client of their drugs and money whilst she engaged the client. During her meeting with Spencer, things did not go according to plan and Dayney killed Spencer during a violent confrontation.

During sentencing, the judge accepted that Lorang-Goubran had a 'tragic upbringing' and a 'terrible life' 'punctuated by domestic violence [in] whatever relationship [she] had over the years' which contributed to her fall into drug use and sex work. The sentencing remarks do not reveal what, if any, consideration was given to the domestic violence in her relationship with Dayney and how that contributed to her offending on the night.

Lorang-Goubran was sentenced to 7 years imprisonment. She gave evidence at Dayney's trial. She had been on remand prior to sentence. She was eligible for parole approximately 10 months after sentence.

Box 12: Women who kill with violent partners: R v Roebuck and R v Ryan¹⁸⁵

In November 2019, Ryan and Roebuck pleaded guilty to the manslaughter of Ryan's ex-husband. Both had been charged with murder. The deceased was murdered by Crump in a premeditated killing in August 2016 (which involved others). Crump was in a long-term relationship with Ryan and was having an affair with Roebuck. The killing occurred after Ryan's daughter complained to the deceased that Crump was sexually abusing her.

Ryan and Roebuck pleaded guilty to manslaughter on the basis that they knew of Crump's plan to threaten the deceased with weapons and assisted him in that plan. Both women also provided Crump with a false alibi.

The sentencing judge accepted evidence that Ryan had endured 12 years of physical and psychological abuse at the hands of Crump, including at least one assault where he had pinned her to the ground with a knife to her throat, and that she acted as she did out of fear of Crump.

The sentencing judge found that Crump had 'preyed' upon Roebuck, and exploited her emotional dependency, untreated mental health problems, youth and history of sexual violence, so that she felt 'powerless' to stop him. Roebuck was only 19 years old at the time and Crum was 35 years old.

Ryan received a sentence of 8 years imprisonment but was eligible for immediate parole; she had served three years and two months on remand.

Roebuck was sentenced to 5 years imprisonment. This was wholly suspended from the date of sentence. The sentencing judge recognised a notional sentence of six years was appropriate but did not declare one year of time spent on remand, reducing this to 5 years. 265 days on remand was 'presentence custody'.

Self-defence

133. The law of self-defence developed to address traditional male violence, between people of similar size and strength, in one-off confrontations.¹⁸⁶ The law of self-defence does not always work effectively for women who are victim-survivors of DFV and where the threat to their

safety may be ongoing and arise in the context of a prolonged history of abuse, including non-physical violence or coercive control. This is true in cases involving both lethal and non-lethal force.¹⁸⁷

134. Victim-survivors who use violence to defend themselves or their children may find it difficult to access the complete defence of self-defence for various reasons including the requirement for a triggering assault and the need to respond to an 'imminent' threat.¹⁸⁸ Women, who are usually weaker and smaller, may use a weapon to defend themselves against a stronger male partner. This may be perceived as an unreasonable response.
135. Myths and misconceptions about DFV may also limit the availability of self-defence where victim-survivors use force in the context of an abusive relationship. The prevalence of such narratives is discussed in the academic literature and finds support in our own case analysis; they will be considered further in our Case Analysis Research Report and Women Who Kill Research Report. Examples include:
 - The misconception that a woman can freely leave an abusive relationship may be used to undercut her claim of self-defence by suggesting that there were other reasonable safety options available.¹⁸⁹ In contrast, evidence demonstrates that separation presents a significant lethality risk, and victim-survivors may stay in an abusive relationship to manage the risk to themselves and their children.¹⁹⁰
 - The failure to report offending to the police or other people may be used to undermine her credibility and suggest she is fabricating the nature and extent of the abuse. This is despite contemporary knowledge that many victim-survivors of DFV do not disclose the abuse to others.¹⁹¹
 - Inconsistencies in the versions provided by the defendant, or inability to recount the precise circumstances surrounding the incident, may be used to attack her credibility. This is despite contemporary knowledge about the impacts of trauma on memory,¹⁹² and increasing evidence about the prevalence of traumatic brain injury in victim-survivors of DFV.¹⁹³
 - Where a victim-survivor has been previously misidentified as DFV offender or respondent on a DVO, this history may be used to suggest that she was either the primary aggressor, or a violent partner in a mutually violent relationship. This runs counter to research about the need to identify the person most in need of protection by reference to the history of the relationship, including the presence of coercive control.¹⁹⁴
 - In cases where there is limited or no recent physical violence forming part of the pattern of abuse, it may be suggested that the use of force was disproportionate to the threat, or that the victim-survivor's assessment of the need to use force was unreasonable. This approach runs counter to contemporary knowledge which shows that DFV is a pattern of violence, with cumulative effects, that is hidden and complex.¹⁹⁵ Findings of the DFV Death Review and Advisory Board shows that victims have unique insight into the risk they face, and that subtle changes in behaviour, even absent an escalation in physical violence, can be indicative of pending lethality.¹⁹⁶ As a result, a victim-survivor's understanding of their own risk is considered central to any risk assessment.¹⁹⁷ However, earlier DFV Death Review and Advisory Board findings show that victim-survivors can underestimate their level of risk, with around half the women who survive intimate partner homicide attempts reporting that they did not recognise that their lives were in danger.¹⁹⁸

- Comments which dismiss or minimise the significance of rape or other sexual violence that occurred in the history of the relationship, where a woman may have complied with sexual demands as a risk mitigation strategy but was not giving ‘free and voluntary consent’.¹⁹⁹ Such comments may describe sexual abuse and exploitation as ‘unwanted sex’.
136. These harmful and outdated narratives can affect the police investigation, if and how the matter is prosecuted, legal advice received by victim-survivors who are charged with criminal offences, and whether self-defence is left for the jury’s consideration. These narratives have no place in a criminal justice system informed by contemporary knowledge of DFV.²⁰⁰
137. A claim of self-defence, which requires an assessment of the necessity of a victim-survivor using force, and the reasonableness of their actions, cannot be assessed in isolation. Framing a self-defence case through a social entrapment lens may help overcome jury perceptions that:
- non-imminent threats do not require self-defensive responses
 - effective safety options are available whenever a victim-survivor is not being physically attacked.
138. Despite the importance of social entrapment evidence in DFV cases raising self-defence, Douglas et al found that there has been judicial resistance to the admission of evidence of the nature and impact of DFV, and the framing of defensive narratives in accordance with this evidence in trials.²⁰¹ A paradigm shift is required to ensure the law keeps pace with current understandings of DFV.²⁰²
139. Our research to date does not suggest that self-defence is being used inappropriately in cases where men kill an intimate partner. However, we have not considered the use of self-defence in criminal cases involving a history of DFV where non-lethal violence is used by the primary perpetrator, or how self-defence may be considered by police when police are deciding whether to charge.

Killing for preservation in an abusive domestic relationship

140. The partial defence of killing for preservation in an abusive domestic relationship was developed to address concerns about the availability of self-defence and killing on provocation when DFV victim-survivors kill their abusers.²⁰³ The policy rationale underpinning the defence was to provide a partial defence in circumstances other defences may not apply and allow sentencing discretion where a victim-survivor of a seriously abusive relationship kills their abuser.²⁰⁴
141. The Taskforce expressed concerns about the availability of self-defence when abused women kill and noted the defence had not been used successfully before a jury.²⁰⁵ Preliminary findings from our case analysis research suggests the partial defence may have had some positive impacts in criminal proceedings against abused women who kill.²⁰⁶
- In two cases,²⁰⁷ the defence may have been used successfully at trial. In both cases the partial defence of killing for preservation was left together with provocation and both resulted in a conviction for manslaughter. It cannot be determined whether the conviction for manslaughter was based on lack of intention, provocation, killing for preservation, or a combination. Of concern, in neither case was the complete defence of self-defence left for the jury’s consideration.
 - In two cases,²⁰⁸ the defence was left for the jury’s consideration where the defendant was ultimately acquitted based on self-defence.

- In one case, R v Sweeney (discussed below), 209 the defence was the basis for a plea of guilty to manslaughter.

Box 13: Killing for preservation in R v Sweeney²¹⁰

In 2012, Sweeney killed her abusive partner by stabbing him once to the chest with a knife. She was charged with murder. In 2015, she pleaded guilty to manslaughter relying on the partial defence of killing for preservation in abusive domestic relationship. At sentence, it was accepted that she had a 'fleeting' intention to cause grievous bodily harm. She was sentenced to 7 years imprisonment and was eligible for parole approximately 2 months after sentence.

Sweeney had experienced domestic violence at the hands of multiple men, including the deceased. Her first violent relationship was from the age of 15, when she moved out of home. She had a history of depression and anxiety and drug and alcohol use. She had a criminal history. She was described as having 'some Aboriginal descent'.

After meeting the deceased, who had significant drug problem, Sweeney progressed from using cannabis to taking pills and amphetamines. The deceased had pressured her to use these drugs. The violence in the relationship started as jealousy and paranoia. Physical violence entered the relationship gradually, starting with slaps and shoves. The physical violence escalated over the 4-year relationship and continued throughout her pregnancies. The deceased would punch, push and at times strangle her. At one point, she left the relationship seeking refuge in a women's shelter but later returned to the relationship. They continued to use drugs and alcohol together; both had consumed drugs and alcohol on the day she killed him.

There was one documented occasion where she had been violent towards the deceased, punching him with a closed fist and causing a cut to his forehead in the context of an argument. There was evidence of other occasions of 'mutual violence'. However, the evidence suggests she was the person most in need of protection. The police and ambulance attended various instances of significant domestic violence where Sweeney had suffered serious injury, including in the weeks and months leading up to his death. A protection order naming her as the aggrieved was made in 2010. It prohibited contact between them but the relationship, and violence, continued. Two months prior to his death, the deceased was sentenced to a wholly suspended sentence for breaching the protection order; Sweeney had sustained injury on this occasion but refused to cooperate with police.

On the night of the offence, they returned home. Both were intoxicated. An argument ensued which culminated in Sweeney stabbing the deceased once to the chest. Neighbours had called police. Sweeney was found sleeping on the floor of the shed.

Sweeney told police she had been dragged by the throat. She made partial admissions to an undercover police officer while being held in the watchhouse. She did not participate in a formal interview.

A more detailed version was provided to the psychiatrist who provided a report for sentence. Sweeney told the psychiatrist that she had gotten drunk as a pre-emptive move, anticipating violence from the deceased, because he became violent when drunk. She described not wanting to leave the venue where they had been drinking with others, knowing he was more likely to hit her when they were alone. She said that during the argument, which went over a couple of hours, she heard her dog yelping and believed he was trying to provoke her by hurting the dog. When she confronted him, he assaulted and berated her. He urinated on her before hosing her off. He tried to calm and comfort her, but based on their history, she perceived this as a prelude to further violence. When she walked away, he yelled into the darkness and said various things including, 'Should I get rid of her, I think she's got to go'. She became fearful for her safety at this time. While

searching for something to protect herself, she came across the steak knife. She believed he was going to grab the knife from her and stabbed out, striking him to the chest. He walked away, calling her names as he retreated. She did not appreciate the seriousness of the injury inflicted. Afraid he may return and use the knife against her, she hid the knife. She lay down and passed out.

The psychiatrist opined that her account was not consistent with battered spouse syndrome, but that she was a 'battered spouse who has suffered with assaults and injuries which have traumatised her and affected her thinking around her situation'. He opined that she suffered from PTSD because of earlier abuse by a different partner which led to a form of 'hyperarousal which would have an effect on her ability to think clearly', which was also affected by her intoxication. It was accepted that this meant she had reasonable grounds to believe her actions were necessary in for self-preservation.

Regarding the version offered to the psychiatrist, the sentencing judge commented, 'it does not follow, of course, that everything you told [the psychiatrist] is innately reliable ... The prospect of you engaging in a degree of hindsight rationalisation and justification for what had occurred, is, of course, something I am alive to in considering what you told him.'

142. Some have suggested the partial defence has been ineffective.²¹¹ Since its commencement more than 14 years ago, it has rarely been used. It may be that introducing the partial defence has promoted greater awareness of the issue. The existence of the defence may have contributed to a willingness to negotiate pleas to manslaughter, even where it is not on the basis of the partial defence.
143. During preliminary consultations, defence practitioners noted significant challenges in gathering evidence to support the partial defence. For various reasons, victim-survivors may struggle to articulate the history of abuse. Where they can do so, prosecutors may rely on misconceptions about DFV to undermine the veracity of the stated history and the real danger faced by the victim-perpetrator.²¹² Issues in accessing the defence may be compounded by cultural factors, use of alcohol or substances, or the presence of cognitive or mental health impairment. Victim-survivors are often unable to specifically articulate their fear of death or grievous bodily harm at the time they used lethal force, which is an element of the defence.
144. It has also been argued that a partial defence may undermine legitimate claims to self-defence and encourage pleas to manslaughter in circumstances that arguably result in wrongful conviction. *R v Sweeney* vividly demonstrates this risk.²¹³ At sentence, it was accepted that Sweeney had a reasonable belief that she needed to use force to preserve herself from death or grievous bodily harm because of the deceased's violence immediately prior to Sweeney's use of lethal force, and in the context of the DFV history in the relationship. She had been assaulted, urinated on, and hosed off and previously strangled and seriously assaulted.
145. Nash and Dioso-Villa argue that the outcome in *R v Sweeney* supports concerns that partial defences may undermine legitimate claims of self-defence.²¹⁴ Douglas also touched on this issue when considering cases where self-defence is successfully used by victim-survivors, and noted that where the victim-offender did not meet the 'benchmark' of 'ideal victimhood', the complete defence was not readily available. Those most likely to have limited access to the defence include Aboriginal or Torres Strait Islander women, victim-survivors who are not small and petite, those with drug and alcohol issues or with a criminal record and women who have fought back in the past.²¹⁵ Almost all these barriers were present in Sweeney's case.
146. When women plead guilty to manslaughter despite a valid claim to self-defence, this potentially represents a wrongful conviction.²¹⁶ As part of our research we will be investigating

factors which contribute to women's decisions to plead guilty in cases where they may be able to argue self-defence.

Killing on provocation

147. One of the primary criticisms of the partial defence of killing on provocation is that it is used inappropriately to reduce culpability in cases where men kill their intimate partners where they are motivated by jealousy or anger.²¹⁷
148. Changes made to the defence in 2011²¹⁸ were intended to exclude the partial defence's operation in cases where men killed their intimate partner out of anger or jealousy.²¹⁹ The amendments exclude provocation **based on** 'words alone' or 'anything done or believed to be done by the deceased to end or change their domestic relationship with the defendant' (section 304(3) of the Criminal Code), other than in exceptional circumstances.
149. Despite these changes, the preliminary findings of our research suggests that the partial defence of provocation continues to be raised, both successfully and unsuccessfully, in cases where men kill intimate partners because of jealousy or anger. Two such examples are Peniamina²²⁰ and R v Kelsey.²²¹

Box 14: Sexual jealousy and provocation in Peniamina

Peniamina brutally killed his wife, with whom he had 4 children. He was ultimately convicted of manslaughter on retrial, after successfully appealing his murder conviction to the High Court.²²²

Peniamina believed his wife was having an affair with a man she had met in New Zealand while visiting extended family with her children. After returning from New Zealand, she had moved into the spare room; he believed she was preparing to leave him. There was evidence of recent domestic violence between the couple. However, there was a dated prior conviction for an assault against the deceased. A son told police 'they fight a lot'. They had recently argued about him taking her mobile phone.

On the day he killed his wife, Peniamina called the man he suspected was having an affair with his wife. He claimed the man said 'horrible things' to him. After the call he left his house and spoke to a relative. When he returned, he wanted to speak with the deceased. He said the deceased looked like 'she didn't care' and told him to 'stop talking shit'. He hit her, which made her mouth bleed, and she went to the bathroom, then the kitchen. He heard the drawer open and found the deceased holding a knife. When he attempted to grab it, she pulled back, cutting his hand deeply. He grabbed the knife and stabbed her at least 29 times. She fled outside and hid behind a car on the driveway. He pursued her and hit her in the head with a concrete bollard.

At the first trial, provocation was left to the jury. There were issues around whether:

- there was a 'sudden provocation',
- what the provocative conduct was, and
- whether 'he lost control' in response to the provocation.

The issue about the provocative conduct was whether it was limited to his hand being cut by the knife, or all the surrounding circumstances, which included conduct to change the nature of the relationship. If the latter, the partial defence was excluded unless there were exceptional circumstances. The trial judge directed the jury on the standard elements of provocation and that the defendant had to prove these on the balance of probabilities.

The jury was also told that they needed to be satisfied that the provocation – whatever they determined it to be – was not based on something done by the deceased to change the nature of

the relationship. If the provocation was based on something she did to change the relationship, the jury were told they had to be satisfied that the circumstances were 'of a most extreme and exceptional character'. The jury found him guilty of murder.

The majority of the Court of Appeal (Morrison JA and Applegarth J) rejected his appeal. They took a 'purposive approach' when interpreting the meaning of '**based on**' in section 304(3),²²³ and said the amended section required the jury to consider whether the provocation was founded on something done by the deceased to change the nature of the relationship.²²⁴ In dissent, McMurdo JA said that the jury was misdirected, section 304(3) should not have been put to the jury and the exclusionary provision did not apply in this case because the act with the knife was not something done to change the relationship.²²⁵

By a 3:2 majority the High Court allowed the appeal. The majority agreed with McMurdo JA: the deceased's conduct with the knife induced the loss of self-control; there was no evidentiary foundation that this was done to change the relationship. It was held that provocation was an available defence and should have been left for the jury without reference to the exclusionary provision. There was an error in putting this issue to the jury. A re-trial was ordered.

At the retrial, the only issue was whether the defendant had proved the defence of provocation on the balance of probabilities. The jury deliberated for 3 days and could not reach a verdict. They were directed to proceed to a majority verdict on manslaughter, without reaching a verdict on murder (which required all 12 to agree) and found him guilty of manslaughter.

The defendant was sentenced to 16 years imprisonment.

Box 15: Words alone provocation in R v Kelsey

Kelsey killed his wife of 28 years in November 2019. In 2024, he was convicted of murder after trial. At trial, he relied (unsuccessfully) on the partial defence of killing on provocation. The claimed provocation was 'words alone'. The defendant claimed those words, which consisted of almost two hours of the deceased victim 'venting' frustrations to him about how he treated her and failed to support her, and where she made negative comments about his family, constituted 'exceptional circumstances'. The defendant recorded her two hour 'vent' on his mobile phone, before retrieving a gun from the bedroom, returning to the veranda where they had been speaking, and shooting her. During sentencing, the deceased's family described her as the victim on an ongoing abusive relationship. There was evidence that she had repeatedly asked for a divorce which the defendant refused, primarily for financial reasons. She had asked for a divorce again on the night of the killing. The defendant told police that '[he'd] had a gutful, just wanted to get rid of her, the divorce and everything'.

The Crown argued that provocation should not be left for the jury's consideration and there was nothing 'exceptional' about the alleged words alone provocation. It was submitted that exceptionality was a question of law for the trial judge's determination. The defence submitted that the ultimate question, which was for a jury, was whether the provocation could, not would, cause an ordinary person to lose self-control.

The trial judge accepted it was a question of law to decide whether there was sufficient evidence of exceptionality to leave the defence to the jury. Taking a view of the evidence most favourable to the defendant, his Honour concluded there was sufficient evidence to raise the defence, including of exceptional circumstances. Whether an ordinary person could have lost self-control, and whether

the conduct was an exceptional character, were ultimately matters to be determined by the jury on the balance of probabilities.

150. The High Court decision in *Peniamina* demonstrates the continued problems with the provocation defence despite attempts to limit its application. A narrow reading of the exclusionary provisions meant that he was able to rely on the provocation defence because of the cut to his hand, despite the fact that his anger was clearly, at least in part, driven by his rage about her apparent affair. Further, the cut to the hand arguably occurred while she acted in self-defence to his initial violence. Because the High Court determined the cut on the hand was 'sudden provocation', the legislative amendment to exclude provocation had no role to play.
151. Similar issues have been experienced in the UK with their loss of control provision, which replaced provocation and adopted a categorical exclusion model. In *R v Clinton*, the Court of Appeal of England and Wales considered the loss of control provision. Clinton killed his wife after she admitted having an affair. During an argument, she allegedly taunted him about his suicidal threats and told him he didn't have the 'balls' to do it. The trial judge declined to leave the partial defence of loss of control based on the sexual infidelity exclusion. The English Court of Appeal found the trial judge was wrong to not leave the partial defence and said that while infidelity cannot on its own be relied on as a qualifying trigger, the existence of infidelity does not prevent reliance on the defence.
152. In Victoria, defensive homicide, introduced following the repeal of provocation, operated in practice as a de facto provocation defence and was subsequently repealed.
153. Our research suggests it is difficult, if not impossible, to amend provocation in a way that would ensure it is not used by DFV perpetrators who kill their partner motivated by jealousy or control.

Duress

154. The Taskforce noted that the excuse of duress may be available to DFV victim-survivors who commit offences because of their experience of coercive control.²²⁶ The first Australian decision to recognise the admissibility of battered woman syndrome evidence (discussed above) involved the defence of duress.²²⁷ The important role the defence of duress may play for victim-survivors is well illustrated in the recent High Court decision of *R v Rowan – a Pseudonym*.²²⁸

Box 16: The role of duress in *Rowan (a Pseudonym)*²²⁹

The High Court upheld a Victorian Court of Appeal ruling that duress was open for a DFV victim-offender. The combined psychological, physical and sexual abuse was found to be sufficient to amount to a continuing or ever-present threat which was impending each time an offence was committed.

Rowan was charged, together with her de facto partner JR, for sexual offences against their two daughters. She had started a relationship with JR when she was about 18 years old and they lived on a rural farm in Victoria. She was isolated, had a mild intellectual impairment and was socially and financially dependent on her abuser. She was unable to leave the farm without JR's permission and 'suffered emotional abuse, intimidation and sexual abuse at his whim'.

The trial judge had excluded the defence of duress following legal argument. During this argument, defence tendered a report from a forensic psychologist who opined that Rowan suffered from

battered woman syndrome. The psychologist relied on statements made during interviews with Rowan, supported by the children's evidence. The psychologist's evidence did not go before the jury (because the defence was excluded).

Edelman J questioned the admissibility of the psychologist's evidence, observing 'there is force in the argument of the Crown that the expert opinion...could not be admissible without independently admissible evidence sufficient to provide a foundation for that opinion'. The defendant had not given evidence at trial and the opinion was based on hearsay statements made by the defendant during interviews with the psychologist.

155. Edelman J's observations in Rowan regarding the admissibility of expert opinion, in circumstances where the defendant had not given evidence or provided a police interview, provide a vivid demonstration of some of the practical issues that may arise when trying to admit expert evidence in cases involving DFV.
156. Cases where women kill with their abuser (filicide and non-DFV homicides) were discussed above. It is possible that in some of these cases, the women were party to the offending of their abusive partner because of coercive control. Because of the limitation in section 31(2) (discussed in our consultation paper), duress may not be an available defence. If mandatory sentencing for murder is retained, there is no ability to take duress into account as a circumstance of mitigation at sentence. Some jurisdictions that have reviewed duress and considered the availability of the defence for victim-survivors of DFV have removed the traditional exclusion of duress to cases of murder; because the requirement for proportionality between the threat and their actions was sufficient to ensure the excuse was not used inappropriately.²³⁰

Assault provocation

157. Sir Samuel Griffith described the complete defence of provocation to assault in section 269 of the Criminal Code (and the complete defence of prevention of repetition of insult in section of the 270 Criminal Code) as recognising what was 'in common life assumed to be a natural law of action,' enacted 'so that juries might not be forced to strain their consciences in order to avoid giving verdicts in accordance with law, but repugnant to their sense of right.'²³¹ For DFV matters, the findings of the community attitudes survey demonstrate that the existence of a complete defence to assault is now a strain on the conscience of the community.²³²
158. Our review of recent appellate decisions of assault provocation matters identified the defence as available in matters including 'traditional' male on male violence,²³³ culturally significant provocation,²³⁴ and DFV scenarios with male defendants.²³⁵
159. We have not been able to identify any appellate decisions in which assault provocation was available for a female defendant in a DFV matter. However, we have identified several cases where provocation was available to primary perpetrators of DFV for assaults against their partners.

Box 17: Assault provocation and its use in R v MEB and JEJ v Queensland Police Service

R v MEB²³⁶

MEB, a Thursday Island man, appealed his conviction for one count of assault occasioning bodily harm against his female partner on the grounds the trial judge failed to leave the defence of provocation and that the jury were not properly directed about evidence of uncharged injuries to

the complainant from an earlier fight with another person. He was acquitted of one count of common assault and one count of deprivation of liberty.

MEB's lawyers did not ask the judge to leave provocation to the jury and, and MEB had denied that he hit the complainant in the act alleged to constitute the assault occasioning bodily harm. The defendant told police the complainant belted, punched and slapped him and pushed him over. The complainant gave evidence of an escalating scuffle with pushing and shoving and that he was preventing her getting to the door, and she pushed him hard to get him to move away and allow her to leave causing him to fall over. She alleged he then punched her repeatedly.

The Court of Appeal considered this evidence relevant to provocation, and that '[v]iewing the complainant's evidence and the appellant's interview in the manner most favourable to the appellant, there was "material in the evidence which might arguably be thought to give rise to a defence of provocation."'

JEJ v Queensland Police Service²³⁷

JEJ and his wife (who had just had abdominal surgery) had been arguing via Messenger, Instagram and verbally throughout the evening. When he came home drunk, JEJ lay on the couch and ignored his wife when she tried to get him to talk to her. She approached him on the couch and grabbed some nuts from his hand and threw them against the wall. He kicked his leg out and struck her hip (near the surgical site). Then she picked up a phone charger from the coffee table and flicked it at him. He grabbed the cord and said: 'If you're going to hit me, I'm going to hit you,.'. She replied that he'd just kicked her. She lay on the couch with her hands on her head and he struck her repeatedly (she said 6-8 times, resulting in bruises and welts) on her thigh and buttocks. The appellant told police 'my wife attacked me'.

The magistrate held the assault on the complainant was disproportionate to the injuries suffered by the defendant and cited the Supreme and District Court Benchbook in relation to sections 268 and 269 Criminal Code. The appellant argued the evidence only proved he kicked his leg out and it connected with the complainant's hip. The appeal judge was not able to determine if the kick was deliberate and found that the magistrate failed to make any findings as to the number of times the appellant struck the complainant with the phone charger, and failed to properly consider and apply the ordinary person test. The appeal judge found that the complainant grabbing and throwing the nuts and striking the appellant with the phone charger could be wrongful acts or insults pursuant to section 268 of the Criminal Code, but that the deficiencies in the evidence meant the ordinary person's response to the provocation offered could not be assessed. A retrial was ordered.

160. Academic commentary has observed that a common thread in the history of provocation defences is 'the focus on viewing the accused's conduct as less culpable in circumstances where the actions of the victim-survivor have deprived the accused of the ability to act and respond rationally.'²³⁸ In the context of DFV, this focus blames the victim-survivor's actions for their experience of abuse, suggests they 'brought the assault on [themselves'²³⁹ and, as a respondent to the community attitudes survey noted, the existence of a defence in a DFV context could be seen to condone DFV.²⁴⁰
161. The concept of loss of self-control also suggests that defendants 'are not themselves',²⁴¹ when engaging in the alleged conduct. However, in DFV matters, an understanding of the ongoing patterns of coercive control would suggest that primary perpetrators who successfully rely on the defence may be acting consistently with their broader pattern of abusive behaviour and shifting the blame to the victim-survivor. This may not be clear on the evidence before the court, given that assault offences in DFV matters address individual incidents of physical abuse, rather than the full extent and impact of coercive control.

DFV and sentencing

162. DFV has been recognised as an important factor to consider in sentencing.
163. In May 2016, following the Taskforce's recommendation,²⁴² the Penalties and Sentences Act 1992 was amended to require courts to treat the feature of DFV in offending as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.²⁴³ One of the examples given of exceptional circumstances refers to the sentencing of DFV victim-survivors for offences of manslaughter that are founded on the defence of killing for preservation under s 304B. This provision was introduced with the expectation that it would 'increase the culpability of an offender' and lead to higher sentences within the existing range.²⁴⁴ The Queensland Sentencing Advisory Council is currently reviewing the effect of these amendments.
164. In 2023 and 2024 the Penalties and Sentences Act was further amended to add the following considerations to which the court must have regard in sentencing:²⁴⁵
- whether the defendant is a victim of domestic violence
 - whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the defendant
 - the defendant's history of being abused or victimised.
165. To determine an appropriate sentence for an offender who is a DFV victim-survivor, the court must treat 'the effect of the domestic violence on the offender' as mitigating unless it is not reasonable because of exceptional circumstances.²⁴⁶ If the court finds that the offence is wholly or partly linked to the effect of domestic violence on such a defendant, the court must treat the extent of this link as a mitigating factor.²⁴⁷ We have undertaken analysis of sentences for manslaughter where the offender was a DVF victim-survivor. Our preliminary results are that such offenders are typically sentenced to between 7-10 years in prison in Queensland. In other jurisdictions sentences in these cases are lower, for example, in Canada the sentences for DFV victim-survivors who kill their abuser are around 2 years.²⁴⁸
166. As discretion is available in sentencing for manslaughter, judges can and do take these factors into account in sentencing for that offence. However, the lack of discretion available in sentencing for murder restricts the court's ability to take these factors into account for the head sentence.
167. Queensland Sentencing Advisory Council data indicates that 25% of the murder cases sentenced from 2016-2017 to 2023-2024 had been flagged as a domestic violence offence.²⁴⁹
168. Our sentencing remark analysis has identified cases where the Court referred to the fact that the offence was a domestic violence offence as aggravating but did not explain what effect this had on the overall sentence received nor did it result in any extension to the minimum non-parole period. For example, in *R v Johnston*,²⁵⁰ the defendant was sentenced for the murder of his estranged wife. In breach of a temporary protection order, he packed a bag with supplies (including duct tape, zip ties, a sedative, knives and a jerry can of petrol), went to her house, stabbed her numerous times and set her on fire, while their children watched. Johnston received the mandatory sentence of life imprisonment and the minimum non-parole period of 20 years despite his offending being aggravated by DFV.

DFV and practice and procedure

169. DFV victim-survivors face significant barriers to accessing and effectively using defences and excuses. Changes to the substantive law must be supported by changes to practice and

procedure informed by contemporary knowledge about DFV and how victimisation may cause or contribute to offending by victim-survivors. In our consultation paper, we have suggested potential changes to practice and procedure which are designed to support the proposed changes to defences. Those suggestions are intended to address common challenges DFV victim-survivors experience, including how matters are investigated and charged, misidentification, and how various issues combine to put undue pressure on victims to plead guilty where a defence is available. They reflect that DFV victim-survivors are often traumatised and may struggle to access justice on an equal basis necessitating special measures.

170. Most DFV victim-survivors are women and, when charged with an offence, are often disadvantaged in a criminal justice system designed to address the offending patterns and behaviour of men. In its second report, the Taskforce observed that the number of women charged with committing offences is increasing at an alarming rate — three times the rate of offending by men and boys —and that the criminal justice system often fails to accommodate the distinctive offending patterns and health and safety needs of women and girls.²⁵¹
171. For DFV victim-survivors who have killed their partner, the information they initially provide may not fully explain the history of domestic violence or coercive control nor how it caused, or contributed to, the killing. They may be in a state of shock, highly emotional, intoxicated, or injured, and be unable to provide a clear and accurate account of what happened. Pre-existing vulnerabilities such as mental health or cognitive impairments may exacerbate problems when telling their story to police (should they choose to do so) or in providing clear instructions to a lawyer. They are also more likely than men to make comprehensive admissions and accept full responsibility for criminal offending despite acting in self-defence. This can negatively impact their ability to rely on defences and excuses, even where those defences (including self-defence and any partial defences) have been amended or introduced to recognise that most DFV victim-survivors kill in defensive circumstances.
172. DFV victim-survivors are at significant risk of both misidentification as DFV offenders and criminalisation of their behaviour which is in response to, or retaliation for, DFV. This is particularly true for Aboriginal women and Torres Strait Islander women, who are disproportionately misidentified as being the perpetrator of DFV.²⁵² Aboriginal women and Torres Strait Islander women are more likely to be seriously injured or killed because of DFV but are also more likely to be charged with homicide. The Independent Commission of Inquiry into Queensland Police Responses to Domestic and Family Violence and academic research also recognise that ‘over-policing’ of civil domestic violence orders designed to protect women and girls, as well as inadequate responses to DFV, common police practices, attitudes and beliefs, are contributing to this increased criminalisation, particularly of Aboriginal women and Torres Strait Islander women.²⁵³
173. Research demonstrates that most DFV victim-survivors who kill their abusers are charged with murder but plead guilty to manslaughter, even in cases where a complete defence (such as self-defence) may be available.²⁵⁴ DFV victim-survivors face several pressures which make them more likely to plead guilty in these circumstances, including:²⁵⁵
 - Most are charged with murder which attracts a mandatory sentence of life, meaning there are significant risks in proceeding to trial even if a complete defence is available.
 - Most are held in custody on remand awaiting trial and may even be eligible for parole immediately following sentence if they plead guilty to manslaughter.
 - Many are unable to tell their story concerning the history of abuse in the relationship and fear being disbelieved. This is exacerbated where the person has previously been misidentified as a perpetrator of domestic violence or does not present as the ‘ideal victim’.

- Many do not want to face the trauma associated with proceeding to trial.
 - Some may receive inadequate legal advice with the Taskforce observing that outdated understandings of DFV may impact the legal advice given the victim-survivors.
 - Some may feel guilty for killing their abuser and believe they should be held responsible, without recognising their own victimisation.
174. Changes to practice and procedures which may address some of these issues may include increasing access to bail, introducing special measures to protect DFV victim-survivors when giving evidence in police interviews and in court and reviewing and amending prosecutorial guidelines to facilitate the charging of manslaughter in these cases. These are explored further in our consultation paper.

Domestic discipline

175. The defence of domestic discipline creates a legal grey area where some acts of violence against children are permitted. The defence of domestic discipline, under s 280 of the Criminal Code, allows parents and caregivers to use 'reasonable' force against children for correction, discipline, management and control. This can make it difficult to identify acts of DFV and discourage reporting.
176. The distinction between 'reasonable' domestic discipline using physical violence, and domestic violence, is not entirely clear. The lack of clarity means it is possible the defence may be used by perpetrators of DFV to pass off acts of abuse as 'reasonable' physical punishment. In cases where the violence is perpetrated by one parent against both the child and the other parent, this can further entrench the social entrapment experienced by that other parent, particularly where systems abuse – such as threatening the involvement of child safety – is also being deployed against the victim-survivor.²⁵⁶
177. Research has consistently shown a strong link between physical punishment and physical abuse, with children who are subjected to physical punishment being more likely to also suffer physical abuse.²⁵⁷ This reflects that physical punishment and physical abuse are two points along a continuum of violence, 'differing only by severity or degree.'²⁵⁸ As noted above, this can make child maltreatment difficult to identify and investigate given the law allows 'reasonable' physical force to be used for authorised purposes which may increase the risk faced by child victims; this can contribute to failures to properly consider cumulative and multi-type harm in the context of the child's situation. In its research report considering 'DFV-context filicides', ANROWS found that no filicide offenders had prior convictions for offences against the filicide victim and/or their siblings, despite there being a history of child abuse in 78% of cases and violence being reported in around half of those cases.²⁵⁹

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