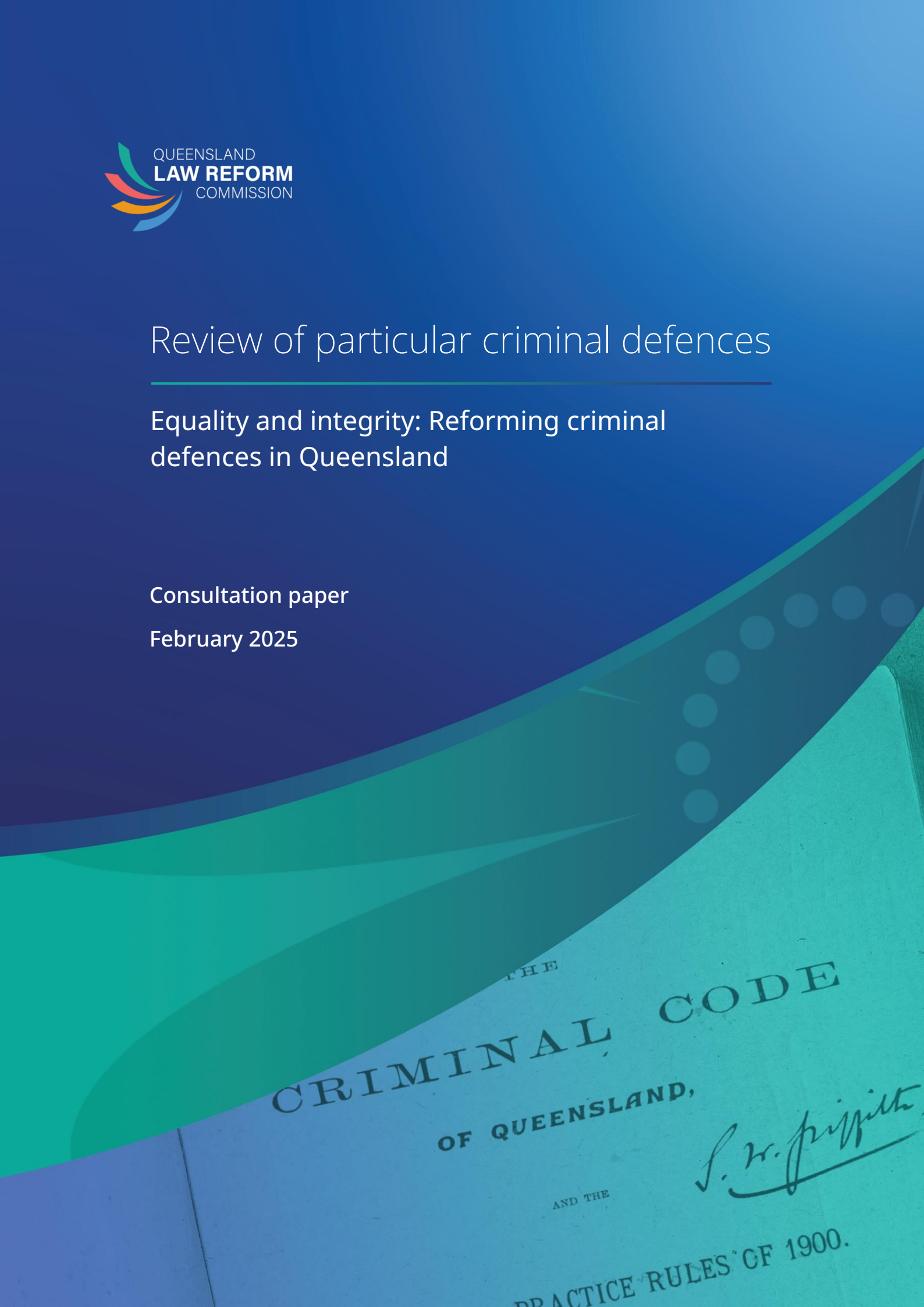
QUEENSLAND LAW REFORM COMMISSION

Review of particular criminal defences

Equality and integrity: Reforming criminal defences in Queensland

Consultation paper

February 2025



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Publications in this reference:

QLRC, Review of particular criminal defences: Our terms of reference (Background Paper 1, November 2023)

QLRC, Review of particular criminal defences: Collected information sheets (November 2023)

QLRC, Review of particular criminal defences: Our guiding principles for reform (Background Paper 2, July 2024)

QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024)

QLRC, Review of particular criminal defences: Understanding the role of domestic and family violence in criminal defences (Background Paper 3, February 2025)

Reference to legislation:

All legislation referred to applies to Queensland, unless otherwise indicated.

Contents

Abbreviations and glossary

Short text:	What it means:
DFV	domestic and family violence
GBH	grievous bodily harm
homicide	unlawful killing of another
ODPP	Office of the Director of Public Prosecutions
PTSD	post-traumatic stress disorder
Taskforce	Women's Safety and Justice Taskforce

Introduction

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

What is self-defence? The complete defence of self-defence recognises that 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 below). 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 to parole, they will be supervised in the community for the rest of their natural life.

What is domestic discipline? The defence of domestic discipline permits parents, persons in their place (like step-parents or foster carers), and schoolteachers to use force, provided the force was reasonable and was used for the purpose of correction, discipline, management or control of a child in their care.

2. This consultation paper:
   - considers community attitudes about these defences and the mandatory penalty
   - examines important context for any reforms including our understanding of DFV, the over-incarceration of Aboriginal peoples and Torres Strait Islander peoples and the over-representation of Aboriginal and Torres Strait Islander women as victims of crime
   - discusses and asks for feedback on:
     - 7 proposals for reform
     - 21 questions about potential reforms.

3. The purposes of the criminal justice system include maintaining social order, protecting individuals and ensuring justice. The criminal law is built on moral principles and ethical considerations. It should protect and promote human rights. Laws should not unfairly excuse or mitigate violence or perpetuate gender or cultural bias. The law should be informed by contemporary community standards. As our understanding of issues such as DFV evolves, reforms may be needed to ensure the law continues to align with community values and the best available evidence.

4. Our proposals include a new legislative test for self-defence to remove unnecessary complexity and to better provide for the use of self-defence in the context of DFV. We consider the intersection between the defence of self-defence and the excuse of compulsion and duress and ask whether changes are required to compulsion and duress, given our proposal to amend self-defence.

5. We propose repealing the partial defence of killing for preservation in an abusive domestic relationship as our reforms to self-defence would render the defence redundant in its current form. We propose the repeal of the partial defence of provocation as it is inconsistent with current community attitudes to excuse lethal violence borne of anger and jealousy. We explore the potential to introduce new partial defences, including a new partial defence built on principles of trauma and excessive self-defence. Our intention is that partial defences are consistent with contemporary attitudes, do not reward anger-fuelled responses, and that they address the vulnerability of DFV victim-survivors who resort to lethal violence.

6. We examine the mandatory penalty for murder and seek feedback on whether it should be reformed. The mandatory penalty reflects the seriousness of murder, and any reforms should be consistent with community attitudes. Mandatory sentencing for murder without the ability to take into account pleas of guilty or cooperation with police leads to more murder trials, retraumatising deceased persons' families and delaying the finalisation of cases. The mandatory penalty also prevents courts from imposing a sentence that matches the circumstances of the crime, the deceased and the defendant.

7. We propose amendments to the complete defences of provocation to assault and repetition of insult so that it does not apply to domestic violence offences.

8. We examine potential reforms to criminal law practices and procedures relating to the issues under review. Vulnerable groups face significant challenges in accessing and effectively using defences and excuses under the criminal law and in raising mitigating factors on sentence. Reforms to practice and procedure, which help improve access for these vulnerable groups, will be necessary to support any legislative change.

9. Finally, we explore potential options to reform the defence of domestic discipline and ask whether the defence should be abolished or substantially amended. We explore options to repeal the defence and options to limit it.

10. We invite you to share your views on the consultation proposals and questions and any other issues you believe are important for our review.

Making a submission

11. Your submission is important and will help us develop our recommendations.

12. You can send us your written submissions through our website.

13. There will also be opportunities to attend meetings and forums to share your views in March and April 2025. Details about these meetings will be shared on our website and through our newsletters and LinkedIn page. You can sign up to receive our newsletters.

14. We prefer to receive public submissions as they provide important evidence in our review. Our submissions policy explains how we may use and publish submissions we receive. We treat all submissions as public unless you clearly indicate it is confidential. We publish public submissions on our website.

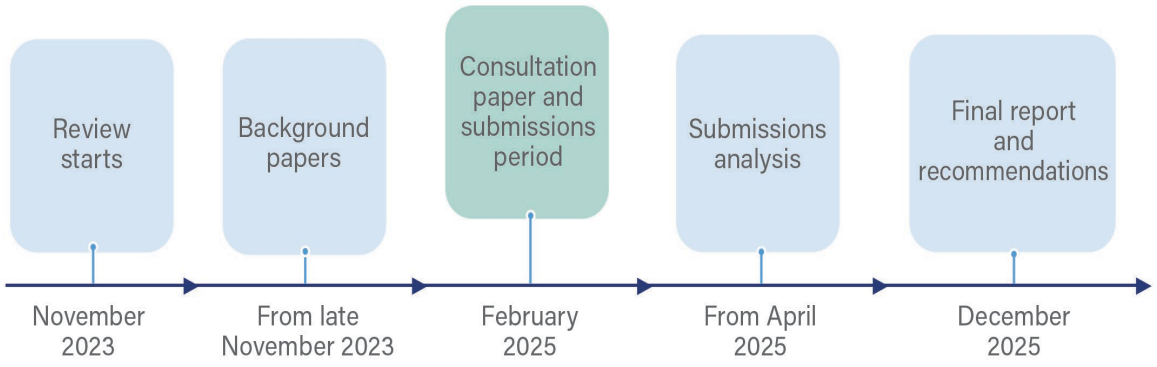
15. Submissions close on **20 April 2025**.

Our review

16. In November 2023, we were asked to review particular defences and excuses in the Criminal Code (see the full terms of reference). Our review was one of the recommendations of the Women's Safety and Justice Taskforce ('Taskforce') that was established in 2021 to examine coercive control and the experience of women and girls across the criminal justice system. It recommended the issue of self-defence and other partial defences, as well as the mandatory penalty for the conviction for murder, be referred to us, given their application beyond DFV contexts.[2]

17. We have undertaken preliminary consultation statewide, which has involved 96 meetings with stakeholders such as judges, prosecutors, criminal defence lawyers, DFV victim-survivors, legal aid, community justice groups and Aboriginal and Torres Strait Islander Elders.

Figure 1: Review timeline



18. In our first background paper, we outlined our terms of reference, described the current law and explained the general scope and focus of our review, in more detail. It was accompanied by information sheets about each of the defences and the mandatory penalty of life imprisonment for murder and other resources. Our second background paper outlined the five guiding principles for this review.

19. Our third background paper explores contemporary understandings of DFV and its effects, community attitudes, and how DFV relates to the defences in our review. It is intended as a companion piece to this paper and discusses the research and issues outlined in this paper in more detail.

Figure 2: Our guiding principles

20. The Commission has not formed concluded views at this stage. The proposals are preliminary ideas we have developed for public discussion and input. We invite your feedback and will genuinely consider all views about the proposals, as well as any other reform options you identify. Your feedback will help us to develop workable and implementable final recommendations.

21. We will give our final report with recommendations and any draft legislation to the Attorney-General by 1 December 2025.

Our research

22. Our recommendations must be evidence-based. We need to understand how the current defences and mandatory life sentence for murder operate in Queensland. As existing research and publicly available data was limited, we are conducting original research. We have also relied on the Queensland Sentencing Advisory Council's research for its Sentencing Spotlight series on murder and manslaughter.[3]

23. We developed six research projects for this review:

- Research project 1 − Community attitudes survey research: independent study to help us understand community attitudes to defences in cases of homicide and assault in Queensland, the mandatory life sentence for murder, and attitudes towards DFV.
- Research project 2 − Sentencing for murder: the practical application of Queensland's mandatory life sentence for murder and its associated minimum non-parole periods (analysis of Queensland Corrective Services data and sentencing remarks).
- Research project 3 − Domestic discipline in Queensland: the use and impact of section 280 of the Criminal Code (interviews with police, young people and analysis of the Queensland Police Service data on how 'domestic discipline' may operate as a bar to prosecution).
- Research project 4 − Women who kill: court outcomes for women charged with homicide (analysis of Courts Performance and Reporting Unit data, trial transcripts and sentencing remarks).
- Research project 5 − Understanding professional experience with the defences: Semi-structured interviews with lawyers, judges and DFV victim-survivors.
- Research project 6 − Homicide case analysis: the use and operation of the defences and excuses in practice in Queensland (analysis of Courts Performance and Reporting Unit data, sentencing remarks and trial transcripts).

24. Research project 1 is completed (see the community attitudes survey). We are part way through completing research projects 2 to 6. In this paper, we present early findings to help inform responses to our proposals and questions. They reflect the analysis completed as at the date of this paper and may change on completion of the research. Reports for each project will be published over the coming months and will include further information about the design and methodologies for each project.

Human rights

25. Human rights are fundamental rights and freedoms that apply to all human beings. They include a wide variety of rights, under both domestic and international law, including the right to life, the right to liberty and security, the right to freedom from torture and inhuman treatment and the right to a fair trial.

26. The criminal law plays a crucial role in protecting human rights by safeguarding individual rights, ensuring fair trials, setting limits on law enforcement, promoting accountability and balancing community safety and individual security and liberty.

27. Queensland's human rights framework is primarily established through the Human Rights Act 2019. It requires public entities, including the Commission, to act and make decisions that are compatible with human rights. Human rights impact how we conduct our review, including how we engage in consultation and promote participation in our work. The Commission is required to consider the compatibility of its recommendations with the Act.[4]

28. The Human Rights Act 2019 protects 23 human rights. Other instruments, such as the Charter of Victims' Rights in the Victims' Commissioner and Sexual Violence Review Board Act 2024,[5] also contain rights relevant to our review. As recommended by the Taskforce, a review is currently considering whether recognition of victims' rights should be incorporated in the Human Rights Act.[6] The Australian Law Reform Commission is also considering how to best recognise victims' rights through the criminal justice system as part of its review into justice responses to sexual violence.[7]

29. In background paper 2, we identified several human rights that are potentially relevant to the review.[8] We will include a complete human rights analysis in our final report.

Reform context

30. In this section, we explore key issues that have informed our examination of law reform options for this review:

- community attitudes
- delays in our criminal justice system
- our evolving understanding of DFV and
- the over-representation of Aboriginal and Torres Strait Islanders in Queensland's criminal justice system.

Community attitudes

31. We are asked to have regard to 'the need to ensure Queensland's criminal law reflects contemporary community standards'.[9]

32. To understand the contemporary views of Queenslanders about the defences and the mandatory penalty of life imprisonment for murder, we engaged an external research team to investigate community attitudes using a representative sample survey and focus groups.[10] The key findings from that study are below. The full report is also available on our website.

Key findings

1. Most community members don't blame victim-survivors for their abuse or have attitudes which minimise DFV.
2. Individual attitudes and knowledge about DFV influenced whether people thought DFV defendants should have a defence.
3. The community does not support provocation as a defence to assault if there is a risk of significant injury.
4. Aboriginal and Torres Strait Islander participants had different views about defendant culpability than non-Indigenous participants in a small number of scenarios.
5. Community attitudes align with traditional rules of self-defence, and participants were able to weigh relevant factors to assess culpability.
6. The community support alternatives to criminal prosecution where parents use minimal force to discipline children.
7. The community supports teachers' ability to use force for the purpose of management or control but not for discipline or correction.
8. The community does not support provocation defences where the defendant's conduct is motivated by anger, jealousy, or a desire for control, particularly in cases involving DFV.
9. The community expects individualised criminal justice responses to the use of lethal violence.
10. There was strong community support for partial and complete defences and consideration of abuse for victim-survivors of DFV who kill an abusive partner.

11. There was some support for a partial defence of excessive self-defence.

12. The community does not support the mandatory penalty of life imprisonment for murder. The community expects sentencing to reflect the culpability of murder defendants.

33. The community supports the concept of self-defence and understands that it requires the balancing of necessity and reasonableness, including options for retreat and proportionality (key finding 5).

34. In a scenario involving a DFV victim-survivor killing their abusive partner, nearly two-thirds of survey respondents (64%) believed the most appropriate outcome was a manslaughter conviction (not a murder conviction) and 16% said the victim-survivor should be acquitted (key finding 10). This suggests Queenslanders recognise reduced culpability in such cases and support a partial defence such as killing for preservation (section 304B).

35. In the circumstances described above, women, victim-survivors, and people 55 years and older were more likely to think the defendant should not be found guilty of murder. In contrast, participants who expressed victim-blaming attitudes were more likely to believe the defendant should be found guilty of murder. This demonstrates the importance of continuing community education about DFV and coercive control, to overcome common myths and misconceptions about DFV and ensure victim-survivors can access appropriate defences.[11]

36. Responses indicate there is a need for effective and DFV-informed jury directions and expert evidence in cases involving a history of abuse by the deceased to explain the nature and impact of DFV, including entrapment (key finding 10). Changes to the law of self-defence, and supporting practices and procedure, may be required for victim-survivors to successfully access self-defence.

37. Participants who said lethal force was an excessive response to sexual assault thought a murder conviction was not appropriate. This indicates that it may be appropriate to consider whether self-defence should apply where there is a reasonable apprehension of sexual assault, and whether a partial defence of excessive self-defence is appropriate (key findings 5 and 11).

38. Key findings 3 and 8 show that Queenslanders do not support provocation as a defence particularly where:

- the provocation consists of 'words alone'
- the defendant was motivated by anger, jealously or desire for control (as opposed to fear for their life)
- in cases of assault, the defendant's conduct risked or caused significant injury.

39. Support for the defence of provocation was especially low in the context of intimate partner assaults (key finding 8).

40. However, where the provocation was verbal insults or harassment in a public setting, Aboriginal and Torres Strait Islander participants were significantly more likely to support the defence of provocation to assault (key finding 4). Individual or collective experiences of public harassment, particularly racism, may shape these views.[12]

41. Most participants supported a defence for parents where they used minimal force to discipline a child. They did not favour a criminal justice response in those circumstances and suggested increased social support was a better response. Participants were more likely to say a parent should be found guilty of assault if the perceived or potential harm to the child was greater, including where the parent used an implement, left bruising or slapped the child in the face. This suggests the consequences for the child were crucial for determining culpability of the parent (key finding 6).

42. Responses showed broad support for the defence of domestic discipline where a teacher used very low levels of force for the purpose of management or control, but not for the purposes of discipline or correction (key finding 7).

43. The findings showed clear evidence that the community does not support the mandatory life sentence for murder. Instead, the community expects sentencing to reflect defendants' culpability, in the specific circumstances (key findings 9 and 12).

Delay

44. Our criminal justice system suffers from lengthy delays at both the police investigation and criminal prosecution stages. We heard in preliminary consultations that it usually takes 3 to 4 years to finalise a murder prosecution by way of trial. This can extend beyond 4 years in cases where there is a referral to the Mental Health Court or there is a re-trial following a successful appeal.[13]

45. Delays in the criminal justice system cause considerable distress to the deceased person's family, who must suffer the uncertainty of associated with drawn out criminal proceedings following the loss of a loved one.[14] At the same time, the defendant typically spends this period on remand, despite not having been found guilty and sentenced for the offence. Delay affects the choices that defendants make in deciding whether to plead guilty, or to continue with a criminal trial. It may also affect the recollection of witnesses.

Understanding DFV

46. Our terms of reference ask us to consider how the defences are operating in the context of DFV, including with regard to:[15]

- the findings of the Taskforce
- the nature and impacts of DFV on victims and survivors, and their families
- the need for laws to balance the interests of victims and accused persons
- the experience of victims and survivors, and their families, in the criminal justice system.

47. We have undertaken research to better understand the nature and impacts of DFV and coercive control and how this may be relevant to our review. This is comprehensively addressed in background paper 3.

48. Traditionally, criminal justice responses to DFV have focused on individual incidents of physical violence. Non-physical forms of DFV are often neglected. This means the full context of the relationship and history of abuse may not be properly considered. The impacts of this can be significant, affecting the police investigation and subsequent criminal proceedings, including the availability of defences. This incident-based approach may lead to:[16]

- Difficulty in determining whether the person is the primary victim of abuse and may result in 'misidentification' of the person as the perpetrator. Charging a primary victim with a criminal offence may compound their trauma.
- Limitations in assessing the real level of risk to the primary victim, resulting in inadequate responses to protect a victim-survivor and their children, and distrust of, and disengagement from, systems which are supposed to hold perpetrators to account while keeping victim-survivors safe.

> ‘[P]olice and courts’ continued reliance on incident-based approaches to DFV, rather than gender-sensitive assessment of the context of violence, is a significant factor in inappropriate legal responses’.[17]

49. Recently, there has been increased recognition that ‘incidents of domestic violence’ generally occur within a broader context of coercive control.[18]

50. Coercive control is a pattern of behaviour perpetrated against a person to create a climate of fear, isolation, intimidation, and humiliation.[19] It may involve physical or non-physical forms of violence or abuse that may vary in frequency and intensity. Over time these dominating and oppressive behaviours restrict the victim-survivor’s freedom and autonomy, essentially trapping them. They are not free to just leave the relationship, and research demonstrates the lethality risk for victim-survivors increases following separation. The perpetrator’s behaviour is deliberate and rational, rather than impulsive or erratic. Each act is designed to punish, hurt or control the victim-survivor.[20]

51. Understanding DFV through the lens of coercive control helps us understand that DFV is hidden, complex, and patterned and its impact is cumulative and significant.[21] Coercive control is highly gendered. Women are almost exclusively the victims of coercive control, and the perpetrators are usually their current or former intimate partners.[22] Men can also be victims of DFV but are more likely to experience violence from a male stranger.[23]

52. The drivers of DFV and factors which allow ongoing abuse include the responses of family, community, organisations and broader systems (including police and the courts) surrounding the people who use and experience DFV.[24] Inadequate systems responses may be compounded by intersectional inequality which further traps a victim-survivor in an abusive relationship and limits their safety options.

53. When confronted by the accumulated impact of all these factors, a woman may resort to the use of force to protect herself or her children. This can lead to criminal charges, particularly where police and lawyers do not have an adequate understanding of the patterned and cumulative nature of DFV and the use of defensive force. It may also result in misidentification of the primary victim of abuse.

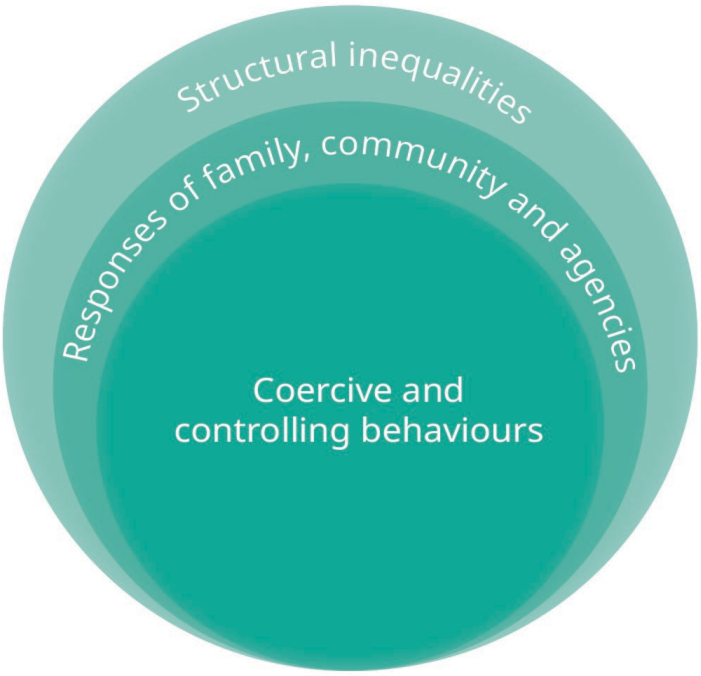
54. Misidentification is when the primary victim of abuse is wrongly labelled as the perpetrator. A primary victim can be misidentified if they use ‘resistive violence’, in cases involving ‘mutual violence’ or where there are conflicting stories about what happened. It may result in cross-orders where both the perpetrator and the primary victim are respondents on protection orders. Misidentification may limit the ability of victim-survivors to successfully rely on defences and may enable predominant aggressors to inappropriately rely on them. The Taskforce was concerned about the rates of police misidentification of the person most in need of protection.[25]

55. To address concerns about misidentification, section 22A was inserted into the Domestic and Family Violence Act 2012 in 2023.[26] It provides guidance to help police, practitioners and courts more accurately identify the primary perpetrator of domestic violence and the person who is most in need of protection. This reflects the policy position that in a DFV relationship, in general, both parties cannot be both the perpetrator of violence and the person needing protection.

56. The Taskforce also found that social entrapment framing, and admission of evidence of the nature and impact of DFV, including expert evidence, was essential to improve criminal justice system responses to victim-survivors.[27] In accordance with the Taskforce’s recommendations,

amendments have been made to part 6A of the Evidence Act 1977 to better facilitate admission of such evidence.[28] The use of social framework evidence to understand social entrapment relevant to offences involving DFV, particularly where a victim-survivor has been charged with a criminal offence, is critical to ensuring they have access to appropriate defences (see background paper 3).

Figure 3: What is social entrapment?



Violence against children

57. The National Plan to End Violence against Women and Children 2022–2032 notes that children can be adversely impacted by exposure to DFV in the home and can also directly experience DFV.[29]

58. At present, the law permits the use of 'reasonable' physical force for the purposes of discipline, correction, management or control, which is commonly known as corporal punishment or domestic discipline; this is different to physical abuse (see below, domestic discipline). However, it can be hard to differentiate between reasonable force for disciplinary purposes, and unreasonable force for non-disciplinary purposes, for example, when used with intention to cause pain or harm to the child or perpetrated in anger without legitimate purpose. The use of force in the later circumstances is an offence and would be considered DFV within the existing legislative framework (see background paper 3).

The relationship between DFV and defences

59. The criminal law should reflect contemporary knowledge of DFV. Defences should not operate as a tool to excuse DFV or reduce or eliminate criminal culpability where primary perpetrators of DFV commit violent offences. It is also important that we consider the availability of defences where a victim-survivor may commit criminal offences. This may arise where they use force against their abuser or where, as a result of coercive control, they become enmeshed in the criminal offending of their abuser. We have considered how the defences we are reviewing may operate in cases involving DFV in background paper 3.

Over-representation

Terminology

We generally use the phrase **Aboriginal peoples and Torres Strait Islander peoples and their communities** where context allows. However, when referring to other sources, we have replicated the terms they used, such as Indigenous peoples and First Nations peoples.

We recognise the diversity of cultures, language and communities throughout Queensland and Australia. We also recognise and respect the distinct cultural identities of Aboriginal peoples and Torres Strait Islander peoples. We recognise that different language preferences exist. We use these terms with the utmost respect.

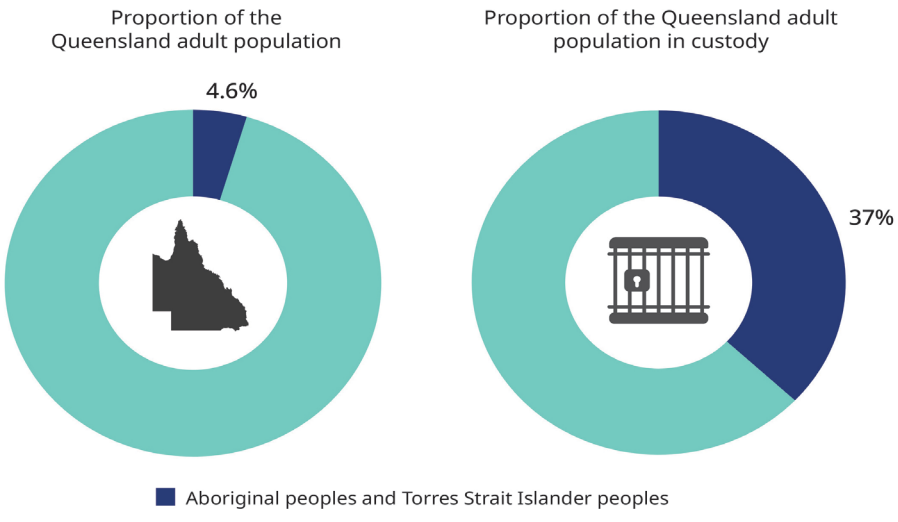
60. Queensland's Better Justice Together stategy recognises that:[30]

> Aboriginal and Torres Strait Islander peoples continue to be overrepresented across Queensland's criminal justice system as offenders, victims and victim-survivors.
>
> While 4.6% of Queensland's population are Aboriginal and/or Torres Strait Islander, Aboriginal and Torres Strait Islander peoples make up 37% of adult prisoners in custody, and 69% of young people in detention. This is unacceptable and needs to change.

61. In 2017, the Australian Law Reform Commission examined this issue and found that Aboriginal and Torres Strait Islander peoples are over-represented at every stage in the criminal justice system.[31] A complex range of intersecting factors, both historical and contemporary, contribute to this over-representation, including the impacts of colonisation, dispossession, child removal, institutional and structural violence, and limited access to services.[32] Our Watch notes:[33]

- violence is not a part of traditional Aboriginal or Torres Strait Islander cultures
- violence against Aboriginal and Torres Strait Islander women is perpetrated by Indigenous and non-Indigenous men
- alcohol is a contributing factor, and often a trigger for violence, but it is not the 'cause'.

Figure 4: Over-representation



62. The fundamental causes for over-representation of Aboriginal people in custody are not located within the criminal justice system. Instead, 'the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally'.[34]

63. The Queensland Government has committed to the National Agreement on Closing the Gap, which includes targets to reduce the rate of Aboriginal and Torres Strait Islander:[35]

- adults held in incarceration by at least 15% by 2031
- young people (10–17 years) in detention by at least 30% by 2031.

64. Queensland is not on track to meet these targets. Over-representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system is actually increasing.[36]

65. The trend of over-representation is reflected in our homicide case analysis which shows that approxiametely 20% of all persons charged with homicide offences are Aboriginal peoples and Torres Strait Islander peoples,[37] despite being only 4.6% of the Queensland population.[38] Research shows that this trend is also true for other offences relevant to the defences in our review, including assault offences.[39]

66. Closing the Gap commitments include targets to reduce family violence and abuse against Aboriginal and Torres Strait Islander women and children by 50% by 2031.[40] Our Watch reports that, in comparison to non-Indigenous women, Aboriginal and Torres Strait Islander women:[41]

- experience DFV at 3.1 times the rate
- are nearly 11 times more likely to die from assault
- are 32 times more likely to be hospitalised due to DFV.

67. As recommended by the Taskforce, the Queensland Government established the First Nations Justice Office to develop and coordinate Queensland's Aboriginal and Torres Strait Islander justice strategy 2024–2031.[42] The strategy aims to improve justice outcomes, address systemic inequity, and keep Aboriginal and Torres Strait Islander peoples safe.[43]

68. We have undertaken preliminary consultation with a number of Aboriginal peoples and Torres Strait Islander peoples, including Elders, academic experts, community groups, legal groups and government officials. These consultations suggest that, although the abolition of any defences could increase incarceration rates, the immediate practical impacts will be limited. This is because existing access to justice issues severely restrict the ability of Aboriginal peoples and Torres Strait Islander peoples to access the defences and excuses available under the criminal law.

69. Broader access to justice issues identified during these consultations include:

- barriers to accessing bail, resulting in long periods on remand and 'pragmatic pleas' to resolve the matter quickly despite the availability of a defence
- language barriers and cross-cultural miscommunication issues, including 'gratuitous concurrence', which refers to the pattern of saying yes in answer to a question (or no to a negative question) regardless of actual agreement
- racial profiling, stereotyping and over-policing of Aboriginal peoples and Torres Strait Islander peoples and their communities
- a lack of cultural competency in the Queensland Police Service and criminal justice system generally
- distrust and fear of the police by Aboriginal peoples and Torres Strait Islander peoples and their communities

- a lack of emphasis on prevention and deterrence measures, as well as restorative justice and mediation, in favour of an emphasis on punitive approaches
- a lack of access to support services, particularly for Aboriginal and Torres Strait Islander women experiencing DFV.

70. While many of these issues go beyond this review's scope, we have considered them when suggesting reforms, particularly about criminal law practice and procedure. Our final recommendations will consider Queensland's ongoing commitment to achieving the targets from the National Agreement on Closing the Gap and will be intended to assist their realisation.

Law of homicide

71. In this section, we set out the law of unlawful homicide and explain complete and partial defences.

72. The offence of 'murder' includes unlawful killing:[44]

- with intent to cause death or grievous bodily harm ('GBH')
- by acts done or omissions made with reckless indifference to human life (where death was foreseen as a probable consequence)
- by acts likely to endanger human life that are done in the course of an unlawful purpose (sometimes called 'constructive murder' or 'felony murder').

73. Unlawful killing that does not amount to murder is manslaughter.[45] Unlawful killing may not amount to murder because:

- the element of killling in one of the ways stated above is not satisfied, often because the evidence does not prove the offender had a subjective intent to cause death or grievious bodily harm
- a partial defence applies that reduces murder to manslaughter.

74. A person who did not do the act or ommission which caused the death of another person may still be convicted of murder or manslaughter as a party to that offence. Party liability in such cases often turns on the person's level of participation, the scope of any agreement between the various people responsible, and the person's knowledge of the intention of the person who caused the death.[46]

75. Our preliminary research indicates that, in sentencing for murder, judges often did not explicitly state the basis of conviction. Where it was stated, it was most often stated as:

- intent to kill
- 'intent to kill OR to cause grievous bodily harm' or
- 'at least intent to cause grievious bodily harm'.

76. In very few cases was intention to cause GBH or felony murder noted as the basis of a murder conviction (see our forthcoming research report 2).

Data snapshot: case examples of different types of murders

- Intent to kill: Brett Cowan was convicted on the basis of intent to kill. After abducting 13-year-old Daniel Morcombe, Brett Cowan indecently dealt with him and then killed him (by strangulation) to avoid being caught.[47]

- Intent to cause GBH: Carl Bricola was convicted on the basis of intent to cause GBH. While intoxicated, he stabbed a friend intending to cause him serious injury.[48]
- Reckless indifference: As yet there have not been any convictions of murder on this basis.
- Felony murder: David Bradshaw was convicted of murder on the basis that he caused the death of the victim when he lit a fire under the victim's house as an act of personal vengeance. Bradshaw claimed that he did not know anyone was at the house. That act of lighting the fire was likely to (and did in fact) endanger human life.[49]
- Party liability: Jade Clarke was convicted as a party to the murder of a drug associate. There was no evidence that she actively did anything to cause injury to the deceased. The death resulted from a bashing by two other males but on the jury's verdict she was someone who aided or went with the males for the purpose of committing an offence.[50]

What are defences and excuses?

77. Defences are generally categorised as 'justifications' or 'excuses'.

78. Where a defence is a justification, the defendant's conduct is not wrongful and is considered acceptable in the circumstances.[51] Common examples of justifications are self-defence,[52] defence of another, and extraordinary emergency.

79. An excuse, however, recognises that the act was wrong, but that the defendant should not be held responsible (or fully responsible) because of their personal circumstances.[53] Common examples include provocation, compulsion, insanity, and diminished responsibility.

80. A person charged with unlawful homicide (either murder or manslaughter) may rely on a complete defence resulting in an acquittal. Self-defence and domestic discipline are complete defences.

81. Partial defences, including killing on provocation and killing for preservation, are only applicable where the Crown can prove the offence of murder.

What are partial defences?

82. The Criminal Code contains three partial defences to murder:

    - Killing on provocation (section 304) – recognises reduced culpability where a person loses control (usually because they are angry) and kills in response to provocative conduct by the deceased person.
    - Diminished responsibility (section 304A) – recognises reduced culpability where an 'abnormality of mind' substantially impairs a person's ability to understand what they are doing, control their actions, or know they shouldn't do the act.
    - Killing for preservation in an abusive domestic relationship (section 304B) – recognises reduced culpability where a victim-survivor of serious domestic violence kills their abuser to preserve themselves from death or grevious bodily harm in circumstances not amounting to self-defence.

83. Partial defences developed when the death penalty was imposed on persons convicted of murder. The link between partial defences and the mandatory penalty for murder has been noted by many law reform commissions.[54]

84. The continuing need for partial defences is connected to:

- the scope of self-defence and the availability of other complete defences including compulsion and accident to recognise cases where a person should not be criminally culpable
- mandatory sentencing for murder.

85. Partial defences only exist for murder. For other offences, including manslaughter, the courts have discretion when sentencing a defendant to reflect different levels of culpability. This discretion allows various matters to be considered by the judge including: the maximum penalty, nature of the offending, the defendant's circumstances including cognitive or mental impairment, a history of DFV, or the victim's contribution to the offending.

86. Some jurisdictions have abolished mandatory sentencing for murder but have maintained partial defences as part of their homicide framework (for example, New South Wales). Other jurisdictions, like New Zealand and Victoria, have abolished partial defences, concluding that different levels of culpability should be reflected at sentence. See our interjurisdictional analysis for further details of the homicide frameworks that apply in other jurisdictions.[55]

87. We acknowledge that the need for partial defences is connected to both mandatory sentencing for murder and principled reasons for recognising reduced culpability in certain cases. It is not possible to have a partial defence for every circumstance which may warrant recognition of reduced culpability. Any partial defences should be justifiable by reference to community standards and legal principles of culpability.

Self-defence

88. In this section, we explore the law of self-defence in Queensland and set out reform proposals with supporting questions to explain how self-defence may be simplified and made fairer for DFV victim-survivors who kill their abuser.

Current law

89. Self-defence is a complete defence to an offence involving the use of force, including assault and homicide. Where the prosecution cannot exclude the defence beyond reasonable doubt, the defendant will be acquitted. This defence may apply to multiple offences. Accordingly, it is important to consider how changes to self-defence may impact the prosecution of both lethal and non-lethal violent offences, including those that occur in the context of DFV and those that do not (such as alcohol-fuelled violence in public places).

90. Self-defence involves the socially acceptable use of proportionate force in defence of an unlawful attack.[56] In Zecevic v Director of Public Prosecutions (Victoria), the High Court said:[57]

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did.

91. Self-defence is founded on the right to autonomy, physical integrity or security and, in more extreme circumstances, the right to life.[58] The concept of self-defence requires balancing competing interests in assessing criminal responsibility. The competing interests include those of the attacker, the person who responds in self-defence,[59] and broader collective interests in ensuring that persons who use violence are held responsible. In balancing these interests, it must also be recognised that a member of the community should be able to use reasonable force to defend themselves against an attack.[60]

92. In Queensland, different tests for self-defence apply depending on:[61]

- Whether the assault which the person was defending themselves against was unprovoked or provoked. A more onerous test applies where the defendant provoked the assault. In such a case, the defendant can only rely on self-defence if they reasonably apprehended death or GBH.
- The nature and seriousness of the original attack. Greater defensive force can be used where there is a reasonable apprehension of death or GBH.
- Whether the person was defending themselves or another person (aiding in self-defence). A person who acts to defend another person can only use force that would have been lawful for that other person to use (which requires consideration of whether the assault was provoked or unprovoked) and must have acted in good faith and for the protection of the other person.[62]

93. We have comprehensively considered the Criminal Code provisions for self-defence in our self-defence information sheet.

Overview of the Criminal Code provisions for self-defence

Section 271(1) – self-defence against an unprovoked assault where the force used is not likely or intended to cause death or GBH. An objective test is applied to determine whether a defendant used reasonably necessary force to defend against the assault.

Section 271(2) – self-defence against an unprovoked assault where there is a reasonable apprehension of death or GBH. A defendant must have reasonably feared death or GBH and must have believed on reasonable grounds that there was no other way to prevent death or GBH (this essentially equates to the belief of a reasonable person in the defendant's position, a mixed subjective and objective test).[63]

Section 272(1) – self-defence against a provoked assault applies where the complainant assaulted the defendant in response to either the defendant first using violence or where the defendant provoked the complainant to react violently (that is, the defendant started it). When this occurs, before the defendant's use of force can be excused under this section, they must have had a reasonable apprehension of death or GBH. The provision uses the same tests as section 271(2), but adds an additional objective test that the force used was reasonably necessary to preserve the defendant from death or GBH.

Section 272(2) – excludes self-defence to a provoked assault, even if the requirements of section 272(1) are met, if any of the following apply:[64]

- the defendant began the assault with intention to kill or cause GBH
- the defendant endeavoured to kill or do GBH to the complainant before the need to preserve themselves arose
- the defendant did not, as far as was practicable, decline further conflict or try to retreat before the need to use force to preserve themselves from death or GBH arose.

Section 273 – aiding in self-defence. In circumstances where a person could lawfully use self-defence (with reference to sections 271 and 272) another person can use a similar degree of force in defence of another under section 273 if:

- they were acting in good faith in defence of the other person and
- they used the force for the purpose of defending the other person.

94. In addition to these provisions, the Criminal Code provides other defences which apply when a person is defending property, including defence of dwelling in section 267 (to prevent a home

invasion) or defence of moveable property in sections 274 to 276.[65] While these provisions use similar concepts, and in some jurisdictions the use of force to defend persons and property is covered by the same provision, provisions dealing with the use of force to defend property is beyond the scope of our current review.

The difference between objective, subjective and mixed tests

An objective test considers the situation from the standpoint of a 'reasonable person' who was in the same circumstances as the defendant, but who does not have the specific characteristics or experiences of the defendant. A reasonable person test asks how would a typical Queenslander respond in this situation.

A subjective test focuses on the defendant's actual belief at the time.

A mixed subjective and objective test combines subjective and objective perspectives. It considers the defendant's actual belief and then asks whether this was objectively reasonable in the circumstances as the defendant perceived them.

95. Discussions about self-defence often raise the concepts of 'proportionality' and 'imminence'. However, they are not separate requirements under the existing Queensland law. Proportionality forms part of the consideration of reasonableness and imminence is tied to the consideration of necessity to defend against an unlawful assault. These are discussed further below.

96. Queensland's self-defence laws are complex. A single case may require consideration of more than one of the self-defence provisions. The provision which applies depends on the jury's factual findings, such as whether the assault was provoked, or whether the force used was 'likely to cause death or GBH'. Mistake of fact in section 24 of the Criminal Code applies where a defendant has an honest and reasonable but mistaken belief as to the existence of any state of things. This may also be relevant when considering self-defence and if so may further complicate and lengthen jury directions. This can be difficult for both lawyers and ordinary people to understand and detract from the true defence.[66]

97. The complexity of the law and jury directions also increases appeals. We reviewed decisions from the Queensland Court of Appeal on self-defence. Numerous appeals arose where it was said that errors were made because the judge failed to direct the jury on one or more of the self-defence provisions, or failed to properly direct the jury on an element of self-defence. For example, in R v Beetham, the Queensland Court of Appeal allowed an appeal against conviction for GBH and ordered a re-trial because of a failure by the trial judge to direct the jury about section 271(2) of the Criminal Code.[67] Her Honour, President Margaret McMurdo, noted the well-publicised 'one punch can kill' campaign, outlining its relevance to determining whether the defendant had a reasonable apprehension of death or GBH and whether the defendant's assault was likely to cause death or GBH.[68]

Self-defence in other jurisdictions

98. Although it incorporates similar elements to the defence as it applies in other states and territories, the structure of Queensland's approach to self-defence is unique. Every other Australian jurisdiction and New Zealand has a single defence for self-defence which also applies to defence of another. They do not have different tests for cases involving threats of serious injury or death and they do not distinguish between provoked and unprovoked assaults.

Table 1: A snapshot of self-defence in Australia and New Zealand

Jurisdiction	Overview of test for self-defence
NSW, Vic, ACT, NT, Cth, Model Criminal Code[69]	A person acts in self-defence if: 1. the person believes the conduct is necessary to defend himself or herself or another person (or other prescribed purpose) 2. the conduct was a reasonable response in the circumstances as the person perceives them.
Tas, NZ[70]	Everyone is justified in using, in defence of himself or herself or another, such force as, in the circumstances as he or she believes to them be, it is reasonable to use.[71]
WA[72]	A harmful act is done in self-defence if: 1. the person believes the harmful act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent 2. the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be 3. there are reasonable grounds for those beliefs.
SA[73]	It is a defence to a charge of an offence if: 1. the defendant genuinely believed the conduct to be necessary and reasonable for a defensive purpose 2. the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

99. There is significant consistency in the approach to self-defence across Australian jurisdictions and New Zealand. Beside Western Australia and South Australia, they all adopt a single test of self-defence which incorporates the same two elements:

- subjective belief that the use of force was **necessary** to defend themselves or another person (or for another prescribed purpose) and
- the conduct was a **reasonable response** in the circumstances as the person perceived them to be (mixed subjective and objective test).

100. The 'single statement' approach of Tasmania and New Zealand requires the jury to determine two matters: subjective belief in the need to use defensive force **and** that the force used was reasonable in the circumstances as the defendant believed them to be.[74] This means that the single statement approach is materially indistinguishable from the 'two element' approach.

Reforming self-defence in Queensland

Proposal 1

Proposal

P1 Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

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

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

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

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

The provision should also provide:

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

(d) Self-defence does not apply if –

i. the person is responding to lawful conduct and

ii. the person knew the conduct was lawful.

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

101. The complexity of the existing self-defence framework provides a compelling argument to repeal the existing self-defence provisions and replace them with a single test for self-defence that would also apply to cases where the defendant was defending someone else.

102. Proposal 1 would promote simplicity, as well as consistency with the approach in other Australian jurisdictions.

103. The first subsection in Proposal 1, belief that the conduct was necessary, contains a subjective test only. It is consistent with the language the High Court used in Zecevic v Director of Public Prosecutions (Victoria),[75] and the current approach to section 271(2) of the Criminal Code. In our view, providing for a subjective belief in the necessity to use force element may also remove the need to consider mistaken belief under section 24 of the Criminal Code when dealing with self-defence.

104. The second subsection in Proposal 1, reasonable response, ensures objectivity in the question of whether the force used was reasonable and proportionate. However, requiring the jury to consider the 'circumstances as the person perceives them' also ensures the defendant's personal circumstances are appropriately considered.

105. Proposal 1 removes the provoked and unprovoked distinction and its associated complexities. Any provocative conduct of the defendant would be considered when assessing necessity and reasonableness (discussed below).

106. Proposal 1 also excludes self-defence as an available defence where the defendant is responding to conduct that they knew was lawful. This reflects the policy position that responding to force that a person knows is lawful is not acting in self-defence,[76] and is consistent with comparable provisions in the federal Criminal Code, Australian Capital Territory, Northern Territory and Victoria.[77] Western Australia and South Australia also have provisions that carve out the availability of self-defence in response to lawful conduct.[78] However, New South Wales and Tasmania do not explicitly exclude the availability of self-defence due to lawful conduct.[79]

Imminence, assault threshold or purpose of defensive force

107. In Queensland, self-defence applies where an assault is directed towards the defendant. An assault is the non-consensual application of force or threatened application of force where there is an actual or apparent ability to give effect to the threat.[80] This is sometimes referred to as the 'threat occasion'.

108. The need for an assault also makes **imminence** a requirement, namely that the threat of harm must be immediate and unavoidable to justify defensive force. The need for an immediate response means that a defendant acting in self-defence has no time to consider alternative steps. This is part of assessing whether the conduct was reasonable, and excludes unnecessary retributive violence.

109. Unlike Queensland, the provisions in other Australian jurisdictions do not require proof of an assault for self-defence to apply (although Western Australia requires a 'harmful act').[81]

110. In most Australian jurisdictions, the question instead is whether the conduct was necessary for a 'prescribed purpose'. The imminence of the threat, and the need to respond defensively, is considered when assessing necessity and reasonableness.[82]

111. For example, the Model Criminal Code provides that a person carries out conduct in self-defence if, and only if, he or she believes the conduct is necessary to:[83]

- defend himself or herself or another person
- prevent or terminate the unlawful imprisonment or himself or herself or another person
- protect property from unlawful appropriation, destruction, damage or interference
- prevent criminal trespass to any land or premises.

What is the Model Criminal Code?

The Model Criminal Code is a comprehensive set of criminal laws developed to standardise and modernise the criminal law across Australia. It has been adopted in full by the federal government, the Australian Capital Territory and the Northern Territory. Other states, such as New South Wales and Victoria, have adopted parts of the Model Criminal Code, including the self-defence provisions.

112. The prescribed purposes differ slightly between jurisdictions. However, they each include defence of self or another. Except for Western Australia and Tasmania, they also include the prevention or termination of unlawful imprisonment (called deprivation of liberty in Queensland, New South Wales and Victoria).[84] Prescribed purposes may extend to defence of property in jurisdictions that, unlike Queensland, do not have separate provisions for these circumstances.

113. Proposal 1 removes the existing assault element, and the related provoked or unprovoked distinction. The need to prove an assault is replaced with a focus on whether the defendant believed their conduct was necessary to defend themselves or another person, and whether the conduct was a reasonable response in the circumstances as they perceived them.

114. Under the proposed approach, the surrounding circumstances, including the option to retreat and the defendant's contribution to the situation, would be considered when determining the necessity and reasonableness of their actions. Combined, these two elements should ensure that the defence is not available in cases of retributive violence.

Proportionality and responding to sexual violence

115. Traditionally, the harm inflicted in self-defence must be **proportionate** to the threat. However, proportionality is not a separate element of self-defence. The High Court has noted the relevance of proportionality together with the risk of 'elevat[ing] matters of evidence to rules of law', and suggested it was important for trial judges to explain to the jury that they should

give 'proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection'.[85]

116. Apart from South Australia, most jurisdictions do not explicitly refer to proportionality (see table 1 above). Instead, proportionality is considered when assessing whether it was necessary to use force (and how much force) and whether the response was reasonable.

117. Proportionality is not currently a requirement in the Queensland provisions. Consistent with other jurisdictions, under Proposal 1, factors such as the defendant's provocative conduct, proportionality, and alternatives (such as retreat), are assessed in considering necessity and reasonableness.

118. However, under the Criminal Code provisions, before a person can use potentially lethal force in self-defence, they must fear death or GBH. This approach can limit the use of the defence in some cases, like those involving actual or threatened sexual assault or rape, which do not fall within the definition of GBH. The only other Australian jurisdiction to include such a requirement is Victoria.

119. Victoria has expressly recognised that a person should only be able to raise self-defence to murder where they feared death or really serious injury.[86] 'Really serious injury' is defined to include 'serious sexual assault'; it is not an exhaustive definition.[87] Although both 'serious injury' and 'sexual assault' are defined elsewhere in the legislation,[88] there are no provisions that define 'serious sexual assault'.[89] In any case, the approach in Victoria explicitly recognises that use of lethal force in self-defence may be appropriate in response to sexual violence. It recognises that sexual violence causes significant and ongoing physical, psychological and emotional harm and ensures those who are defending against serious sexual violence have full access to self-defence provisions. It may be appropriate for Queensland law to expressly recognise the right to use force in response to sexual violence.

120. Our community attitudes survey suggests there are mixed views about whether it is appropriate to respond to threatened sexual violence with lethal force.[90]

121. Proposal 1 would extend the availability of self-defence for the use of lethal violence where a person believes it is necessary to prevent death or **serious injury**. Question 2(a) asks for your views on how 'serious injury' should be defined.

Factors relevant to the assessment of reasonableness

122. Proposal 1 removes the structured approach to proportionality and the provoked and unprovoked distinction to simplify the test for self-defence. This potentially removes the limited guidance concerning reasonableness that currently exists in Queensland law.

123. Question 2(b) asks for you views on whether a non-exhaustive list of factors relevant to the assessment of reasonableness should be included in any new self-defence provision. This may assist lawyers, judges and juries to ensure relevant surrounding circumstances are properly considered. It could also address concerns that proposal 1 may not provide sufficient clarity and assist judges in explaining the law to juries.

124. No Australian jurisdiction has such a provision. The existing structured approach to self-defence in the Criminal Code reflects the policy intention that lethal force should only be lawfully used in cases involving a threat of serious injury or death and should not generally be available to persons who start a fight. Comparatively, the self-defence provision in the Canadian Criminal Code provides a non-exhaustive list of factors that may be relevant to the assessment of reasonableness.[91] Other jurisdictions, such as the United Kingdom, provide limited additional guidance in legislation.[92]

125. A provision could include some or all the factors listed in the text box below (modelled on the Canadian provision) or other relevant factors as identified by stakeholders through consultation. For cases involving domestic violence, consideration may be given to referring to significant lethality indicators within the provision as relevant when assessing reasonableness (for example, previous domestic violence or coercive control, the victim-survivor's intuitive sense of fear, previous threats to kill, escalation in violence, and pending or actual separation).

Factors which may be relevant to an assessment of reasonableness

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

Questions

Q1 What are your views on proposal 1?

Q2 For the purposes of proposal 1:

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

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

Self-defence by DFV victim-survivors

126. The law of self-defence was developed to address traditional male violence, between people of similar size and strength, in one-off confrontations. It was not developed to respond to situations involving DFV, where the threat to a person's safety may be ongoing and arise in response to a history of prolonged violence or coercive control.[93]

127. The elements of self-defence may make it hard for victim-survivors to access the defence. These elements include the requirement to prove an assault which builds in a requirement for imminence. Victim-survivors may face additional obstacles in accessing self-defence where they respond 'disproportionately' to a minor assault against background of coercive control. Traditional understandings of 'reasonable response' may also limit the availability of self-defence in cases where women use force. Women, who may be weaker and smaller, may arm themselves to effectively defend themselves against their attacker, but the use of a weapon against an unarmed person may be considered objectively unreasonable.[94] Proposal 1 goes some way to address this concern by removing the need for a threat occasion and instead

focusing on the person's need to use defensive force. This allows broader considerations of the relationship from the perspective of the defendant.

128. The elements of self-defence are not the only barriers faced by victim-survivors who seek to rely on self-defence. Myths and misconceptions about DFV may influence a police investigation, decisions made by the prosecution about how to run their case, and how a judge and jury make decisions (see background paper 3).

129. One of the most signfiicant barriers to relying on self-defence is the tendency of the criminal justice system to consider incidents of abuse in isolation, separate from their context and a victim-survivor's lived experience of DFV. Even if the history of DFV is considered, too much emphasis may be placed on the victim-survivor's experience of individual, physical acts of violence, rather than a nuanced consideration of the pattern of coercive control. This may result in the threat faced by the victim-survivor being minimised and the use of defensive force being misunderstood, even if it is is a reasonable response to an ever-present threat.[95] To overcome these issues, it is essential that the law consider victim-survivors' experiences through a 'social entrapment lens'.

> 'Practices that emphasise incident-specific injuries will continue to result in women being charged for acting in self-defence and, therefore, will do little to tackle the larger problem of coercive control'.[96]

130. Social entrapment theory explains that women cannot leave a violent relationship due to a complex array of factors such as: deep-rooted gender norms, economic inequality, the lack of social support and housing, inadequate police responses, the criminalisation of women who use retaliatory violence, and risks of homicide against children and women (which increases following separation). For Aboriginal and Torres Strait Islander victim-survivors, the history of colonisation and adverse police interactions, remoteness and other factors may compound the entrapment experienced. The need for a victim-survivor to use defensive force, and the reasonableness of their actions, cannot be assessed in isolation from these other relevant factors.[97]

Outcomes for DFV victim-survivors in Queensland

131. We are undertaking research to understand how self-defence is operating for victim-survivors in Queensland. Our findings, including the results of our data analysis, will be published in our forthcoming research report 4. Preliminary findings from our research indicate that most victim-survivors who kill their abuser are charged with murder but plead guilty to manslaughter, including in cases where they killed in confrontational circumstances against a history of DFV. Only a few proceeded to trial and fewer still raised self-defence. As part of our research, we are considering the barriers to proceeding to trial and will examine this further in our structured interview project. However, our preliminary research and consultation suggests that the mandatory sentence for murder is a significant factor.[98]

132. When DFV victim-survivors proceed to trial for murder, a number have been able to successfully raise self-defence.[99] Research by Nash and Dioso-Villa demonstrates that Queensland's self-defence provisions can work effectively for victim-survivors who kill their abuser. Queensland has the highest proportion of acquittals for this cohort of any Australian jurisdiction.[100] This may be the result of the progressive approach some Queensland judges take when applying self-defence to cases involving DFV.

133. In R v Falls, the defendant was acquitted of murdering her abusive husband on the basis of self-defence in non-confrontational circumstances. Applegarth J took a broad approach to the requirement for an assault and provided extensive directions to dispel commons myths and misconceptions. For example, when speaking of 'present ability' to carry out an assault, his Honour told the jury:[101]

> Now, that reference to 'present ability', don't let that distract you. It means an ability based on the facts known at the time of the making of the threat to carry the threat into effect. So long as the threat remains and that nothing has been done to remove it, it continues, and it doesn't matter if the deceased is temporarily physically unable to carry out his threat because he is asleep. Threats by their nature relate to future conduct. The law does not require the threat to be one of an immediate physical threat. The law does not provide that the threat be one of imminent danger.

134. A similar approach was taken in the cases of Ms Reynolds and Ms Irsigler, also DFV victim-survivors who killed their abuser, who were acquitted of murder on the basis of self-defence.[102]

135. However, Douglas suggests that self-defence was only successful in the cases of Ms Falls and Ms Irsigler because they were 'benchmark' battered women who met stereotypes of how the 'ideal victim' of DFV should present and behave. In other cases that Douglas reviewed, where the defendant did not meet the 'benchmark', the complete defence was not utilised. Those most likely to have limited access to the defence include Aboriginal and 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.[103]

136. This suggests that additional safeguards may be required to ensure equal access to justice.

Addressing the needs of DFV victim-survivors who act in self-defence

137. Many jurisdictions have reviewed self-defence laws to respond to criticisms that self-defence does not operate fairly or effectively for victim-survivors who:[104]

- use force in response to DFV
- resort to lethal violence for their own preservation (or to protect their children or others) in the presence of coercive control.

138. Similar problems are experienced by victim-survivors in Queensland. The Taskforce found:[105]

- there is a lack of clarity about defences currently available for victim-survivors who offend in the context of a controlling, abusive relationship
- when lawyers have a dated understanding of DFV, they cannot effectively represent the interests of their clients, especially DFV victim-survivors who have killed their perpetrators
- the decisions of courts, whether made by juries or judicial officers, are at risk of being unjust if presiding judicial officers have dated understandings of DFV and its effect on victim-survivors.

139. Recent amendments to the Evidence Act 1977 and the Domestic and Family Violence Protection Act 2012, implementing recommendations of the Taskforce, are intended to ensure the use of defensive force is assessed by reference to social entrapment (see background paper 3). However, Victoria and South Australia have addressed the specific problems with self-defence by including protections for victim-survivors in their self-defence provisions.[106]

140. Such provisions respond to criticisms of the requirement for immediacy and proportionality in establishing self-defence in cases involving DFV by recognising the unique circumstances

within which the offending occurred. Another benefit of including special provisions alongside general self-defence provisions is that it ensures the relevance of this evidence is front of mind.

The Victorian approach – Overview of sections 322J and 322M of the Crimes Act 1958 (Vic)

- Section 322J(1) provides examples of evidence of family violence that may be introduced in proceedings where the defendant is a DFV victim-survivor. This includes the history of any family relationships, the cumulative effect of violence on the defendant and the social, cultural and economic factors that impact them.
- Section 322J(2) defines various terms including family member, family violence and violence.
- Section 322J(3) explains that a single act may amount to abuse and therefore be considered family violence, and that a number of acts forming a pattern of behaviour may amount to abuse, even if some or all of those acts may appear minor or trivial in isolation.
- Section 322M(1) provides that where self-defence in the context of family violence is in issue, a defendant may be acting in self-defence even if they are responding to harm that is not immediate, or the response involves the use of force in excess of the force involved in the harm or threatened harm.
- Section 332M(2) provides that evidence of family violence may be relevant to determining whether a person has acted in self-defence and applies to any claim of self-defence (both fatal and non-fatal offences).[107]

141. Victoria introduced the above special family violence provisions for self-defence in 2014.[108] In Queensland, sections 103CA to 103CD of the Evidence Act 1977, and the definitions of domestic violence (including emotional or psychological abuse) as defined in sections 8 to 12 of the Domestic and Family Violence Protection Act 2012, are broadly consistent with the Victorian approach (in section 322J and related provisions).

142. In South Australia, section 15B of the Criminal Law Consolidation Act 1935 (SA) provides additional guidance about reasonableness where an offence is committed in circumstances of family violence and the defendant is relying on self-defence:

- section 15B(1) provides that the requirement for conduct to be reasonably proportionate to the threat does not imply that the force used by the defendant cannot exceed the force used against him or her.
- section 15B(2) essentially provides that questions of reasonableness and necessity, where the defendant asserts the offence occurred in circumstances of family violence, should be determined by having regard to evidence of family violence admitted during the trial.

143. Western Australia attempted to address the imminence concern by expressly recognising that a harmful act need not be imminent before one can lawfully respond in self-defence.[109] However, this approach did not align with the recommendations of the Law Reform Commission of Western Australia for jury directions and social framework evidence provisions to be implemented alongside changes to self-defence provisions.[110] It may also have the unintended consequence of unjustifiably broadening the assessment of imminence, because the provision is not limited to cases involving DFV. Following the convictions of two women (who were the primary victims of DFV) for murder[111] and manslaughter,[112] changes to the Evidence Act 1906 (WA) were made in 2020 to ensure evidence of family violence (including expert evidence) is admissible in relevant proceedings, including those where self-defence was

an issue, and to introduce jury directions to address stereotypes, myths and misconceptions about family violence.[113]

Proposal 2

Proposal

P2 The new self-defence provision should provide that evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence. It should further provide that the person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:

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

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

144. Proposal 2 seeks to address common barriers to accessing the complete defence of self-defence in cases where a DFV victim-survivor kills their abuser for self-preservation. Proposal 2 is designed to support proposal 1 by providing additional safeguards for persons who are the primary victim of DFV.

145. The proposed approach provides express statutory recognition, within the substantive self-defence provisions, that DFV victim-survivors may not immediately respond to a specific or ongoing threat, and addresses the 'proportionality problem' faced by women who use weapons or use force in non-confrontational situations. Inserting this in the self-defence provision would not only make self-defence more accessible to victim-survivors, but would serve to educate and promote changes to the narratives around DFV.[114]

146. Recent changes to the Evidence Act 1977 to facilitate the admission of social framework evidence would support the proposal and ensure expert evidence and the history of the relationship could be properly considered (see background paper 3).

Question

Q3 What are your views on proposal 2?

Intoxication

147. Intoxication, whether by drugs or alcohol, often contributes to homicide.[115] Either or both the defendant and the deceased may be affected by drugs and alcohol. These substances can increase aggression, reduce inhibitions and self-control, and affect how they assess and respond to an actual or perceived threat. Research has shown that roughly half of all homicides in Australia between 2000 and 2006 involved alcohol consumption.[116]

148. Under Queensland's existing self-defence provisions, evidence of intoxication is relevant when considering whether the defendant subjectively believed they needed to use defensive force and whether there were reasonable grounds for their belief. However, it is not relevant when considering whether the response was reasonable. This is assessed from the point of view of a sober person.[117]

149. Legislation in some jurisdictions limits the ability to rely on self-induced intoxication when assessing the elements of self-defence.[118] For example, Criminal Law Consolidation (Self-

Defence and Self-Induced Intoxication) Amendment Bill 2024 (SA) proposes an amendment that would exclude the operation of self-defence where the prosecution shows that a defendant's subjective genuine belief that the force used was necessary and reasonable was substantially affected by their self-induced intoxication.

150. These types of limitations are designed to ensure a person cannot escape criminal responsibility simply because they were intoxicated. However, we acknowledge the intersection between intoxication, drug and alcohol abuse, trauma and violence is complex.[119]

Proposal 3

Proposal

P3 The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

151. Proposal 3 addresses concerns about potential misuse of self-defence where intoxication substantially contributed to a person's belief and their response. The South Australian amendment was introduced in response to community outrage following Cody Edwards' conviction for manslaughter on the basis of excessive self-defence. He brutally murdered his partner while experiencing a drug-induced psychosis and subjectively believed his actions were necessary.[120] With the proposed changes to self-defence, which apply a subjective test for necessity, proposal 3 may provide a sensible limitation to reduce the risk of improper use by persons who are intoxicated. There are important reasons for imposing such a limitation given the scourge of alcohol-fuelled violence and views that voluntary intoxication should not excuse criminal behaviour.[121]

152. We are mindful, however, that many homicides, particularly those committed by Aboriginal and Torres Strait Islander peoples, may be committed in circumstances where one or both parties consumed alcohol. Persons with post-traumatic stress disorder ('PTSD'), which is commonly experienced by DFV victim-survivors, are more likely to have a substance use disorder. They may use drugs and alcohol for a variety of reasons, which in their circumstances, may be completely understandable.[122] The impact of trauma is considered further below (see trauma-informed partial defence).

153. Proposal 3 may have the unintended consequence of making self-defence more difficult to prove where a victim kills their abuser. We seek your views on whether we should limit self-defence in the way we propose and whether there may be alternative approaches.

Question

Q4 What are your views on proposal 3?

Self-defence, compulsion and duress

154. Section 31 of the Criminal Code provides two additional defences that are relevant to our review: compulsion (section 31(1)(c)) and duress (section 31(1)(d)). The defence in section 31(1)(d) is commonly referred to as compulsion, but we have labelled it duress in this paper to provide a distinction between the defences in these two subsections. The defence in section

31(1)(d) is broadly consistent with the common law defence of duress and is similar to duress in other jurisdictions.

Section 31 Criminal Code: Justification and excuse – compulsion

(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, …

…

(c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence;

(d) when—

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

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

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

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

155. Conceptually, duress and compulsion are distinct from self-defence. Self-defence is the reasonable and proportionate use of force which is justified to defend themselves or another person. Compulsion and duress excuse a person from criminal responsibility when they are threatened with harm and commit an offence as a result.

156. Compulsion and duress cannot excuse criminal liability for murder due to the operation of section 31(2) of the Criminal Code. However, the High Court has concluded that the defence of compulsion may arise in cases for murder where a manslaughter conviction is a possible outcome. This means both compulsion and duress may excuse criminal liability for manslaughter.[123] Both defences also have application to cases involving the use of non-lethal force, but unlike self-defence, may excuse a broader range of criminal offences, such as property or drug offences.

157. Reviews of self-defence provisions in other jurisdictions have considered the availability of duress to DFV victim-survivors and interactions between duress and self-defence.[124] However, compulsion in section 31(1)(c) appears to be unique to Griffith Code jurisdictions. Western Australia previously had a comparable provision in their Criminal Code which was repealed following the recommendation of the Law Reform Commission of Western Australia.[125]

158. Our proposed changes to self-defence will have ramifications for how the defence of duress operates. For this reason, we invite your submissions on what, if any changes, to duress and compulsion may be required to ensure the framework for criminal defences operates appropriately (Question 5).

Compulsion

159. Section 31(1)(c) of the Criminal Code provides an excuse where a person commits a criminal act to resist actual or threatened unlawful violence to themselves or another person in the person's presence. Where the violence was lawful (for example, use of force by police or violence in self-defence or under provocation) the defence does not apply. However, there are significant overlaps between compulsion and duress.

160. It is difficult to understand the practical difference between compulsion and self-defence in cases involving the use of force against the person who threatened them or a person whose aid they came to. The Law Reform Commission of Western Australia observed that the intersection between self-defence and compulsion was uncertain and had been subject to little judicial consideration.[126]

161. Fraser JA considered the intersection between self-defence and compulsion:[127]

> The differences between the requirements for protection under s 31(1)(c) and the requirements for self-defence in s 271 and s 272 make it seem strange that both provisions may be invoked to exclude criminal liability for an offence charged against an accused upon the basis of the same threatened violence amounting to an assault upon the accused. Self-defence is inapplicable and s 31(1)(c) is potentially applicable where the violence threatened against the accused does not amount to an assault as defined in s 245. Conversely, it may be arguable that s 31(1)(c) is inapplicable where the violence threatened against the accused amounts to an assault as defined in s 245 and self-defence is potentially applicable. Such a construction would confine the operation of s 31(1)(c) to cases where the threatened violence does not amount to an assault upon the accused person or where the relevant act of the accused does not constitute an offence to which the self-defence provisions apply. No such argument was adverted to in this appeal and I do not express any view about it.

162. On this analysis, compulsion may apply in cases where self-defence does not, where the 'threat' does not constitute an assault under existing self-defence provisions. However, with our proposal to remove the assault element of self-defence, there would be few circumstances where compulsion operates separate from self-defence. Possibilities include where there are threats to property which cause the defendant to act with violence (though these are likely covered by other provisions), or in cases where the threat leads to other offending (like drug offences). However, this could be covered by duress (discussed below).

163. Judges in Queensland must leave a defence to the jury if it is reasonably open on the evidence. Compulsion is often left alongside self-defence. This causes unnecessary complication and confusion and distorts the true defence: self-defence. If our proposal for self-defence is recommended and implemented, then in our view there is no need to retain the defence of compulsion under s 31(1)(c) of the Criminal Code.

Question

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

Duress

164. Duress under section 31(1)(d) of the Criminal Code excuses criminal liability where sufficiently serious and credible threats of harm or detriment result in a person doing something in

response to the threat or complying to the demand, provided they reasonably believe they cannot otherwise avoid the threat, and the criminal act is 'reasonably proportionate' to the threat.

165. The defence recognises the criminal law is built on a fundamental assumption of free will and individual choice.[128] This means that duress has a different moral basis than self-defence. However, like compulsion, because of the current drafting of duress, it may arise in cases where self-defence is the real issue. This can cause unnecessary complexity and confusion.

166. The role of duress is to excuse liability in cases where a person commits an offence because of a threat or delays retaliation against the threatener in circumstances not captured by self-defence. Duress captures a broader range of threats than compulsion under the Criminal Code, extending to 'serious harm or detriment' as opposed to just 'actual and unlawful violence'. Neither duress nor compulsion require imminence; duress has been found to be applicable to 'a present threat of future harm'.[129] This is consistent with our proposed amendments to self-defence to remove the requirement for immediacy in certain circumstances. However, the Court of Appeal has held that the defendant 'must have a reasonable basis for believing that the law and its enforcement agencies cannot afford protection from the threat',[130] which may create substantial problems for DFV victim-survivors as discussed in this paper and background paper 3. Duress may require amendments given what we understand about DFV and coercive control.

167. We have considered the important role of duress for DFV victim-survivors further in background paper 3.

168. As noted above, duress does not apply in cases involving GBH or murder. Some jurisdictions have removed this limitation. We seek your views on whether this restriction should be removed in Queensland.

169. We welcome your views on what changes to compulsion and duress may be necessary in view of our proposed changes to self-defence.

Question

Q6 In light of proposals 1 and 2 (about self-defence), are changes to the defence of duress in section 31(1)(d), and the exclusions in section 31(2), of the Criminal Code required?

Killing for preservation

170. In this section, we explore section 304B of the Criminal Code which provides the partial defence of killing for preservation in an abusive domestic relationship. Section 304B is a partial defence to murder, unique to Queensland, which may be used by DFV victim-survivors who kill their abusive partner to preserve themselves from death or GBH. If proposals 1 and 2 were implemented, self-defence would cover the same factual situations as this partial defence. Accordingly, we propose repeal of section 304B.

171. The partial defence was developed to address concerns about the availability of self-defence (discussed above) and killing on provocation when DFV victim-survivors kill their abuser. The policy rationale underpinning the defence was to provide sentencing discretion where a victim-survivor of a seriously abusive relationship kills their abuser and would otherwise be convicted of murder and receive a mandatory sentence of life imprisonment.

172. In our 2008 review of provocation, we noted the difficulties that DFV victim-survivors who kill face in raising a partial defence of provocation. We did not favour amending provocation to permit the broader application of the defence to circumstances where the victim-survivor kills their abuser, noting this would further distort provocation, which was ill-suited to providing a partial defence to DFV victim-survivors.[131] Instead, we recommended further consideration be given to the development of a separate defence to murder for persons who have been victim-survivors of a seriously abusive relationship who kill their abuser.[132]

173. In response to our recommendation, the then Attorney-General commissioned academics from Bond University to undertake a review. Their 2009 report ('Bond report') recommended introduction of a new partial defence to murder to be available to victim-survivors of seriously abusive relationships who kill in fear and desperation believing their action is necessary for self-defence.[133]

174. The partial defence commenced in 2010 following passage of the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009. Minor amendments were made to section 304B in 2011.[134]

Current law

175. The history, legal elements and scope of section 304B were considered in detail in the killing for preservation in an abusive domestic relationship information sheet.

176. The key elements of the partial defence, to be disproved by the prosecution, are:

- the deceased committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship
- the defendant believed the act or omission causing death was necessary to preserve themselves from death or GBH
- there were reasonable grounds for the defendant's belief, taking into account the abusive domestic relationship and all the circumstances of the case.

177. The partial defence was intended to be more readily available than self-defence, as it does not require a proof of an assault and recognises the cumulative nature of DFV.

Strengths and criticisms of the current law

178. The Taskforce expressed concerns about how killing for preservation was being used in practice and noted section 304B had not been used successfully before a jury.[135] However, preliminary findings from our case analysis research and international research suggests the partial defence may have some positive impacts in criminal proceedings against abused women who kill and has been used successfully (in conjunction with provocation) in at least two trials.[136] Circumstances where killing for preservation has been used is explored further in background paper 3.

179. Data suggests that Queensland is performing well in the area of court outcomes for abused women in homicide prosecutions in comparison with other Australian states and territories. Research by Nash and Dioso-Villa which considered case outcomes for homicides committed by victim-survivors demonstrates that Australian jurisdictions with partial defences have a higher proportion of defendants proceeding to trial.[137] It has been argued that partial defences provide a necessary safeguard which encourages those with meritorious claims of self-defence to proceed to trial.[138]

180. However, the need for a bespoke defence like section 304B has been considered and rejected by other Australian jurisdictions, including South Australia which also has a mandatory penalty of life imprisonment for murder. When considering the merits of a partial defence, the South Australian Law Reform Institute concluded that it was largely ineffective and that concerns were better addressed through changes to self-defence, with supporting evidential changes.[139] The Tasmania Law Reform Institute expressed a similar view, concluding that a partial defence was unnecessary given Tasmania's 'broad and flexible self-defence test and discretionary sentencing for murder'.[140] The Law Reform Commission of Western Australia also rejected the need for the defence, noting that a bespoke defence 'might give the impression that [a DFV victim-survivor] did not act *genuinely* in self-defence, only in a special category of it'.[141] A joint review by the Australian Law Reform Commission and the New South Wales Law Reform Commission did not reject the need for a bespoke defence but did find that circumstances of family violence should be recognised in both complete and partial defences and that the focus should not fall exclusively on partial defences at the expense of complete defences.[142]

181. The fact that the partial defence is rarely used suggests that many of the intended benefits have not been realised. Defence lawyers have told us during preliminary consultation that there are challenges in gathering evidence to support the defence which can be compounded by cultural factors, use of alcohol or substances and the presence of cognitive or mental health impairment. Myths and misconceptions about DFV may be deployed to undermine access to the defence (discussed above in relation to self-defence).

182. Our preliminary consultations and preliminary findings from our research suggest that prosecutors are reluctant to accept a plea of guilty to manslaughter based on the partial defence and are more likely to accept a manslaughter plea on the basis of a lack of intention.[143]

183. Failure to adopt the full range of recommendations made in the Bond report may have undermined the intended purpose and operation of the partial defence, including:

- failure to extend the defence to third parties (who kill on the victim-survivor's behalf) or where a defendant kills to protect a child[144]
- failure to adopt specific evidence provisions, which may be relevant to an assessment of reasonable grounds[145] and
- the inclusion of a requirement for structured proportionality (that is the requirement that the act was necessary to preserve the person from death or GBH) which had not been recommended.[146]

184. The most significant criticism of the defence is that it has the potential to undermine legitimate claims of self-defence.[147] For example, a jury which has considered self-defence but is struggling to agree may agree on the partial defence as a 'compromise verdict', particularly if the defendant is seen as an 'undeserving victim'. It may also contribute to pragmatic pleas from victim-survivors who do not want to risk a conviction for murder and a mandatory life sentence and so plead guilty to manslaughter despite having a legitimate claim to self-defence. This was demonstrated in R v Sweeney,[148] where the defendant pleaded guilty to manslaughter on the basis of the partial defence of killing for preservation, despite the fact that the killing occurred in confrontational circumstances where there was a long history of DFV, and where the sentencing judge accepted that, in light of the history of DFV, she had reasonable grounds for believing the use of force was necessary to preserve her from death or GBH.[149]

Proposal 4

Proposal

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

185. The rationale for the partial defence of killing for preservation is sound. Where there is mandatory sentencing for murder, it may provide an important safety net for victim-survivors who kill their abuser in circumstances where they may not have access to self-defence (for example, killing in non-confrontational circumstances, or killing in response to less serious violence, but where there is a history of domestic violence causing cumulative harm). The findings of our community attitudes survey suggest there is community support for a partial defence being available to DFV victim-survivors who kill their abuser.[150] The evidence also suggests that the existence of a partial defence may encourage those who have a claim of self-defence, which is a complete defence, to proceed to trial, with reasonably high rates of acquittals in such cases.[151]

186. However, our proposed reforms to self-defence mean that the partial defence would not provide any additional protection because:

- Proposal 1 removes the need for there to be an assault. This was the most significant difference between the existing self-defence provisions and the partial defence of killing for preservation. Under the proposed approach, a victim-survivor who killed their abuser would not need to demonstrate that there was an assault. Rather, to prove their actions were necessary in self-defence, they could point to cumulative abuse to demonstrate the threat they faced.
- Proposal 2 supports proposal 1. It provides that in cases where the person is a DFV victim-survivor, the threat need not be imminent, and that a response is not unreasonable just because the force used exceeded the harm or threatened harm to them.
- These changes would find additional support from recent amendments to the Evidence Act 1977 (noted above) to ensure the history of domestic violence, and expert evidence about the nature and effect of domestic violence (including jury directions), are admissible in criminal proceedings.

187. Noting the important role that partial defences may play in encouraging people with valid claims of self-defence to proceed to trial, alternative partial defences which may replace killing for preservation are considered below.

Question

Q7 What are your views on proposal 4?

Killing on provocation

188. In this section, we explore section 304 of the Criminal Code which provides the partial defence of provocation. This defence is highly controversial as it can be seen to 'reward' lethal violent

responses borne of anger and jealously with the lesser conviction of manslaughter. We propose the defence be repealed.

Current law

189. Section 304 of the Criminal Code provides a partial defence to murder if the person did the act causing death in the **heat of passion** caused by a **sudden provocation** and before there was **time for the person's passion to cool**. Section 304 relies on the common law definition of provocation, rather than the definition of provocation in section 268.[152]

190. The elements of the defence, and some of the relevant legal considerations, have been considered in detail in our Killing on provocation information sheet.

191. The defence requires proof of three elements:

- The deceased provoked the defendant. Conduct may amount to provocation if it **could** cause an **ordinary person in the position of the defendant** to lose self-control and act as the accused did (the 'ordinary person test').
- The provocation caused the defendant to actually lose self-control.
- The defendant killed the deceased while still deprived of self-control. This is a purely subjective test as it does not matter if an ordinary person would have regained self-control.[153]

What is the ordinary person test?

The ordinary person test:

1. Requires an assessment of the gravity of the provocation from the defendant's viewpoint This allows consideration of their personal characteristics and circumstances, including any cumulative provocation.[154]
2. Applies a purely objective standard to determine whether a provocation of that gravity could have (not would have) caused an ordinary person of the defendant's age to lose control and act as the defendant did.[155] Age is the only subjective feature that can be considered when applying this step.[156]

   To 'act as the defendant did' means to act with an intention to kill or cause GBH. It does not consider whether the ordinary person would have killed in the same manner the defendant used. Proportionality is not considered.[157]

192. Legislative amendments in 2011 and 2017 attempted to limit what could amount to provocation.[158] A 'categorical exclusion model' was adopted, where certain categories of provocative conduct cannot provide a foundation for the partial defence. Other than in exceptional circumstances, provocation cannot be based on:

- words alone[159]
- anything done or believed to be done by the deceased to end or change their domestic relationship with the defendant[160]
- an unwanted sexual advance.[161]

193. The 2011 amendments also shifted the burden of proof from the prosecution (to exclude the defence beyond reasonable doubt) to the defendant (to prove on the balance of probabilities).[162]

194. The language of the defence has been criticised. Duffy describes it as 'dated, confusing and [something that] reads more like "Mills and Boon" than the by-product of modern parliamentary counsel drafting'.[163]

195. While the defence is gendered and has been said to favour jealous men who kill in anger rather than victim-survivors of long-term DFV who kill out of desperation, the defence has evolved over time to better recognise the circumstances in which DFV victim-survivors kill. Developments include:

- recognition of 'cumulative provocation' and the history (if any) between the parties[164]
- recognition that fear or panic, not just anger, may cause a loss of self-control[165]
- modification to the suddenness requirement to reflect 'slow burn' (or 'slow boil') provocation where the fatal act did not occur immediately after the provocation.[166]

Previous consideration

196. In 2008, we examined provocation. The terms of reference for that review excluded consideration of any changes to the mandatory life sentence for murder.

197. Despite significant concerns about the operation of the defence, we did not recommend repealing the partial defence. Instead, we recommended amending section 304 to limit the circumstances in which the defence would apply as set out in [192] above.[167] This was intended to ensure the defence could not be used by violent men who killed their partner motivated by jealousy or anger.[168]

198. These amendments have not worked as intended. Attempts to provide statutory limits to provocation, in both Queensland and the United Kingdom, have been largely unsuccessful[169] (see background paper 3). The amendments have also had the unintended consequence of substantially increasing the complexity of the provision. It is possible that further 'tinkering' may not achieve its intended purpose and may have unintended consequences.

Strengths and criticisms of the provocation defence

199. The partial defence of provocation is generally regarded as a 'concession to human frailty'.[170] It seeks to distinguish 'hot blooded killings' caused by a provocation offered by the deceased from pre-meditated killings motivated by 'some secret hatred or design'.[171] However, developments in human psychology suggest that the concept of 'loss of control', as a response by an ordinary person, lacks a proper basis in medicine and psychology.[172] Ordinary people do not just 'lose control' and kill, even when faced with extreme emotion. Rather, most 'ordinary people' only 'lose control' when they are unlikely to experience significant resistance or retaliation when using lethal violence. Thus, provocation is more likely to apply where the victim was, or the defendant perceived the victim to be, weaker or otherwise unable to respond.[173]

200. Most jurisdictions in Australia have abolished the defence because it no longer reflects community attitudes.[174] Our community attitudes survey suggests Queenslanders share this concern. Most participants did not think a loss of control in response to provocation should reduce culpability where defendant's conduct was motivated by anger, jealousy, or a desire for control, particularly in cases involving DFV.[175] When responding to a scenario where a male defendant killed their female intimate partner because he thought 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.[176]

201. The Taskforce expressed concern that perpetrators of domestic violence who kill their partners in a jealous rage continue to rely on the partial defence of provocation. They suggested the High Court's interpretation of the 2011 amendments have defeated the policy intent of those amendments.[177]

202. There is no principled reason to recognise anger leading to a response 'in the heat of passion', where we do not recognise anger, even justified anger, as a basis of reducing culpability in other cases For example, we do not afford a partial defence for other emotions which may contribute to an intentional killing (such as mercy killings).[178] Despite developments in the law designed to better recognise the circumstances in which DFV victim-survivors kill (see [195 above]), they can still have difficulty accessing the defence, including because planning is seen to be inconsistent with being 'deprived of self-control'.[179]

203. The 'ordinary person test' also means that the defence is not well adapted to reducing culpability in cases where the defendant has an impairment or is intoxicated. Where a cognitive or mental health impairment substantially contributes to a defendant's actions, this should be covered by the partial defence of diminished responsibility in appropriate cases. Where a person is intoxicated and responds to 'provocative conduct' with lethal violence, because of reduced inhibitions or increased aggression, the question of whether they are guilty of murder should be determined by reference to the issue of subjective intention. This is particularly so because the ordinary person is not intoxicated. Our homicide case analysis suggests that extreme alcohol-fuelled responses to provocation can be adequately addressed by subjective intention (with further cases analysis undertaken in research project 6).[180]

204. Other arguments in support of abolishing the provocation defence include:

- The provision is complex, uses confusing and dated language, and the test itself lacks clarity. Recent amendments have only increased the complexity of the provision creating confusion for practitioners, judges and juries.[181]
- The ordinary person has a 'split personality', having subjective features when considering gravity, but requiring the fact finder to ignore those features when applying the second step.[182]
- Without a requirement for proportionality between the provocation and response, the defence can be used in cases of extreme, excessive violence. Use of extreme violence has been used as evidence of actual loss of control.[183]
- The approach to provocation in the Criminal Code is inconsistent because the current common law test under section 304 is different from the test under section 268 (see 'Provocation to assault' below). Inconsistency is undesirable in the context of a Code.

Proposal 5

Proposal

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

205. Repealing the partial defence of killing on provocation is consistent with the approach taken in most other Australian jurisdictions. It addresses concerns about the defence continuing to be used to reduce culpability in cases of intimate partner homicides motivated by anger, jealousy and control, and would align with community attitudes. It also recognises that previous

amendments increased the complexity of the law and failed to achieve their intended outcomes.

206. We acknowledge that there may be a small number of meritorious cases where the partial defence of provocation operates appropriately, and in line with community standards, to reduce a person's culpability.[184] Other potential amendments discussed in this consultation paper, including changes to the mandatory penalty for murder, changes to self-defence, and the introduction of other partial defences (discussed below) may be necessary to ensure reduced culpability in such cases is appropriately recognised.

Question

Q8 What are your views on proposal 5?

Alternative partial defences

207. In this section, we consider alternative partial defences that could be introduced to recognise reduced culpability in appropriate cases, and which are consistent with our proposed reforms to self-defence and the repeal of the partial defences of killing for preservation in a domestic relationship and provocation. We consider what, if any, circumstances should be recognised as reducing culpability through a partial defence. We explore partial defences based on a trauma response and excessive self-defence.

The problem with existing partial defences

208. Partial defences across various jurisdictions have historically recognised reduced culpability in the following circumstances:[185]

- where there is a loss of control resulting from some sort of trigger or provocation
- where a person held an honest belief that their actions were necessary for self-defence or self-preservation
- where the person has a mental health or cognitive impairment (abnormality of the mind) which substantially contributed to their offending.

209. Our community attitudes survey supports recognising reduced culpability in cases where a DFV victim-survivor kills their abuser. Most respondents, when responding to scenarios involving victim-survivors who killed in non-confrontational circumstances, recognised that their culpability was lower because of their history of DFV but did not think self-defence applied. Similar attitudes were expressed where lethal force was used in response to sexual violence.[186] Our proposed changes to self-defence endeavour to address this issue (and other issues that arise for victim-survivors, discussed above). However, even with such changes, there may be defendants who are DFV victim-survivors who cannot access any defences based on concepts of self-defence because necessity or reasonableness cannot be established. This is especially where anger or intoxication has contributed to their offending.

210. The Victorian Law Reform Commission observed:[187]

> In many circumstances in which a person kills, he or she will experience and be motivated by mixed emotions including fear and anger. For instance, women responding to a history of physical and psychological abuse might quite

legitimately have feelings of anger towards their abusers, while still acting out of fear for their lives.

211. The need for a partial defence to apply in such circumstances has been used to justify keeping provocation and was the reason for introducing killing for preservation. However, for reasons discussed above, in many cases, these partial defences do not work effectively for victim-survivors of DFV.[188]

212. We have heard that there are significant challenges in raising killing for preservation, even when attempting to negotiate a plea to manslaughter, because of the need to prove a history of domestic violence and that their actions were done to protect themselves from death or GBH.

213. DFV victim-survivors who kill may rely on the partial defence of diminished responsibility by producing expert evidence to demonstrate they suffered from battered woman syndrome.[189]

214. Battered woman syndrome is considered a form of PTSD. It relies on concepts such as the 'cycle of violence', 'trauma-bonding' and 'learned helplessness'.[190] The use of diminished responsibility by this cohort has been criticised for incorrectly labelling women as mentally ill or irrational ('crazy') despite their actions being a reasonable response in the circumstances.[191] This is explored further in background paper 3.

215. Battered woman syndrome is outdated, reinforces concepts of ideal victimhood, and is not readily available to many victim-survivors. It differs from a social entrapment framework, which is used to demonstrate how coercive control, in the context of broader social factors, entraps the victim-survivor and contributes to their actions.[192]

216. Beyond cases involving DFV, there may be other cases where there is a principled basis consistent with community attitudes to recognise reduced culpability. Noting that diminished responsibility will continue to be available as a partial defence to murder, we would appreciate your views on what, if any, additional partial defence should be considered as part of this review.

A bespoke trauma-based partial defence?

217. Victim-survivors of DFV who kill their abuser are often traumatised because of the history of abuse. Some defendants have complex trauma as a result of childhood abuse, sexual abuse or domestic violence perpetrated by the deceased or others.[193] As discussed under 'Intoxication' above, some defendants may have turned to drugs or alcohol to cope (or have become addicted to drugs as a result of the coercive control tactics of their abuser) and may have been intoxicated at the time of committing the offence. Some defendants may have cognitive impairments or other disabilities, such as an acquired brain injury, which we are beginning to understand is common among DFV victim-survivors.[194] While DFV impacts people from all backgrounds, poverty and housing instability can also contribute to victimisation and a person's belief that there are no other options but to kill their abuser.[195]

218. The variety of factors which may contribute to offending in such cases demonstrates there may be elements of loss of control, diminished responsibility and self-defence which contribute to the offending.[196] However, the underlying commonality is trauma.

What is trauma? Trauma is the psychological injury caused by, and emotional response to, deeply distressing or disturbing experiences. The term may refer to both the adverse life event and the person's reaction to it. Traumatised people often experience emotional upset, anxiety and disturbance to sleep and appetite. They may also experience fear, anger, or guilt. People affected by trauma may experience mental health conditions including acute stress disorder, PTSD and

other mental health conditions such as depression, anxiety, substance abuse, agoraphobia, social phobia, panic disorder and obsessive-compulsive disorder, impacting their ability to cope.[197]

What is complex PTSD? Complex PTSD refers to additional problems which can result from continuous and repeated exposures to trauma, including exposure to multiple, chronic and prolonged traumatic events, and their long-term impacts. Complex PTSD results in heightened emotional reactivity, persistent negative self-belief and difficulty maintaining relationships and emotional engagement resulting in greater impairment than PTSD.[198] This may cause a person to feel trapped and unable to escape.[199]

How does DFV victimisation cause trauma? DFV causes trauma by subjecting victim-survivors to chronic stress, fear, and emotional and physical abuse. This ongoing abuse erodes their sense of safety, trust, and self-esteem, often leading to conditions like PTSD and complex PTSD. Many victim-survivors have also experienced prior trauma exposures from DFV with previous partners and childhood trauma, increasing the trauma impact.[200]

How might trauma contribute to a victim-survivor killing their abuser? Trauma from prolonged abuse can lead victim-survivors to believe that killing their abuser is the only escape from imminent danger, driven by a heightened fight-or-flight response. Their belief about looming death or serious injury can be reasonably held. Coronial death reviews and research note that the victim is often best placed to accurately assess their situation and perceive subtle changes in the relationship and abuser's behaviour which indicate heightened risk.[201] Additionally, the psychological breakdown and intense emotional turmoil caused by continuous trauma may result in impulsive and desperate actions.[202]

New Zealand's consideration of a trauma-based partial defence

219. In 2016, the New Zealand Law Commission considered the possibility of developing a trauma-based partial defence for DFV victim-survivors who kill their abusers. The rationale was to recognise reduced culpability of victim-survivors traumatised by a history of abuse, whether by over-reacting to a threat or responding in anger after reaching breaking point.[203]

220. Drawing on the 'extreme mental or emotional disturbance' defence ('EMED defence') in the American Law Institute's Model Penal Code, the New Zealand Law Commission considered that the elements of a new trauma-based partial defence could be:[204]

- the defendant had been subjected to serious violence
- the defendant reacted in a state of extreme mental or emotional disturbance caused by the violence they had experienced
- there is a reasonable explanation or excuse for the extreme mental or emotional disturbance in the circumstances as the defendant believed them to be.

221. The EMED defence reduces murder to manslaughter where the offence is 'committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse'. The reasonableness of such explanation or excuse is to be determined according to the circumstances as perceived by the defendant. It is the extreme emotional or mental disturbance which requires reasonable explanation or excuse, not the killing itself.[205]

222. The EMED defence is a hybrid, drawing on elements of the defences of provocation and diminished responsibility. States of the United States have adopted differing iterations of the defence, leading to inconsistencies in application. Case analysis suggests it is being utilised in the same way and is subject to the same problems as killing on provocation.[206] Ultimately, the New Zealand Law Commission did not recommend the inclusion of the partial trauma-based

defence. The Law Commission of England and Wales identified wide-ranging problems with the EMED defence and did not recommend adopting it.[207]

What a trauma-based defence may look like

223. A trauma-based partial defence may be introduced to recognise reduced culpability where a DFV victim-survivor kills their abuser. A partial defence of this nature would acknowledge that the trauma victim-survivors experience often substantially contributes to their actions, which may warrant conviction for manslaughter instead of murder. It reflects contemporary knowledge about DFV, the impact of trauma, and that most primary victims who kill do so in defensive circumstances.[208] It is consistent with community attitudes.[209]

224. A partial defence of this type it is not aligned with existing defences which require proof of loss of control, abnormality of mind, or apprehension of death or GBH. Founding the defence on the trauma that DFV victim-survivors experience (and reflecting contemporary knowledge about lethality indicators and the risks DFV victim-survivors and their children face) instead of focusing on beliefs about necessity and reasonableness of their response may address some of the problems inherent in the current approach in section 304B of the Criminal Code (or the alternative of excessive self-defence, discussed below). It would sit alongside proposed changes to self-defence, would not require proof of elements that may undermine a legitimate claim of self-defence and would not require loss of control or mental abnormality.

Potential elements of a trauma-based partial defence

1. The defendant was in a 'relevant relationship' with the deceased (Domestic and Family Violence Protection Act 2012 s 13)
2. The defendant had experienced 'domestic violence' in the relationship (Domestic and Family Violence Protection Act 2012 s 8)
3. The defendant was the 'person most in need of protection' in the relevant relationship (Domestic and Family Violence Protection Act 2012 s 22A)
4. The history of domestic violence substantially contributed to the act or omission causing the death of the deceased.

225. The suggested approach adopts the language of 'substantial contribution' as the link between the history of domestic violence and the offending. 'Substantial contribution' is a well understood phrase within the criminal law (for example, diminished responsibility).[210] The proposed causal link is less onerous than an element requiring a belief in the necessity to act in self-defence.

226. The defence should be crafted to ensure it is not available to primary perpetrators of DFV who use lethal violence in response to resistive violence by the victim-survivor. The concept of resistive violence is explored further in background paper 3. To ensure this, the formulation of 'who is the person most in need of protection in a relevant relationship' in section 22A of the Domestic and Family Violence Protection Act 2012 could be adopted.

227. Given the definitions of 'domestic violence' and 'relevant relationship' in the Domestic and Family Violence Protection Act 2012, the defence may also apply to children who kill as a result of exposure to domestic violence (associated domestic violence) to protect themselves or a parent.

228. Expert evidence, including evidence about the nature and effects of DFV, could support access to the defence.

229. This approach is not without problems. There are high rates of misidentification of DFV victim-survivors as perpetrators, particularly of Aboriginal and Torres Strait Islander women. While there have been changes to legislation and policing practice following the Taskforce and the Independent Commission of Inquiry into Queensland Police Service Responses to DFV, we expect the issue will persist. This is considered further in background paper 3.

230. Further consideration may be given to whether it is appropriate to extend a partial defence of this type to other cases where a victim-survivor may kill their abuser as a result of trauma, such as where they have experienced long-term sexual abuse but there is no relevant relationship. We would appreciate your feedback on this issue, and how this may be achieved.

231. During preliminary consultation, we heard that proving a history of DFV for the current section 304B defence is challenging and often contested by the prosecution. Successfully raising the new defence would still require proof of this history. Practice and procedure amendments (like improved investigation, access to a DFV expert evidence panel, and alternative methods of giving evidence) may support proof of a history of DFV in such cases. It would be supported by judicial, practitioner, police and community education about DFV and coercive control which has been implemented following the recommendations of the Taskforce and Independent Commission of Inquiry into Queensland Police Service Responses to DFV.

232. We welcome your feedback on this approach including alternative ways to structure a new partial defence.

Question

Q9 Should the Criminal Code be amended to add a new trauma-based partial defence to murder that applies when a victim-survivor of domestic violence kills their abuser? How should this be framed?

A new partial defence of excessive self-defence?

Excessive self-defence in other jurisdictions

233. The High Court abolished common law excessive self-defence in 1987.[211] Since then, excessive self-defence has been introduced by legislation in New South Wales, South Australia and Western Australia.[212]

234. In 2004, the Victorian Law Reform Commission, as part of its review of defences to homicide, recommended Victoria introduce a partial defence of excessive self-defence.[213] It was noted that, without a partial defence of provocation, excessive self-defence may give persons who kill in response to domestic violence access to an appropriate partial defence.[214] Similar findings were also made by the South Australian Law Reform Institute, and the Law Reform Commission of Western Australia.[215] While the Victorian Law Reform Commission generally did not support partial defences, preferring that reduced culpability be taken into account at sentence,[216] it concluded that the moral culpability of a person who acts in excessive self-defence is fundamentally different to cases where provocation may apply and thought it appropriate for this to be resolved by the jury rather than be dealt with at sentencing.[217]

235. In response to the Victorian Law Reform Commission's report, Victoria repealed provocation and introduced a new offence of defensive homicide in 2005.[218] A review by the Victorian Government in 2013 demonstrated that most of the people convicted of defensive homicide were men who killed other men – often in circumstances where either or both the defendant

and the victim were intoxicated.[219] Only three women (compared with 25 men) were convicted of defensive homicide, all in circumstances where self-defence may have been open (two pleaded guilty, one proceeded to trial).[220] There were concerns that defensive homicide could be misused by DFV perpetrators, as happened in the case of Luke Middendorp, who was a primary perpetrator of DFV and violently killed his partner but was found guilty of defensive homicide.[221]

236. Following this review, Victoria abolished defensive homicide and amended self-defence to make it more readily accessible to DFV victim-survivors who kill.[222] Some stakeholders expressed concern that abolishing defensive homicide would lead to primary victims who kill being convicted of murder. However, research by Nash and Diosa-Villa demonstrates that no abused women who were prosecuted in Victoria for killing an abusive partner between 2010 and 2020 were convicted of murder.[223] Rather, most of these women entered pleas of guilty to manslaughter rather than argue self-defence at trial.[224] This suggests that despite changes to self-defence, there continue to be practical barriers to accessing the complete defence.

237. While Queensland does not have a partial defence of excessive self-defence, our case analysis research has shown that the concept of excessive self-defence has been occasionally utilised in sentencing defendants for manslaughter.[225] In such cases, a plea of guilty to manslaughter appears to have been accepted based on lack of intention with the defendant's primary intention being noted as self-protection.

238. Our community attitudes survey suggests some support for recognising reduced culpability in homicide cases where a person acted in self-defence but used excessive force.[226] An earlier, smaller community survey in New South Wales in 2000, found that there was broad support within the community for excessive self-defence.[227] Yeo suggests introduction of this defence also has broad support amongst the judiciary and practitioners.[228]

239. A new partial defence of excessive self-defence could apply to all defendants charged with murder or could be limited to only DFV victim-survivors who kill their abuser.

Excessive self-defence limited to DFV victim-survivors

240. Excessive self-defence could be limited to DFV cases where the primary victim kills their abuser. Limiting excessive self-defence in this way may address the need for a partial defence for DFV victim-survivors while avoiding some of the unintended consequences of making a new partial defence universally available.[229]

Elements of excessive self-defence

A partial defence of excessive self-defence would have the following elements:

- the person believes the conduct was necessary in self-defence (or in defence of another) and
- the conduct was an unreasonable response to the circumstances as the defendant believed them to be.

Additional elements may limit the partial defence to DFV victim-survivors:

- the defendant was in a 'relevant relationship' with the deceased (Domestic and Family Violence Protection Act 2012 s 13)
- the defendant experienced 'domestic violence' in the relationship (Domestic and Family Violence Protection Act 2012 s 8) and

- the defendant was the 'person most in need of protection' in the relevant relationship (Domestic and Family Violence Protection Act 2012 s 22A).

241. This suggested approach reflects the two fundamental elements of excessive self-defence being subjective necessity and unreasonable response. It aligns with our proposed approach to self-defence. Adopting the additional three elements could restrict the partial defence to primary victims of DFV. These elements were suggested in the trauma-informed partial defence discussion above.

242. A partial defence of excessive self-defence may also support changes to charging practice (discussed below under 'Practice and Procedure') to promote indicting manslaughter in cases where a DFV victim-survivor kills their abuser.

243. When determining charges, the Director's Guidelines require the Office of the Director of Public Prosecutions ('ODPP') to apply a two-step test to charging decisions: that there are reasonable prospects of success and that the prosecution is in the public interest.[230] Available defences are required to be considered as part of this process.

244. The introduction of excessive self-defence would make it appropriate for the ODPP to indict the defendant on manslaughter in cases involving an issue of self-defence where the ODPP has no reasonable prospects of being able to disprove that the person believed it was necessary to do the act in self-defence.[231] Because the first limb is subjective necessity, the ODPP would not encounter challenges of assessing 'reasonable response' and the associated requirement to apply 'community standards', which we understand from preliminary consultation is often a barrier to discontinuing a prosecution where self-defence may be relevant. The ODPP should be well placed to consider whether there is sufficient evidence to rebut the first limb.

245. In contrast to killing on provocation, the justification for reduced culpability in excessive self-defence cases has a principled basis: that the person was acting for self-preservation. It may be considered appropriate to reflect this reduced culpability in conviction for a lesser offence.

246. Existing partial defences have different foundations. This can make it difficult to properly run self-defence while establishing a sufficient factual basis for other partial defences. Excessive self-defence is conceptually aligned with self-defence. It would promote more consistent trial narratives. The proposed approach is reasonably simple and could be easily applied without adding unnecessary complexity to jury directions. It may also encourage more DFV victim-survivors to proceed to trial on self-defence by providing a safety net for those charged with murder.

247. The most significant argument against introducing a partial defence of excessive self-defence is that it may undermine proposed changes that are designed to ensure that DFV victim-survivors are acquitted in appropriate cases.[232] In complex DFV cases, such as where the killing occurred in non-confrontational circumstances or where a weapon was used, jurors may find it difficult, even with expert evidence, to conclude that the actions were reasonable and take the easy middle option of manslaughter on the basis of excessive self-defence.[233]

Excessive self-defence with general application

248. Introducing a partial defence of excessive self-defence of general application would bring Queensland into line with other jurisdictions. This includes Western Australia, another Code jurisdiction, which introduced the partial defence when it repealed killing on provocation.[234] It would also provide an ability to recognise reduced culpability in cases where a person kills in the context of a confrontation or fight but uses excessive force. This is already occurring to

some degree in plea negotiations and sentencing for manslaughter. The need to recognise reduced culpability in such cases may be especially important given our proposal to repeal provocation, and if no changes are made to mandatory sentencing.[235]

249. However, this approach carries the risk of improperly providing a partial defence in cases which do not align with community standards.

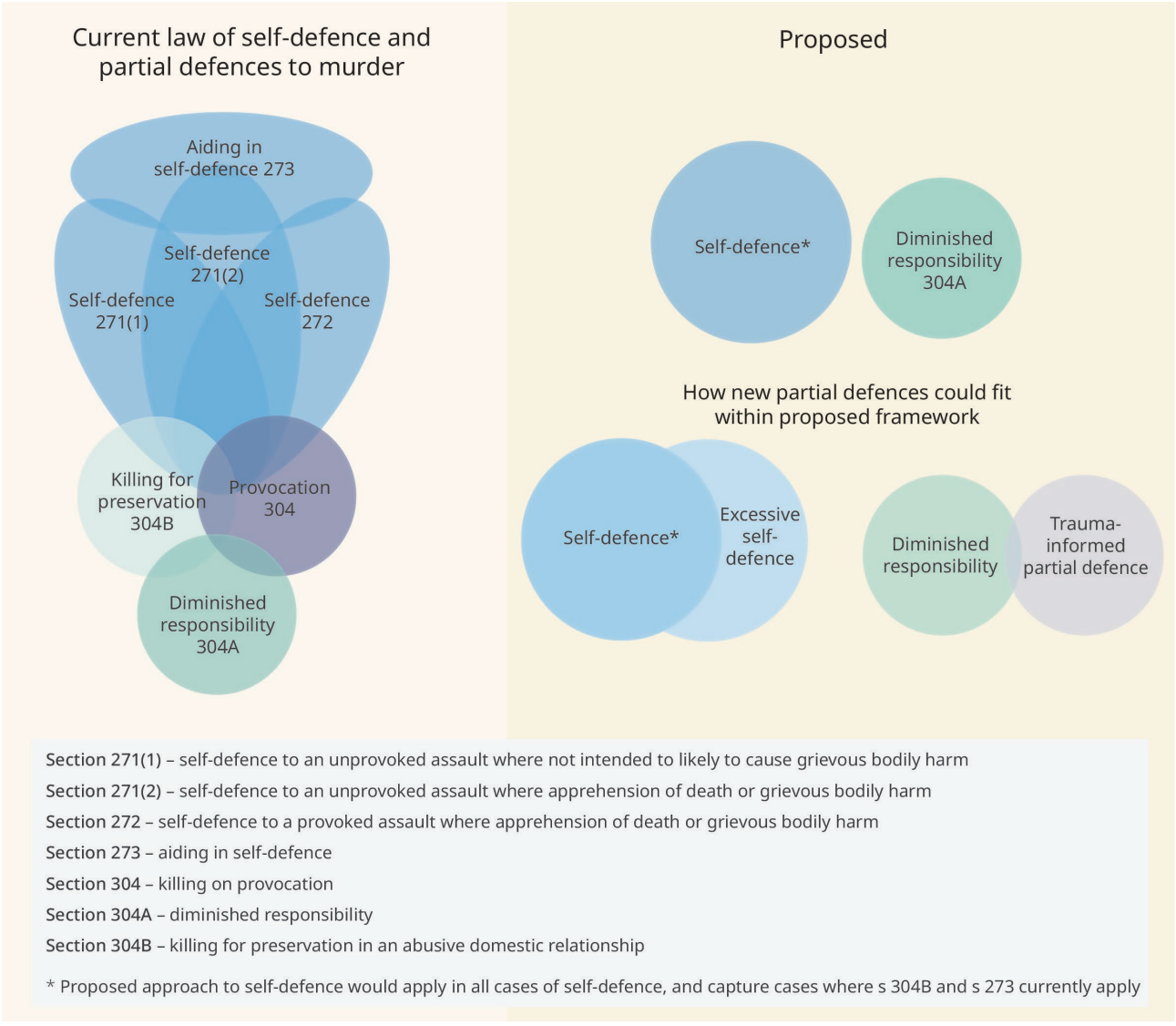
Question

Q10 Should the Criminal Code be amended to add a new partial defence to murder that applies where the defendant has acted excessively in self-defence and, if so, should the defence apply:

(a) only in the context of DFV where the person in most need of protection kills their abuser or

(b) generally?

Figure 5: The current and proposed approach to self-defence and partial defences



Mandatory penalty for murder

250. The penalty for murder is mandatory life imprisonment.[236] A sentence of life imprisonment for murder also attracts a minimum non-parole period. Mandatory sentences are unusual. Normally, legislation sets a maximum penalty and the court has discretion to order a sentence up to and including the maximum. This section examines the mandatory penalty and minimum non-parole period and asks questions about various reform options.

Current law

251. The penalty for murder is mandatory life imprisonment or an indefinite sentence. Life imprisonment is sometimes referred to as the head sentence. While the penalty for manslaughter is also life imprisonment, unlike murder, the penalty is not mandatory, it is a maximum.[237] This means that a judge sentencing a defendant for murder cannot order a shorter or different head sentence but a judge sentencing for manslaughter can do so.

252. A sentence of life imprisonment for murder also attracts a minimum non-parole period of:[238]

- at least 20 years
- at least 25 years, if the person is sentenced for the murder of a police officer in certain circumstances or
- at least 30 years, if the person is sentenced for the murder of more than one person or has committed or previously been sentenced for another offence of murder.

253. The non-parole period is the time that the person must serve in prison before being eligible to apply for parole. Parole is not automatic upon reaching the non-parole period stated in law or imposed by the court. An application for parole must be made to the Parole Board Queensland. Parole will only be granted where the eligibility date has passed and the Parole Board has decided to grant it. The Parole Board's overriding consideration in making such a decision is community safety.[239]

What is parole?

Parole involves the person serving a part of their term of imprisonment in the community, subject to strict conditions and supervision. If they do not comply with those conditions, it can mean they are returned to prison.

If a person sentenced to life imprisonment is granted parole, they remain on parole for the rest of their life (unless they are returned to prison).

254. The sentencing court may increase, but not decrease, the non-parole period.[240] However, this is rare as 'the element of denunciation is usually fully served by the imposition of a mandatory term of imprisonment for life with a minimum parole eligibility date of 20 years'.[241]

Strengths and problems

255. The mandatory penalty of life imprisonment for murder and the associated minimum non-parole periods have a number of strengths. They:

- Promote consistency by ensuring all persons sentenced for murder receive life imprisonment and serve at least the minimum non-parole period.[242]

- Differentiate murder from other offences (such as manslaughter). For example, between 2005 to 2006, and 2023 to 2024, no-one convicted of manslaughter was sentenced to life imprisonment. For adults, the longest sentence of imprisonment received was 20 years, the shortest was 18 months and the average was 8.8 years.[243]
- Protect the community through the incapacitation of defendants while in prison, and through ongoing supervision while on parole.[244] For further information about how much time people convicted of murder spend in custody past the minimum non-parole period and how often they are returned to prison for breaching parole, see our forthcoming research report 2 on sentencing for murder.

256. There are various problems with the mandatory penalty of life imprisonment for murder and the associated minimum non-parole periods. They:

- Discourage guilty pleas, increasing both financial costs to the community and emotional costs to deceased persons' families and friends, and witnesses. Queensland Sentencing Advisory Council research shows that almost three-quarters of defendants sentenced for murder entered a plea of not guilty.[245] Comparatively, for manslaughter, where there is sentencing discretion, only 11.2% of sentenced defendants entered a plea of not guilty.[246] The only way the sentencing court can reflect a plea of guilty for murder is to not extend the minimum non-parole period. However, regardless of plea, extensions are rarely made.[247] Only those for whom an extension would be likely, due to particular aggravating circumstances, potentially benefit from a plea of guilty. In addition, the Parole Board Queensland decides whether to grant parole, and this is often after the parole eligibility date.
- Do not adequately reflect individual circumstances. This is contrary to our community attitudes survey, which found that the community does not support the mandatory life sentence for murder and instead expects sentencing to reflect the defendants' culpability in the specific circumstances.[248]
- May disproportionately impact disadvantaged persons, including Aboriginal peoples and Torres Strait Islander peoples and their communities and DFV victim-survivors, because the court's ability to recognise mitigating and aggravating factors is restricted.[249]

Head sentence options

257. Below we set out four options for the head sentence:

- retain mandatory sentencing for all murders
- retain, but only for particular cases
- replace with a presumptive life sentence or
- replace with a maximum life sentence.

258. These options have been identified based on consideration of approaches in other jurisdictions.[250]

Retain mandatory life imprisonment

For all murder offences

259. Queensland could retain its current mandatory penalty of life imprisonment for murder. This is consistent with the approach in South Australia and the Northern Territory, as well as some international jurisdictions, such as Canada, England and Wales, and Northern Ireland.

For particular murder offences

260. Queensland could retain the mandatory penalty of life imprisonment for particular cases only. It could then replace the mandatory penalty of life imprisonment for all other cases of murder. For example, mandatory life imprisonment may be retained for:

- Murders involving intent to kill. However, this has the potential to increase the complexity of murder trials.[251]
- The murder of vulnerable victims. This might include children, the elderly, persons with disability, persons living with chronic and terminal forms of illness, persons in coercively controlling relationships, or police officers (or others in particular categories of employment). However, this approach of distinguishing offences committed against particular victims could raise concerns for principles of equality and every person's right to equal protection of the law without discrimination.

Replace mandatory life imprisonment

261. Queensland could replace the current mandatory penalty of life imprisonment for murder with either a presumptive or maximum period of life imprisonment.

Presumptive life imprisonment

262. This approach would require the courts to order life imprisonment for murder unless the defence establishes a different sentence was justified. This is consistent with the approach in Western Australia and New Zealand.

263. If this approach is adopted, the test for departing from the presumption of life imprisonment would need to be stated. For example:

- In New Zealand, the court must order life imprisonment, 'unless, given the circumstances of the offence and the offender', it would be manifestly unjust.[252] The injustice in imposing life imprisonment must be clear and found from the overall weighing of both considerations.[253] The threshold has been described as high and likely to be met only in rare and exceptional cases.[254]
- In Western Australia, life imprisonment applies unless that sentence would be 'clearly unjust given the circumstances of the offence and the person' and 'the person is unlikely to be a threat to the safety of the community when released from imprisonment'.[255]
- It could require a finding of 'exceptional circumstances' to justify the departure. This is recognised language within Queensland law, including the Penalties and Sentences Act 1992.[256]
- Alternatively, the law could require departure to be 'in the interests of justice'. The Queensland Sentencing Advisory Council recommended this test to depart from the presumption of a serious violent offence declaration in the Serious Violent Offences scheme.[257]

264. A head sentence of presumptive life imprisonment recognises a life sentence as being appropriate for most cases of murder, while providing the court with some discretion to support individualised justice in circumstances which justify a departure from the norm. Our preliminary research indicates in Western Australia, where this approach is adopted, the presumption has been displaced in only two occasions. However, we have identified a broad range of cases where the New Zealand courts have departed from the presumption of life imprisonment. For example, in 2024, the High Court did so in R v Dickason, where a mother's

mental illness impacted on the killing of her three daughters.[258] The High Court ordered a finite sentence of 18 years imprisonment concurrent for each murder. They have also done so in R v Huntley, where a 19-year-old was charged with a murder committed when he was 17 and had an upbringing marred by violence, profound social and cultural deprivation and neglect.[259] He received 16 years imprisonment instead of life. In R v Salter, an 80-year-old who murdered his wife, where his wife had Alzheimer's disease and had earlier agreed to a suicide pact, received a sentence of 4 years imprisonment.[260]

265. If this approach is taken, it will be necessary to consider that defendants who have access to high quality legal representation and who are able to fund the preparation of specialist reports might be better able to rebut any presumption, which may impact negatively on those who do not have those resources such as Aboriginal peoples and Torres Strait Islander peoples and their communities.

A maximum of life imprisonment

266. This approach would allow a court to use its discretion to order a sentence up to and including life imprisonment for murder. This is the approach in most Australian jurisdictions, including Victoria, the Australian Capital Territory, Tasmania and New South Wales (for most murders).[261]

267. A maximum sentence of life imprisonment for murder gives the court the greatest ability to individualise the sentence and distinguish between the gravity of different types of murder and blameworthiness of defendants.

268. In jurisdictions, such as Victoria, where the penalty for murder is maximum life imprisonment, the rate of guilty pleas is higher than in Queensland.[262]

269. However, the community may raise concerns about judicial discretion leading to lenient sentences.[263] Given this, an option may be including a standard sentence in legislation as a factor the court must take into account when sentencing.[264]

270. See our forthcoming research report 2 for further information about the operation of the maximum penalty of life for murder in other jurisdictions.

Question

Q11 Should the mandatory life sentence for murder be:

(a) retained for all murders

(b) retained but only for particular cases

(c) replaced with a presumptive life sentence or

(d) replaced with a maximum life sentence?

Non-parole period options

271. Below we set out four options for the approach to setting the non-parole period head sentence:

- retain the current minimum non-parole periods
- amend to allow a discount for a guilty plea, or cooperation with law enforcement authorities, or both
- replace with a presumptive non-parole period

- replace with an entirely discretionary approach to setting the non-parole period.

272. These options have been identified based on consideration of approaches in other jurisdictions.[265]

Maintain without amendment

273. Queensland could retain its current minimum non-parole periods for murder and the current approach to extending non-parole periods.

Provide a discount for a guilty plea or cooperation

274. Existing minimum non-parole periods could be maintained but with the introduction of a statutory provision allowing a court to reduce the statutory mandatory non parole period for guilty pleas or where there has been cooperation with law enforcement authorities, or both.

275. This approach recognises:

- the utility of guilty pleas in reducing the impact on witnesses, friends and family members of the deceased persons
- the public cost that is saved by not proceeding to trial[266]
- the public interest in encouraging defendants to co-operate to assist in the identification and prosecution of others.[267]

276. This approach would be consistent with the Penalties and Sentences 1992, which requires courts when sentencing defendants to have regard to guilty pleas and their cooperation (or undertakings to cooperate) with law enforcement authorities.[268]

277. Given the serious nature of the offence, it may be appropriate to legislatively limit the available discount. The appropriate discount (or range of discounts) for a guilty plea and for cooperation could be stated up to a maximum, for example, 5–25% depending on timing of plea and other relevant factors.[269] We would also need to consider whether any discount for the guilty plea could be cumulative upon any discount for cooperation.

Replace the minimum non-parole period

With a presumptive non-parole period

278. When sentencing for murder, courts could be required to set a specified non-parole period, but, in appropriate circumstances, be given discretion to increase or decrease the non-parole period. The onus would be on the defence to show why the stated non-parole period should be decreased. The concerns stated in [265] apply equally here.

279. As discussed at [263], if this approach were adopted, the test for departing from the specified non-parole periods would need to be stated. For example, in South Australia, the court may:

- fix a longer non-parole period than the stipulated minimum if satisfied 'it is warranted because of any objective or subjective factors affecting the relative seriousness of the offence'[270]
- fix a shorter non-parole period in exceptional circumstances, which, in addition to the guilty plea or cooperation, include that the offence was committed in circumstances of family violence and where the deceased person's conduct or condition substantially mitigated the defendant's conduct.[271]

280. This approach enables community expectations and the seriousness of this offence to be taken into account in framing the standard non-parole period while allowing the court to depart from the set period where it would be proportionate to do so.

281. This approach may require consideration of whether the specified non-parole periods for murder should reflect the current minimum non-parole periods or whether they should be adjusted. Currently, non-parole periods in Australia range from 10 years (for example, in Western Australia) to 30 years (for example, for life sentences in Victoria).[272] In some jurisdictions different non-parole periods are expressed for different types of murder. See our forthcoming research report 2.

With a discretionary approach to the non-parole period

282. This approach would require the court to order that the person must serve a certain period of time in custody before being eligible for release on parole. However, the court would have complete discretion as to the length. This is consistent with the approach in New South Wales (apart from where a defendant is sentenced to a head sentence of life imprisonment), Northern Ireland and Scotland.[273] See our forthcoming research report 2 on the sentencing for murder.

Question

Q12 Should the minimum non-parole periods for murder be:

(a) retained

(b) amended to allow a discount for a guilty plea or cooperation with law enforcement authorities, or both

(c) replaced with a presumptive non-parole period or

(d) replaced with an entirely discretionary approach to setting the non-parole period?

Combinations

283. Queensland's combination of mandatory life imprisonment for murder and minimum non-parole periods that can only be extended, not reduced, is the most inflexible in Australia. Other Australian jurisdictions that have mandatory life imprisonment for murder (South Australia and the Northern Territory) allow some flexibility in increasing or decreasing the non-parole period in certain circumstances.[274]

284. Considering the numerous approaches to the head sentence and to the non-parole periods listed above, various combinations to reform could be suggested. These may include, but are not limited to:

Combination 1	Combination 2	Combination 3
• Retain mandatory life imprisonment for murder • Replace the minimum non-parole periods with a presumptive non-parole period	• Replace mandatory life imprisonment for murder with presumptive life imprisonment • Retain the minimum non-parole periods but allow a discount for guilty pleas or cooperation, or both	• Replace mandatory life imprisonment for murder with a maximum period of life imprisonment • Replace the minimum non-parole period with a completely discretionary approach to non-parole periods

Question

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

Provocation to assault

285. In this section, we examine:

- the complete defence of provocation to assault (Criminal Code section 269)
- the complete defence of prevention of repetition of insult (Criminal Code section 270).

286. We propose amendments to these defences to ensure DFV perpetrators are held accountable for their use of violence.

Current law

287. The use of force against a person without their consent is an assault, which is unlawful unless it is authorised, justified or excused by law.[275]

288. Section 269 of the Criminal Code provides the complete defence of assault provocation. It excuses an assault where a person, in response to a provocation, loses self-control and uses violence 'on the sudden and before there was time for [their] passion to cool'. It applies only to offences containing assault as an element,[276] and does not apply to offences such as wounding, GBH or manslaughter. The elements of the defence, and some of the relevant legal considerations, have been considered in detail in our Provocation to assault information sheet.

An offence of which assault is an element

Early case law permitted use of the section 269 defence in cases where there was a factual assault (rather than only to offences which contain assault as a legal element), provided the force used was not likely or intended to cause death or GBH.[277] This meant that the defence could apply in cases of manslaughter.[278] However, in the 1962 case of R v Martyr, Philp J held that provocation to assault cannot apply to manslaughter because section 291 provides it is unlawful to kill unless the killing is authorised, justified or excused by law, and section 269

justifies an assault, not death.[279] Despite this, in the 1966 case of R v Sleep, Hart J continued to take the earlier approach and held that **both** provocation to assault (section 269) and prevention of repetition of insult (section 270) were available where the defendant was charged with manslaughter for killing his wife.[280]

The High Court supported Philp J's approach, limiting the defence to offences where assault is an element,[281] but in the 2013 case of R v Major, the Court of Appeal cited R v Sleep as authority that the section 270 defence was available on a charge of manslaughter.[282] Some commentators suggest that the decision in R v Major raises some 'degree of uncertainty' as to whether the earlier interpretation of the scope of provocation to assault could regain judicial favour.[283] This raises the question of **whether section 269 should be legislatively restricted to offences of which assault is an element**.

289. The defence applies if the force used was proportionate to the provocation and was not intended or likely to cause death or GBH. This proportionality requirement differentiates assault provocation from the partial defence of killing on provocation.

290. Section 268 defines provocation for section 269 and other provisions in Chapter 26 of the Criminal Code.[284] A provocation is a **wrongful act or insult** of the type likely to deprive an ordinary person of the power of self-control. 'Wrongful' qualifies only the word 'act'. An insult does not need to be wrongful to be provocation.[285] 'Insult' is not defined and is given broad meaning.[286] Words and gestures may be an insult depending on the surrounding circumstances, including the defendant's characteristics.[287]

291. Like killing on provocation, provocation to assault is a concession to human frailty. Sir Samuel Griffith, the author of the Criminal Code, said the defence recognised what was 'in common life assumed to be a natural rule of action'.[288] The results of our community attitudes survey suggest that responding to provocative conduct with violence may no longer be considered an acceptable response.[289]

292. Queensland and Western Australia are the only Australian jurisdictions which have the defence. The Law Reform Commission of Western Australia provisionally formed the view the defence should be repealed, and recommended it be reviewed.[290]

Previous consideration

293. In 2008, we considered whether provocation to assault should be repealed and recommended it be retained. We considered that the scope of the defence was appropriately limited to less serious violence.[291] That review did not consider the defence of prevention of repetition of insult.

Prevention of repetition of insult

294. Section 270 of the Criminal Code provides the complete defence of prevention of repetition of insult. The defence excuses the use of force which is 'reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault', if the force is not intended or likely to cause death or GBH.

295. Provocation for section 270, like section 269, is defined by section 268. However, section 270 potentially has broader application than the defence of provocation to assault because it:

- applies to a broader range of offences; there is no requirement for assault as an element, which means it can apply to more serious offences such as manslaughter or wounding
- does not require a loss of self-control

- does not require the use of force be on the sudden and before there is time for the defendant's passion to cool.

296. Section 270 may be raised in matters where self-defence or defence of another is raised.[292] Prevention of repetition of insult draws on terminology similar to self-defence, with a requirement that the force used be 'reasonably necessary' to stop the repetition of provocative conduct. It may also apply in matters where section 269 applies.[293]

Strengths and criticisms of the current approach

297. Many of the criticisms of the partial defence of killing on provocation are equally applicable to provocation to assault (see above), including:

- criticisms of its conceptual, logical and moral bases
- its complexity and unequal gendered operation
- excusing violent reactions, particularly in cases involving DFV and
- blaming victims for their victimisation.

298. We have also identified specific criticisms of provocation to assault, including that:

- restricting section 268 to offences in which assault is an element is inconsistent with the broader scope of the prevention of repetition of insult defence
- it does not assist female defendants charged with wounding when they use a knife in response to provocation by a larger man.

299. Provocation to assault received limited support in our community attitudes survey. In a DFV assault scenario involving provocation, almost all respondents thought there should be no defence: 95.6% of respondents were against a defence regardless of either the victim's conduct or degree of injury. The community also did not support a defence if there was risk of significant injury, or where the defendant's conduct was motivated by anger, jealousy or a desire for control.[294]

300. Our preliminary case analysis suggests assault provocation is used in DFV matters, where defendants argue victims contribute to their own victimisation (see background paper 3). Use of the defence in DFV matters is inconsistent with the findings of our community attitudes survey.

301. In contrast, preliminary consultation with legal professionals suggests there is significant support for provocation to assault. Some suggested it should be expanded to a broader range of offences.

302. Our community attitudes survey found that where provocative conduct was verbal insults or harassment in a public setting, Aboriginal people and Torres Strait Islander people were more likely to support the defence of assault provocation. This may be due to individual and collective experiences of public harassment, including racism.[295]

303. There are significant concerns that repealing provocation to assault may disproportionately impact Aboriginal peoples and Torres Strait Islander peoples and increase criminalisation.

304. Our preliminary consultation with Aboriginal people, Torres Strait Islander people, legal practitioners who represent them and community organisations suggest that repealing the defence may increase the rates of conviction of Aboriginal peoples and Torres Strait Islander peoples. Practitioners told us of some limited examples of Aboriginal people and Torres Strait Islander people successfully relying on assault provocation, including an Aboriginal defendant who responded to racial harassment and abuse. However, limited access to justice, discussed above, means the defence does not work as effectively as it could for Aboriginal peoples and

Torres Strait Islander peoples. Aboriginal peoples and Torres Strait Islander peoples often struggle to access culturally appropriate legal advice and face significant pressures to plead guilty, which is compounded where the person is held on remand before the trial.[296]

Proposals 6 and 7

Proposals

P6 The defence of provocation in section 269 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

P7 The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

305. We are concerned that repealing the defence of provocation to assault would improperly increase the criminalisation of Aboriginal peoples and Torres Strait Islander peoples in circumstances where they should have access to a defence, and where they are significantly over-represented in our criminal justice system.

306. The context of racially driven abuse is also a relevant consideration. We therefore propose to limit the application of provocation to assault, not abolish it.

307. Proposal 6 amends provocation to assault so that it does not apply to domestic violence offences (as defined in the Criminal Code s 1).

What is a domestic violence offence?

'Domestic violence offence' is defined in section 1 of the Criminal Code. It means an act or omission constituting an offence where that act or omission is 'domestic violence' or 'associated domestic violence' (as defined in the Domestic and Family Violence Protection Act 2012) or a breach of a domestic violence order.

Amendments were made to sections 564 and 572 of the Criminal Code in 2015 following the Not Now, Not Ever report,[297] to include a 'domestic violence offence' averment which is designed to make it easier to identify domestic violence offences on criminal histories.[298] The Penalties and Sentences Act was also amended to better recognise domestic violence offences.[299]

308. Defences which excuse the use of violence by a primary perpetrator of DFV may no longer reflect contemporary attitudes about DFV. Our community attitudes survey indicates a lack of support for a provocation defence in DFV matters.[300] Proposal 6 is consistent with this.

309. The proposed changes to self-defence, which would remove an assault trigger and provide special considerations for DFV situations where a victim-survivor uses violence, are intended to ensure that self-defence would be available in appropriate cases where victim-survivors are provoked, after a history of domestic violence, into using retaliatory violence. This should mean that proposal 6 does not have unintended consequences for victim-survivors of DFV who use retaliatory violence.

310. The limited scope of provocation to assault is broadly consistent with community attitudes.[301] We do not propose to extend the defence to make it available in cases involving more serious violence, such as manslaughter. However, given the proposal to abolish the partial defence of killing on provocation, and the suggestion by academics that the courts may reconsider reinstating the wider interpretation of section 269,[302] it is also worthwhile considering whether section 269 should be explicitly restricted to offences of which assault is an element.

311. Proposal 7 is to amend section 270 to limit its application to offences to which assault is an element, and to exclude domestic violence offences from its scope. The provocation to assault and prevention of repetition of insult defences may apply in the same factual circumstances. Prevention of repetition of insult may also apply to manslaughter cases which raise self-defence or defence of another as the primary issue,[303] which would add unnecessary complexity to the trial and be contrary to community standards about the use of serious violence in response to provocation.

312. The intention of proposal 7 is to reduce the complexity of trials involving serious violence or death, align the defence with community standards, and ensure consistency between defences with a similar purpose and application. The intention of amendments to section 269 may be frustrated if the two defences have significant differences in scope, and section 270 applies in circumstances specifically excluded by reform to section 269.

Questions

Q14 What are your views on proposal 6?

Q15 What are your views on proposal 7?

Practice and procedure

313. Our terms of reference ask us to consider whether reform is needed to practice or procedure relating to the defences we are reviewing.[304]

314. In criminal law, 'practice and procedure' means the rules and processes through which the substantive law is applied, including the processes for investigating, charging, prosecuting and defending criminal cases, pre-trial and trial processes, sentencing and appeal.[305] It informs the exercise of discretion and the balancing of fairness to defendants with fairness to the community.[306] The source of practice and procedure is multiple laws, guidelines and policies in relation to criminal procedure and sentencing.[307]

315. Criminal process can and should change in response to changes in society and community attitudes.[308] Changes to practice and procedure could support improved outcomes for victim-survivors of DFV who offend in response to, or because of, DFV. Changes may also help address the over-representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system and improve access to defences.

316. In the following sections we note some of the challenges victim-survivors face in accessing defences and consider potential changes to practice and procedure that could support reform of the defences. We want to hear whether you support these suggestions, or any other suggestions you have for reforms to practice and procedure.

Improving access to defences for DFV victim-survivors

317. DFV victim-survivors face complex and intersecting vulnerabilities and can face barriers to accessing defences. They may have difficulty disclosing the history of abuse, its relationship to offence conduct, be misidentified as DFV perpetrators and face pressure to plead guilty rather than go to trial where defences are available. We consider this in more detail in background paper 3.

318. Below we set out five potential reforms that could improve access to defences for victim-survivors. These suggestions build on approaches in other jurisdictions and the academic literature. We welcome your submissions on these suggestions or other reforms to improve access to defences for victim-survivors.

Introduce special protections for DFV victim-survivors during police interviews

319. Women who offend in response to, or retaliation for, DFV are more likely than male perpetrators to accept responsibility for their actions rather than present the other party as blameworthy.[309] In contrast, male primary perpetrators of DFV often deflect responsibility for their actions,[310] and may be highly skilled at image management and presenting themselves as victims.[311] If victim-survivors make admissions of guilt in the immediate aftermath of an incident, their trauma may adversely impact the direction of police investigations. Providing DFV victim-survivors with special protections during police interviews may help alleviate the risk of misidentification and improve access to defences.

320. The Police Powers and Responsibilities Act 2000 governs the powers and duties of police officers and provides for special protections in police interviews for vulnerable groups, including Aboriginal peoples and Torres Strait Islander peoples, children and people with impaired capacity.[312] Protections can include the presence of a support person or notification of opportunities to access legal aid. They are intended to alleviate the vulnerability and disadvantage that these groups may face. These provisions could be extended to include DFV victim-survivors.

Expressly recognise DFV victim-survivors who offend and Aboriginal peoples and Torres Strait Islander peoples as special witnesses

321. DFV victim-survivors may be vulnerable and face challenges when trying to tell their story at trial, particularly when impacted by trauma.[313] Aboriginal peoples and Torres Strait Islander peoples can also face significant sociolinguistic and other difficulties when giving evidence in criminal proceedings.[314] This may impact their ability to rely on relevant defences.

322. Section 21A of the Evidence Act 1977 gives the court discretion to order measures to help a 'special witness' give their best evidence. Special witnesses are people with certain recognised vulnerabilities which impact their ability to give evidence. Measures include allowing them to give evidence from behind a screen or in a remote room. Section 21A(1) provides that a special witness includes a person against whom domestic violence is alleged to have been committed by another person giving evidence about the commission of an offence by that other person. Section 21A(1B) provides that the person charged may be a special witness. However, it is unclear if this extends to DFV victim-survivors giving evidence where they are a defendant, if their evidence is not directly 'about the commission of an offence'.[315]

323. To help alleviate these vulnerabilities, section 21A could be amended to expressly recognise that 'special witness' includes:

- people charged with offending which they claim was in response to, in retaliation for, or otherwise related to, DFV victimisation, where they are the person most in need of protection
- Aboriginal peoples and Torres Strait Islander peoples.

Require pre-charge consideration of victimisation and abuse history of the defendant

324. Chapter 9 of the Queensland Police Service Operational Procedures Manual requires 'holistic investigation' of DFV matters and identification of the person most in need of protection.[316] Inadequate police investigations risk misidentification of victim-survivors as perpetrators of DFV.[317] The Operational Procedures Manual was recently reviewed following a Commission of Inquiry recommendation.[318] It is possible the requirements for holistic investigation and identification of the person most in need of protection are intended to overcome recognised problems with incident-based policing,[319] and promote consideration of the history of abuse, including coercive control, in the context of the relationship as a whole. This should help investigators identify where victim-survivors have used force to protect themselves and their children and help prevent misidentification. However, the Operational Procedures Manual does not set out the factors relevant to determining the person most in need of protection or provide specific guidance on assessing the use of defensive force by DFV victim-survivors.

325. We know there are high rates of misidentification, which is discussed further in background paper 3. Identifying the primary perpetrator and person most in need of protection can be challenging and complex, particularly in dynamic policing situations. However, the misidentification and criminalisation of victim-survivors, including charging and remanding women who have used force defensively, can have devastating consequences. It breaks up families, impacts future employment and housing options, and is highly detrimental to physical and mental health.[320]

326. Requiring pre-charge consideration of the defendant's victimisation and abuse history may help reduce misidentification and criminalisation of victim-survivors, reduce improper charging in cases where violence is used defensively, assist the defence case, and promote gender-responsive and trauma-informed police interviewing. The Queensland Police Service could review and amend its Operational Procedures Manual to require consideration of the defendant's victimisation and abuse history before charging them and include a specialist and tailored response for Aboriginal women and girls and Torres Strait Islander women and girls. It could also be amended to set out the factors relevant to determining the person most in need of protection. Additional guidance on 'defensive violence' could also be included.

327. This could be supported by changes to policy and legislation to address previous instances of misidentification. Where a person has historically been misidentified, it can impact interactions with police, courts and other services, and whether a victim-survivor's use of violence is accurately understood.[321] This may impact the availability of defences.

Improve access to bail for DFV victim-survivors

328. Many DFV victim-survivors who kill their abusive partners, or use non-lethal defensive violence, are held on remand pending finalisation of their matter. This is as a result of the show cause provisions of the Bail Act 1980. These provisions apply to murder charges and other domestic violence offences, reverse the presumption that bail should be granted, and require the defendant to demonstrate why detention is not justified.[322] Even where the defendant is able to 'show cause', they must satisfy the court that they are not an 'unacceptable risk', taking into account the relevant factors, including the strength of the evidence against them.[323]

329. Where women are refused bail, they are often held in custody until their case is finalised. Legal practitioners told us that, for a murder trial, this can take between three and four years.[324] Almost 40% of women in custody are on remand (compared to 29.6% of men in custody), with Aboriginal women and Torres Strait Islander women being more likely to be held on remand than non-Indigenous women.[325]

330. We were told that a victim-survivor held on remand is more likely to plead 'guilty', even where they have a legitimate claim of self-defence. Improving access to bail for DFV victim-survivors who offend is critical for increasing their access to appropriate defences.

331. The Bail Act 1980 could be reformed to reflect contemporary knowledge about DFV and the use of defensive violence by victim-survivors. Possible reforms include:

- Amending the 'show cause' provisions so that in DFV cases, if the defendant is identified as being the person most in need of protection, they are not required to 'show cause'.
- Introducing a requirement to consider whether the defendant is the person most in need of protection as part of the initial risk assessment. The relevant risk factors could also be amended to expressly include the availability of possible defences, in addition to the strength of the evidence against the defendant.

332. The Queensland Police Service could also amend its Operational Procedures Manual to direct arresting officers to disclose the domestic violence history of the deceased with the objection to bail affidavit. This may help earlier assessments of whether the deceased was the primary perpetrator.

Introduce specialist prosecutors and defence lawyers for women who kill

333. Cases where women kill their abusive partner often involve complex evidence which requires specialist knowledge of the nature and impact of DFV, coercive control and social entrapment. Most practitioners do not have first-hand experience with such cases, as they are rare. Increasing the availability of specialist practitioners with expert understanding of relevant issues would support these women to successfully rely on self-defence, including during the police investigation and initial charge stage, in making written submissions to discontinue, or at trial.

334. To promote this, the Queensland Law Society and the ODPP could develop new practitioner specialisations and provide additional training on DFV to practitioners.

Question

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

Early identification of self-defence, early resolution and legal certainty

335. Long delays may impact a defendant's decision to go to trial. In some cases, defendants charged with murder can be held on remand for three to four years before their matter is finalised by plea or trial. Delay can also cause ongoing distress to the family of the deceased.

336. Where cases do proceed to trial, there can be a lack of legal certainty as to the admissibility of expert evidence, availability of defences, and what jury directions should be given to support jury understanding of DFV.

337. Below are six potential reforms that could promote the early resolution of matters (including where the defendant is a DFV victim-survivor), early identification of legal issues, legal certainty and access to defences.

ODPP take carriage of homicide cases pre-committal and introduce measures to facilitate early pleas of guilty

338. Most homicide prosecutions are handled by the Police Prosecution Corps (a branch of the Queensland Police Service) from the time of charge until committal proceedings are finalised. The ODPP take carriage of homicide matters after committal, review the evidence, and decide what charge to indict.[326] The Police Prosecution Corps cannot engage in plea negotiations on homicide matters, as the ODPP will be the ultimate decision-maker.[327] Plea negotiations for most homicides cannot occur until after the matter is committed for trial, which contributes to delays in proceedings being finalised.

339. Requiring the ODPP to have carriage of homicide prosecutions after the brief is ordered may facilitate the early identification of relevant issues and early guilty pleas. It may also reduce the time spent by the defendant on remand. It could also avoid unnecessary directions hearings, committal hearings, mentions and trial listings.

340. Mandatory case conferencing at the committal stage could help identify matters which should resolve as a plea, facilitate earlier resolution, or the narrowing of issues where a matter is only contested in part.

341. This approach may require increased funding for the ODPP to manage additional workloads. Further consideration would also need to be given to case file management, particularly for court appearances, given that the ODPP does not have offices in all regional and remote Magistrates Court locations.

Requiring the defence to give notice of reliance on particular defences

342. A requirement for the defence to give notice of defences they intend to rely on following presentation of an indictment would allow prosecutors to assess whether charges are appropriate in light of available evidence and obtain expert reports in appropriate cases. It would also ensure defence lawyers take detailed instructions and consider possible defences earlier.

343. To achieve this, a new provision could be inserted into Chapter 62, Division 4, of the Criminal Code to require pre-trial disclosure of relevant defences.

344. This approach has been taken in New South Wales, which requires pre-trial disclosure of matters including the nature of the defendant's defence and the particular defences relied upon.[328]

345. Critics of this approach may consider it an inappropriate limit on the defendant's rights in criminal proceedings, including the right to silence. Despite this concern, the New South Wales Law Reform Commission recommended pre-trial disclosure of defences on the basis that it would improve trial efficiency, prevent delays from new defences or unrelated evidence, narrow issues and shorten trials.[329]

Introduce pre-trial hearings to determine the availability of defences

346. Section 590AA of the Criminal Code provides for pre-trial rulings and directions to determine certain issues (including those in a non-exhaustive list in section 590AA(2)). This likely allows pre-trial determinations of whether a particular defence is available,[330] but is rarely used for this purpose.

347. Using pre-trial hearings to determine whether a particular defence is available (based on depositions) may facilitate effective use of defences, particularly by DFV survivors, and increase

legal certainty. This is particularly important if the legal framework of defences is changed following this review and new partial defences are introduced.

348. Pre-trial hearings to determine the availability of a defence (following defence notice of reliance on particular defences) have been used in New South Wales. For example, in R v Songcuan,[331] a pre-trial decision held that the partial defence of extreme provocation should be available.

349. Amendments to section 590AA to expressly provide for a pre-trial determination of whether a particular defence is available may have an educative function and facilitate effective use of defences without significantly curtailing the defendant's rights within proceedings.

Introduce interlocutory appeals

350. An interlocutory appeal is an appeal from a decision made by the trial judge, either pre-trial or during the trial, which happens while the case is still proceeding. Under the Criminal Code, there is limited scope for interlocutory appeals against pre-trial rulings.[332]

351. Access to interlocutory appeals is deliberately limited to avoid significant delays in trials which could infringe on the defendant's right to a fair and speedy trial and cause distress to complainants or the family of victims.[333] However, interlocutory appeals may promote legal clarity by allowing the Court of Appeal to provide guidance before a matter is finalised. This may reduce post-conviction appeals and retrials where issues could have been resolved before or during the trial. Interlocutory appeals would support legal clarity if there were changes to defences. They may also promote legal certainty in relation to the significant recent and ongoing legislative changes in response to Taskforce recommendations,[334] including changes to propensity evidence[335] and expert evidence,[336] jury directions[337] and the new offence of coercive control.[338]

352. New South Wales and Victoria both allow interlocutory appeals against pre-trial rulings. In New South Wales, if the trial judge does not certify the matter as appropriate, the defendant must seek leave to appeal.[339] In Victoria, the judge who made the decision must certify the matter before leave to appeal can be granted.[340]

353. Interlocutory appeals may be introduced by amending section 668A of the Criminal Code or by introducing a new provision to permit interlocutory appeals against pre-trial rulings. To prevent inappropriate use of this power, it could require the judge who made the decision to certify support of leave to appeal.

Clarify when a trial judge must leave a defence that was not expressly relied on

354. Trial judges must direct the jury to consider a defence where, on the view of the evidence most favourable to the defendant, 'a properly instructed jury acting reasonably might fail to be satisfied beyond reasonable doubt that the accused person was not acting in circumstances giving rise to the defence'.[341] This is so even where the defence is contrary to the defendant's primary case, or is contrary to evidence adduced by the defendant, even if no party has requested the defence be left.

355. For example, in R v MEB, the defendant successfully appealed against his conviction based on the failure by the trial judge to leave the defence of provocation to assault to the jury.[342] He denied assaulting his partner. This meant that on his version, he was not provoked.

356. Directing a jury on all possible defences can increase the complexity of directions and obscure the real issues. Appeals may result in cases where the defence have made strategic decisions

not to seek, or to oppose, the giving of certain directions, particularly those pertaining to defences.

357. Amendments to the Criminal Code, modelled on the provisions in the Jury Directions Act 2015 (Vic),[343] could limit the availability of defences contrary to the defendant's case. The Victorian provisions require counsel to assist in identification of matters in issue (including applicable defences) and request the trial judge give or not give particular directions. Trial judges are only required to give directions contrary to parties' views where there is a substantial and compelling reason to do so.[344]

358. Alternatively, Queensland may consider adopting the New South Wales approach[345] and amend the Criminal Code to require leave to appeal where the ground of appeal is the giving of a direction, or omission to give a direction, where the defence did not object to the direction or omission at trial.

Amend police and prosecution policies to facilitate the charging of manslaughter where a DFV victim-survivor kills their abuser

359. Most DFV victim-survivors who kill their abuser are charged with murder but plead guilty to manslaughter.[346] This happens even where the killing occurred in confrontational circumstances, and where they may have been able to rely on self-defence and be acquitted. This is discussed in background paper 3 and will be explored further in our research report 4.

360. Our preliminary research and consultations suggest that there are many reasons why a victim-survivor charged with murder may decide to plead guilty to manslaughter, including:[347]

- murder attracts mandatory life and proceeding to trial risks life imprisonment even if a complete defence is available; long periods on remand and delays reaching trial mean many defendants will be immediately eligible for parole when sentenced if they plead guilty to manslaughter
- inability to explain the history of abuse in the relationship and fear of being disbelieved, which can be exacerbated where the defendant has past experience of misidentification as a perpetrator of DFV or does not present as the 'ideal victim'.
- trauma associated with proceeding to trial
- inadequate legal advice
- potential feelings of guilt associated with killing their abuser and a belief that they should be held responsible, without recognising their own victimisation.

361. To address this, the Queensland Police Service Operational Procedures Manual and ODPP Director's Guidelines could be reviewed and amended to require that a charge of manslaughter be preferred where DFV victim-survivors have killed their abuser, unless there are exceptional circumstances. This may support informed decision-making about whether to proceed to trial and raise self-defence, promoting early resolution of the matter where the person voluntarily decides to plead guilty to manslaughter. Other supporting changes could include:

- Revising the Operational Procedures Manual and Director's Guidelines to provide more detailed mandatory considerations when a homicide suspect is, or may be, a DFV victim-survivor.
- Establishing an effective mechanism for challenging decisions to prosecute a DFV victim-survivor.
- Introducing a statutory duty for public authorities to do routine enquiries as to whether the offending of women and girls took place in the context of DFV.

- Introducing police guidance on:
  - identifying potential DFV victim-survivors through routine enquiry,
  - when it may or may not be in the public interest to charge the victim,
  - investigation of potential offences against the victim,
  - protection of the victim's rights,
  - trauma-responsive practice and
  - out of court disposals.

  This should be done jointly with local domestic and family violence specialist services, including services led by and for vulnerable populations such as Aboriginal peoples and Torres Strait Islander peoples and their communities.
- Amending the Director's Guidelines to provide additional guidance about when it may not be in the public interest to prosecute cases, including when the defendant is a DFV victim-survivor who used defensive force.

Question

Q17 What reforms are needed to criminal law practice and procedure to facilitate:

(a) early identification of self-defence in criminal investigations and prosecutions

(b) early resolution of criminal prosecutions?

Evidence of the nature and impact of DFV

362. Social framework evidence, including expert evidence and evidence of the defendant's history of experiencing DFV and the responses of people and systems to that abuse which contribute to social entrapment, is essential in cases where victim-survivors are charged with offences related to their DFV victimisation and wish to raise defences.[348] Such evidence, combined with limits on questioning that reinforces DFV myths and appropriate jury directions, can help ensure criminal proceedings reflect contemporary knowledge of DFV.

363. Below we consider three potential reforms that could facilitate the admission of evidence of the nature and impact of DFV and help dispel common myths and misconceptions about DFV.

Establishing a DFV expert evidence panel

364. Preliminary consultation highlighted a number of issues impacting defendant access to qualified, appropriate experts who can provide expert evidence of the nature and impact of DFV. The qualifications and experience of experts, the quality of and availability of experts (particularly for Aboriginal and Torres Strait Islander women and defendants living in regional and remote locations) and financial barriers may limit access to expert evidence for some defendants.

365. A DFV expert evidence panel, modelled on the sexual violence expert panel, could address these issues. The sexual violence expert evidence panel, established by part 6B, division 4 of the Evidence Act 1977, supports recent amendments to sexual offence consent laws by providing access to suitably qualified experts who can provide reports and give relevant evidence in sexual violence court proceedings. A DFV expert evidence panel could consist of suitably qualified experts, including social workers, academics, psychiatrists, psychologists,

and others with necessary expertise about social entrapment and DFV. These experts could provide reports and give evidence in court to support access to defences in appropriate cases.

Make certain DFV jury directions mandatory

366. The Evidence Act 1977 allows certain directions concerning DFV to be given to a jury, including as to domestic violence (section 103T), self-defence in response to domestic violence (section 103U) and domestic violence directions on the judge's own initiative (section 103V). However, preliminary consultation suggests prosecutors may oppose the giving of such directions, resulting in lengthy legal arguments and a decision to not to give the direction.

367. Amending part 6A, division 3 of the Evidence Act 1977 to make certain directions mandatory (amending 'may' to 'must'), including, where appropriate, directions as to the context, nature and impact of DFV on Aboriginal peoples and Torres Strait Islander peoples and their communities, may ensure DFV directions are given in relevant criminal proceedings.

368. We may also consider amendments for directions to be given at commencement of the trial or immediately before the relevant evidence. Currently decisions as to the timing of DFV directions are a matter for the trial judge.

Limiting admissibility of victim-blaming evidence in homicide trials

369. Character attacks on a deceased victim are common during intimate partner homicide trials, particularly where the partial defence of provocation is raised.[349] Witnesses may be questioned about the deceased in a manner designed to illicit responses which portray the deceased negatively in circumstances where such evidence cannot be effectively rebutted. Examples of 'victim-blaming evidence' include describing the victim as crazy, irrational, aggressive, a bad parent, or an addict.[350] This can unfairly shift the focus from the conduct of the defendant to the conduct of the deceased (both immediately before the fatal attack and over the course of the relationship) and may reinforce victim-blaming narratives.[351]

370. Such evidence is generally not relevant to the facts in issue but seeks to build on prejudice against 'undeserving' victims. However, relevant evidence of prior conduct of a deceased could be relevant to determine the history of DFV in the relationship. Evidence that is relevant to this determination would not properly be considered victim-blaming evidence and should not be captured by any exclusionary provision.

371. Consideration could be given to introducing a new provision into the Evidence Act 1977 to exclude 'victim blaming' evidence, while preserving the ability to introduce evidence about the nature of the relationship and context of the offending. This provision could be modelled on section 135(d) of the Evidence Act 2008 (Vic), which limits the admissibility of evidence where its probative value is 'substantially outweighed by the danger' that it could 'unnecessarily demean the deceased' in a homicide proceeding. Alternatively, section 21 of the Evidence Act 1977 could be amended to provide that a question about a deceased person is improper where, if they were alive and giving evidence in court, the question would be offensive, humiliating, or demeaning.

Question

Q18 What reforms are needed to criminal law practice and procedure to facilitate the admission of evidence about the nature and impact of DFV on victim-survivors who offend?

Access to justice for Aboriginal people and Torres Strait Islander people and their communities

372. Aboriginal people and Torres Strait Islander people and their communities face significant barriers when engaging with police and the criminal justice system. This contributes to their over-representation in the criminal justice system as both victims of crime and defendants. We discussed some of these issues above. Many of the causes of over-representation are outside the criminal justice system,[352] and are therefore outside the scope of our review. However, we suggest three reforms below that are designed to improve access to justice for Aboriginal peoples and Torres Strait Islanders peoples in areas connected to our review.

Evidence of traditional laws and customs

373. Evidence of the traditional laws and customs of Aboriginal peoples and Torres Strait Islander peoples and their communities may be relevant to making out a defence, including honest and reasonable mistake of fact, defence of 'native title', consent, compulsion and provocation. This type of evidence may be admitted but is often challenged on the basis of the hearsay and opinion evidence rules. 'Hearsay' is evidence of what a person has heard from another person and is generally not considered reliable for proving the existence of fact.[353] Similarly, evidence of an opinion which is not based on 'expert knowledge' is not typically admissible.[354] The passing of knowledge through oral tradition and uncertainty around who is considered an 'expert' can make it difficult for evidence of traditional laws and customs to be admitted.

374. An exception to the hearsay and opinion rules in legislation would make clear the legal position. The provisions could be modelled on the exceptions used in the Uniform Evidence Law. Similar provisions have been enacted in Victoria, New South Wales, Tasmania and the ACT,[355] and will soon come into force in Western Australia and South Australia.[356]

Increasing cultural capability training for police, court officers, judicial officers and prosecutors in regional and remote areas

375. Police, court officers, judicial officers and prosecutors receive varying degrees of cultural capability training, particularly in regional and remote areas. Additional training could specifically address cross-cultural communication. The training could also highlight the availability and use of appropriate and impartial interpreters.

376. The Queensland Human Rights Commission recently released its final report on the Queensland Police Service Diversity and Inclusion Review which identified widespread and systemic discrimination against women, First Nations', and culturally diverse people within Queensland Police Service. One of its key recommendations was that the Queensland Police Service should work with 'internal champions for change' and provide them with specific training to help shift organisational culture.[357] Including cross-cultural communication in that training could support a shift in organisational culture.

Increasing accessibility of cultural reports for Aboriginal defendants and Torres Strait Islander defendants

377. Community Justice Groups are non-government organisations made up of members of Aboriginal communities and Torres Strait Islander communities. They provide support to members of their communities in criminal justice matters, including preparing bail and sentence submissions to the court, including cultural advice ('cultural reports').[358]

378. Cultural reports prepared by Community Justice Groups can aid court decision-making at sentence (and support bail applications) by explaining cultural considerations relevant to the defendant, including the impact of systemic disadvantage and intergenerational trauma. Cultural reports may provide an effective and culturally safe way to ensure information relevant to the mitigation of a sentence is placed before the court. However, our research suggests these reports are rarely used in superior court matters.

379. We have heard that Aboriginal and Torres Strait Islander defendants may disclose information to an elder while they are preparing the report which might not otherwise be disclosed to their defence lawyer. Such information may be significant to sentence but may also raise a defence. Further consideration may be given to how these reports may be more readily available to not only support sentencing in superior court sentences, but also as a means to ensure all relevant information is assessed before a plea is entered. Greater use of cultural support officers may also help build trust between a defendant and their lawyers to ensure relevant information is disclosed.

380. Community Justice Groups are not presently funded to provide reports for superior court matters. Increased funding to Community Justice Groups would be required to ensure greater accessibility of cultural reports.

Question

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

Majority verdicts in murder and manslaughter cases

381. In Queensland, under section 59(1)(a)(i) and (4) of the Jury Act 1995, the jury in a murder trial must reach a unanimous verdict. Under that section manslaughter trials can be resolved by a majority verdict (meaning 11 out of 12 jurors or 10 out of 11 jurors agree), if the judge is satisfied that the jury is unlikely to reach a unanimous verdict. The common law position is different: a unanimous not guilty verdict on murder is required before a jury may consider manslaughter (Stanton v The Queen).[359]

382. In R v Peniamina, the defendant was convicted of manslaughter (on the basis of provocation) where the jury could not reach a unanimous verdict on murder. In deciding to take a majority verdict on manslaughter, without a verdict on the charge of murder, the trial judge found that the effect of sections 59 and 59A of the Jury Act 1995 (in particular, section 59(4)), was to reverse the rule in Stanton v The Queen.[360]

383. The position in R v Peniamina creates the risk that one 'hold-out' on a jury could result in a compromise verdict of manslaughter. Where there is a hung jury for murder, the Crown may run a further trial which cannot be done where a majority verdict to manslaughter is taken.

384. Three alternative reforms to address this risk are set out below. It may also be appropriate to leave the law as is, as decided in R v Peniamina.

Allow majority verdicts for murder

385. Majority verdicts were introduced to ensure 'jury deliberations are not thwarted by a single person who is unwilling to engage in proper examination of the evidence' and to 'help give certainty and finality to criminal proceedings'.[361] If it is accepted that majority verdicts are safe and reasonable for offences beside murder, some may argue that they should be available for murder. This approach is taken in all other Australian states and territories.[362]

386. However, given that murder carries the mandatory minimum sentence of life imprisonment in Queensland, it could also be argued that unanimity is required to ensure a just outcome and community confidence in that verdict. The significance of this issue would be reduced if mandatory sentencing was abolished.

Require unanimous verdicts for manslaughter (where brought as a lesser charge)

387. The law could be amended so that where a person is indicted on murder, and manslaughter is an alternative charge, a unanimous verdict is required for both murder and manslaughter unless the prosecution consents to a majority verdict being taken on manslaughter where a jury cannot reach a unanimous verdict on murder. This would maintain the status quo, of requiring a unanimous verdict for murder, but limit the availability of a majority verdict on manslaughter to cases where the prosecution consents or where murder was not charged.

388. A requirement for the consent of the prosecution acknowledges that, in cases where a jury is hung on murder, the evidence adduced during trial may satisfy the prosecution a conviction for murder is unlikely on retrial. In some cases, a majority verdict on manslaughter may be the most appropriate course. However, the prosecution may think it is appropriate to run another trial on murder and not want the jury to proceed to consideration of manslaughter without a unanimous determination of the murder count.

Reinstating the rule in Stanton v The Queen

389. Section 59(4) of the Jury Act 1995 could be amended so that a unanimous verdict of not guilty to murder is required before the charge of manslaughter can be considered. This would reinstate the High Court's view in Stanton v The Queen (see [381]).

Question

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

Domestic discipline

390. In Queensland, the use of force without consent against another person, including a child, is unlawful unless it is 'authorised, justified or excused by law'.[363] The defence of domestic discipline in section 280 of the Criminal Code justifies the use of physical violence against a child for the purposes of 'correction, discipline, management or control'. The force used must be reasonable in the circumstances. The defence is available to a parent, person in the place of a parent, schoolteacher or master. A child is a person under 18 years old.[364] Section 280 provides a complete defence to an offence involving the use of force. This includes common assault but could also include more serious offences such as assault occasioning bodily harm or choking.

391. Each Australian jurisdiction has a similar defence, either in legislation or at common law. We have published a Domestic discipline information sheet with more information on the defence in Queensland and other jurisdictions.[365] We have also published an easy to understand information flyer summarising the Queensland defence.[366]

Current practice

392. Support for corporal punishment is declining in Australia and across the developed world. Sweden was the first country to prohibit the use of corporal punishment in 1979. Since that time, 67 countries have outlawed the use of corporal punishment, and many others have committed to legislative change.[367] It is likely that changing attitudes and legal responses are driven by various factors including:

- recognition that corporal punishment is ineffective, potentially harmful and associated with various negative outcomes for children[368] and
- compliance with international human rights standards which recognise that corporal punishment violates a child's human rights.[369]

393. Research tells us that the use of corporal punishment to discipline a child continues to be common, notwithstanding our increasing understanding that it can be counter-productive and harmful.

How common is physical punishment in Australia today?

The Australian Child Maltreatment Study showed that:[370]

- 6 in 10 (58.4%) young people aged 16–24 were hit or physically punished for misbehaviour as children
- 1 in 2 parents (53.7%) have used physical punishment but use is much lower in younger generations (being 32.8% for parents aged 25-34 years, and 14.4% for parents under 24 years)
- 3 in 4 Australians (73.6%) **do not** believe physical punishment is necessary.

394. The domestic discipline defence raises issues about the ability for parents to discipline their children and the rights of children to be protected from all types of violence and abuse.

395. The defence is inconsistent with the protection of the best interests and human rights of children, including their right to equal protection under the law.[371] Australia has repeatedly faced criticism from the United Nations for its continued allowance of corporal punishment against children in breach of international law.[372] The advocacy group End Physical Punishment of Australian Children told us:[373]

> It is not acceptable to say that families have the right to choose to discipline their children in their own way if we know it has negative consequences. Governments and those setting legislation need to intervene in family matters when the effects are adverse for children's health and wellbeing.

396. There is a difference between 'corporal punishment' – which is protected by the defence of domestic discipline – and physical abuse. The difference between corporal punishment and physical abuse are the intention behind the use of force as well as the degree of physical harm or injury inflicted.

397. Corporal punishment refers to 'the use of physical force to cause pain, **but not injury**, for the purposes of behavioural discipline or correction'.[374]

398. Physical abuse involves the use of force against a child 'that causes injury, harm, pain, or breach of dignity', or is likely to do so, and includes 'hitting, punching, kicking, shaking, choking and burning'.[375] Physical abuse is one of five types of child maltreatment (also sexual abuse, emotional abuse, neglect and exposure to DFV) and is a form of DFV when committed

by a parent or relative. Approximately 28% of young Australians have experienced physical abuse, with the research demonstrating that multi-type maltreatment is common.[376] Understanding the intersection between various types of maltreatment may assist in determining whether force is 'corporal punishment' or 'physical abuse'.

399. The use of physical violence may be best understood as a continuum, which starts at 'reasonable force' with no injury for the purposes of 'correction', but may escalate to more frequent, serious physical abuse, often driven by anger, with the potential for serious injury or even death. The Child Death Review Board reviewed a number of reportable child deaths which involved circumstances where there had been reported physical violence against the child by a parent or caregiver, but the conduct had been dismissed as unsubstantiated or disciplinary. The Child Death Review Board noted that:[377]

> 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.

400. The literature demonstrates that the use of corporal punishment is associated with an increased risk of physical abuse.[378] Even when corporal punishment does not escalate to physical abuse, the detrimental outcomes for children are almost the same: physical injury, psychological harm, anti-social behaviour, aggression, negative impact on cognitive and intellectual ability, and intergenerational transmission of support for use of physical violence.[379]

401. In 2008, the Queensland Department of Justice and Attorney-General audited 198 cases involving parent-child assaults and sought to better understand how the defence of domestic discipline was being used in criminal proceedings. It concluded that the domestic discipline defence is not relied on to a significant degree and does not operate to prevent the charging or prosecution of parents who offend against their children. The Department noted 'a disturbing trend' in relation to the use of implements, force applied to the head of children, and the use of punches and kicks.[380] A significant limitation of this work is that it did not examine cases which the police did not bring before the courts. That is, the Department did not examine how the defence of domestic discipline impacted decisions by police about whether to charge a parent.[381]

402. We obtained data from the Queensland Police Service to understand how 'domestic discipline' may operate as a 'bar to prosecution'. Police searched their Queensland Police Records Information Management Exchange (QPRIME) system for matters identified as child assaults occurring within the family, where charges were not laid because of the 'domestic discipline' defence. The dataset consists of 571 cases, involving four charge types, in the period between January 2021 and December 2024. We are still analysing this data and findings will be published in our research report 3. Preliminary findings are outlined in the box below.

Data Analysis: Domestic Discipline as a bar to prosecution – preliminary findings

- The defence of domestic discipline has been used as the basis for the decision by police to not charge a parent in 571 cases
- Approximately 60% of cases involved allegations of common assault
- Approximately 40% of cases involved more serious allegations of violence (other serious assaults, assaults occasioning bodily harm and grievous bodily harm)
- Domestic discipline has operated as a bar to prosecution in a range of circumstances, including where:
  - there is serious violence leading to injuries
  - the violence occurs in the context of ongoing family violence, including where the child is a named person on a protection order
  - instruments have been used
  - children have been the victim of non-fatal strangulation.

403. We conducted structured interviews with police officers working in the Child Protection Investigation Unit, who have experience investigating reports about the use of physical force against children, to better understand police atttiudes towards corporal punishment and how charging decisions are made. That research reinforces concerns from the data that domestic discipline may inappropriately act as a bar to prosecution. A significant issue for frontline police appears to be the lack of legislative guidance about what is 'reasonable force', and how to effectively distinguish between corporal punishment and physical abuse.

404. We have conducted research to understand community views about domestic discipline. We included questions on this topic in our Community Attitudes Survey and focus groups. We also conducted additional research to understand the views of young people. See our forthcoming research report 3.

Our Research – attitudes and opinions

Community Attitudes Survey

- Participants were generally supportive of a defence being available for parents where they used minimal force to discipline a child.
- There was broad support for the defence of domestic discipline where a teacher used very low levels of force for the purpose of management or control but not for the purposes of discipline or correction.
- Focus group participants did not support the use of violence against children for discipline.
- Participants did not favour a criminal justice response in cases involving minimal force and instead suggested increased social support.
- Participants were more likely to say a parent should be found guilty of assault if the perceived or potential harm to the child was greater, including where the parent used an implement, left bruising or slapped the child in the face.

Structured interviews with police

- As one police officer explained 'by and large it [the domestic discipline defence] allows parents to properly correct behaviour and control behaviour with young people without making every day parenting a criminal offence'.
- Corporal punishment frequently comes to the attention of police particularly in the context of physical child abuse notifications and as a result of the domestic discipline defence the matter is dismissed.
- The exercise of police discretion is critical in limiting domestic discipline cases from entering the legal system. The defence of domestic discipline is a rarely raised defence at trial reflecting that few matters where the defence is relevant progress beyond police investigation.
- The interpretation of reasonable force varied across the police interviewed.
- Police officers interviewed generally did not support the repeal of section 280 or substantial amendments making the section too prescriptive.

Focus group with young people

- A focus group discussion found that young people:
  - do not believe that physical punishment should be used to raise a child
  - understand the harms that can be caused by physical punishment
  - do not support a criminal justice response for low level use of physical punishment by a parent, supporting instead the use of alternatives such as parenting education
  - support a criminal intervention where physical punishment is more harmful, either involving the use of an implement, or causing an injury
  - believe there are no circumstances in which a teacher should ever physically punish a child.

Reasonable force

405. Section 280 does not define 'reasonable force'. The common law informs our understanding of 'reasonable force' which should be assessed by reference to 'the age, physique and mentality of the child', whether 'administered by hand or with an implement' and 'the nature of any injury or pain produced'.[382] Our police interviews show that these matters are being considered by police when deciding whether to charge people for the use of violence against their children. However, in the absence of any clear guidance about reasonableness, an ad hoc approach is taken. During police interviews, some police said the defence only applied in cases of common assault. However, others indicated it could be considered in more serious cases. The police data shows that in about 60% of cases, the offending was classified as common assault. In about 40% of cases, more serious offending was involved, including two cases of GBH.

406. Preliminary consultations reinforce concerns established by the police data that the defence may excuse unreasonable use of force. During police interviews, we were told of an example where a magistrate dismissed assault charges brought against a teacher involving use of a 'choke hold' against three primary school students. We are aware of one recent prosecution where a parent was acquitted of various assaults, including non-fatal strangulation, likely on the basis of domestic discipline. It is possible that outcomes like these contribute to police

assessments of 'reasonableness' and use of the defence as a bar to prosecution in more serious cases.

407. Ultimately, whether the force used was reasonable is determined by the decision-maker who would apply their own standards of 'reasonableness' which may not be informed by community attitudes. This will be police who investigate a complaint, prosecutors who determine whether there are 'reasonable prospects of success' when deciding whether to continue with a prosecution, or magistrates (in summary proceedings) or juries (in superior courts) where a matter proceeds to trial.

408. Some jurisdictions have sought to address these concerns by imposing limits on the defence in cases of physical punishment or by limiting the offences to which the defence applies.

Options for reform

Option 1: Repeal the defence

Option 1: Repeal the defence and introduce diversion and other supporting measures

Repeal section 280 of the Criminal Code which provides the defence of domestic discipline. Police and court based diversionary options should be introduced to divert parents who use low level corporal punishment from the criminal justice system and support education and rehabilitation.

The repeal should come into force two years after the initiation of a statewide community education and awareness campaign.

409. There are sound reasons to abolish the defence including:

- children should be afforded the same protections as adults
- the approach is consistent with recent reforms to address DFV that recognise violence is never an acceptable way to behave
- research demonstrates the defence is being used to excuse serious examples of violence against children
- the defence is being used in circumstances where there is a history of DFV within the family unit
- research establishes that using corporal punishment is ineffective and associated with various detrimental outcomes for children
- the link between corporal punishment and the increased risk of physical abuse
- abolition of the defence is consistent with the views of the Child Death Review Board who, after reviewing multiple child death cases where physical abuse had been dismissed as domestic discipline noted–[383]

> The Board was inclined to make a recommendation that the Queensland Government consider removing this legislation permitting physical discipline.

410. Abolishing the defence is also consistent with various government policies and legislation which prohibit teachers and masters using force against children for corporal punishment. The use of physical punishment is prohibited in government schools.[384] Corporal punishment is also prohibited for children in care, in youth detention, or at an early childhood education and care service (such as a long day care, family day care or outside school hours service).[385]

Despite this, these people can still rely on the defence if criminally prosecuted. This is contrary to community standards.

411. Abolition, combined with supporting measures and diversion, is also consistent with the law serving an educative function. If the law clearly prohibits the use of force against children for punishment, it aids in other efforts to teach parents and caregivers that using force can be harmful and does not achieve long terms goals of modifying behaviour.

412. The most significant argument against abolition is that it could lead to parents being criminalised for the use of 'low levels' of physical force. Given the current prevalence of corporal punishment in Queensland, this could significantly increase the number of parents being subject to a criminal justice response.

Supporting measures

413. Other jurisdictions have introduced supporting measures to help achieve the aims of protecting children while ensuring parents are not criminalised for the use of minimal physical force (such as light smacking). Table 2 provides a list of supporting measures, with examples from other jurisdictions. New Zealand, Wales and Scotland have not reported significantly increased rates of prosecutions for minor incidents (such as smacking) despite banning physical punishment of children in all settings, including the home.[386]

Table 2: Supporting measures

Supporting measure	Examples in other jurisdictions
Delays in enforcement and public education and awareness: • A time delay before the changes come into force to enable a public education and awareness campaign about the changes to the law and alternatives to physical discipline.	• Wales and Scotland: Delay of one to two years before the abolition of physical punishment took effect. Requirement for the relevant minister to take steps to promote public awareness.[387] • New Zealand: Government conducted public awareness and education campaigns.[388] The Government also invested in positive parenting programs.[389]
Statutory review requirement: • A requirement in legislation for the new law to be reviewed after a specified time period, to monitor whether the law is having unintended consequences and consider whether it is meeting its objectives.	• New Zealand: Required the chief executive to monitor and report two years after the new laws commenced. The review examined police data about investigations and charging of physical child harm incidents.[390] • New South Wales: A requirement for the Attorney-General to review and report on the provisions three years after commencement.[391]
Providing guidance for police: • Update Operational Procedures Manual to provide guidance about investigating and making decisions to charge and the consideration of diversionary options, such as adult cautioning, as alternatives to charging a parent or a person in place of a parent.	• New Zealand Police developed a practice guide on the new laws.[392]

Diversion

414. Risks of increased criminalisation may also be mitigated by introducing a court based diversionary scheme for persons charged with offences of violence against their children. A diversion scheme would be consistent with community attitudes that a criminal justice

response to low level parental domestic discipline is inappropriate. This could be modelled on the DFV Perpetrator Diversion Scheme which was introduced in response to Taskforce recommendations. The purpose of that scheme is to hold perpetrators accountable for their violence (through the bringing of a criminal charge of breaching a domestic violence order) while reducing the incidence of DFV by diverting perpetrators to intervention programs. Successful completion means the perpetrator can be discharged for the breach DVO offence.

A diversion orders scheme for parents (and people in the place of parents) who assault children for the purpose of correction, discipline, management or control

A diversionary scheme could be modelled on the DFV Protection Act diversion orders scheme introduced by the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024, Part 4, Division 5 (assent 18 March 2024, yet to commence).[393]

The purpose of making a diversion order may include:

- to intervene at an early stage in the proceeding for an assault offence and direct the defendant to attend an approved parenting program, or counselling with an approved provider, to address the defendant's behaviour and to promote ongoing behavioural change in the defendant
- to hold the defendant accountable for an assault for which the defendant has accepted responsibility to facilitate rehabilitation of the defendant
- to ensure the safety and well-being of children in the defendant's care, and in the community generally
- to reduce the risk of harm to, and increase the safety of, children.

Eligibility requirements could include:

- it is the defendant's first time being charged for assaulting a child
- the use of force on the occasion did not cause serious injury, and was not inflicted with a weapon or other implement
- the use of force does not form part of a pattern of behaviour involving abuse of the complainant child or another family member (including partner, ex-partner or parent of the child)
- the defendant is not subject to a protection order naming them as a respondent
- the defendant accepts responsibility for the alleged facts
- the defendant is on bail (because people on remand cannot participate in programs)
- the defendant has no prior convictions for assault of a child in their care or for breach of a protection order
- they have not previously been referred to participate in a parenting program or counselling under the scheme
- they are willing to participate in a parenting program or counselling
- an appropriate parenting program or counselling with an approved provider is available
- the defendant is a suitable person to take part.

415. Further consideration would need to be given to the parameters around such a scheme, including what offences should be permitted to be subject to diversion (common assault only, or minor assaults occasioning bodily harm) and eligibility factors that may exclude diversion

(such as a history of DFV perpetration). This would need to be informed by broad ranging consultation, including with experts who understand where corporal punishment may be indicative of more serious risk warranting a criminal justice response.

416. Additional police diversionary options could also be considered but would need to address concerns emerging from the data which suggest police may not be well placed to assess reasonableness and risk without additional legislative or policy guidance.

A defence for management and control?

417. If domestic discipline were repealed, further consideration would need to be given to whether a replacement defence or additional legislative guidance was required to ensure that parents, caregivers and teachers who use 'force' to manage and control children are not prosecuted.

418. It was raised during preliminary consultations that teachers and masters may need to use reasonable physical force to manage or control children in challenging circumstances, such as where a child poses a risk to themselves or others.

419. In 2007, New Zealand removed the defence of reasonable chastisement and introduced a new defence of parental control.[394] This approach provides children with the same protection from assault as adults, while clarifying that parents will not be prosecuted for restraining their children for purposes such as to prevent them from harming themselves or others.[395]

420. Our preliminary view is that such a defence is not required in Queensland as the use of force in these circumstances is already protected by law. However, we seek views on whether there is a need for additional protections for teachers that would clarify that teachers can use reasonable physical force for some purposes, including to prevent harm or injury, but not for the purpose of discipline or correction.

Option 2: Amend the defence to limit its scope and provide clarity

421. Given the prevalence of the use of corporal punishment in Queensland and current community attitudes which suggest some support for maintaining a defence for using low level force for disciplinary purposes, an alternative approach to reform would be to amend the defence to limit its application and provide additional guidance as to what is reasonable and unreasonable force.

422. If option 2 is the preferred option, who may access the defence would need to be reviewed. The defence uses the terms 'parent' and 'person in place of a parent', as well as 'schoolteacher and master'. These terms are not defined.

Option 2: Amend the domestic discipline offence

Amend section 280 of the Criminal Code in one or more of the following ways:

- limit the defence so it is only available as a defence to common assault
- provide legislative guidance as to factors relevant to the assessment of reasonableness or include deeming provisions about conduct that is unreasonable, or both
- limit the purposes for which domestic discipline may be used
- include definitions of 'parent', 'person in place of a parent', 'teacher' and 'master'.

Limit the defence to common assault

423. The defence of domestic discipline could be amended so it is only available as a defence to common assault. This is consistent with the definition of corporal punishment (noted above)

which refers to conduct which causes pain but not injury. Limiting the defence in this way is also consistent with community attitudes.

424. The police data indicates that in 40% of cases the offence for which the police deemed section 280 to be a bar on prosecution was a more serious offence.[396] If the defence was amended to only apply to common assault and applied appropriately by police, it would lead to a criminal justice response for the more serious assaults.

425. This approach balances competing considerations of ensuring parents using minimal force are not criminalised while ensuring the rights of children are protected, that the legislation reflects contemporary knowledge, and DFV is taken seriously.

Define what is reasonable and unreasonable

426. Section 280 could be amended to specifically adopt common law considerations of factors relevant to reasonableness including:

- the need to consider age, physique and mentality of the child
- whether it is part of a course of conduct involving physical violence or other types of maltreatment including exposure to DFV within the home.

427. An additional provision could be included in section 280 to provide a non-exhaustive list that force is deemed to be unreasonable if:

- applied to head, face or neck of the child
- caused bodily harm
- was inflicted with an implement or weapon
- other factors that stakeholders identify as appropriate to exclude as unreasonable which are more demonstrative of physical abuse and may be indicative of the risk of future harm to the child.

428. The benefit of this approach is the additional guidance provided to decision-makers of all types and ensuring that community standards of reasonableness are explicitly reflected in legislation.

429. This type of approach was taken in New South Wales in in 2001 which statutorily defines lawful correction as force for the purpose of punishment that is 'reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances'.[397]

430. The NSW provision also provides that, except for force that is 'trivial or negligible', the use of physical force is not reasonable if it is applied to: any part of the head or neck of the child; or any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.[398]

431. The New South Wales provision was reviewed in 2010 and found to be working effectively and meeting its policy objectives.[399] However, the exclusions are criticised as vague and uncertain, raising questions about what may be considered 'trivial' or 'negligible', and what is a 'short period'.[400]

Approaches to reasonableness in other jurisdictions

Canada

Section 43 of the Criminal Code (Canada) provides generally that the force used to correct a child must 'not exceed what is reasonable under the circumstances'. What is reasonable in the

circumstances was limited by the Supreme Court of Canada in the 2004 case of Canadian Foundation for Children, Youth and the Law v Canada (Attorney General).[401] The majority found that 'reasonable under the circumstances' only provides a defence for 'minor corrective force of a transitory and trifling nature'. Specifically, it:[402]

- cannot be used against a child under the age of 2 or over the age of 12
- can be used only if the child is capable of benefiting from the discipline
- cannot cause harm or raise a reasonable prospect of harm to the child
- cannot involve the use of objects or blows to or slaps to the head
- does not protect degrading, inhuman or harmful conduct.

McLachlin CJ said that those limitations were based on current expert consensus and treaty obligations.[403]

Scotland

In Scotland, before the defence was completely abolished in 2019, it was amended in 2003 to specifically prohibit the following types of punishment to a child of any age:[404]

- a blow to the head
- shaking
- the use of an implement.

Limit the purpose for using force

432. The current defence provides the purpose of permissible reasonable force is 'correction, discipline, management or control'. These terms are not defined and have their everyday meaning. Our interviews with police suggest there is significant variation in how officers understand these 'allowable purposes'. Historically the common law recognised that correction was distinct from force used in anger.[405] However, many of the cases in the police data involve parents using force on their child in circumstances of anger and frustration. These cases suggest the parent is lashing out rather than making the decision to use force for the purposes of punishment or correction. The defence could be amended to provide that force used in anger is not for punishment and correction.

433. The provision may also be amended to provide guidance about what is 'management and control'. As noted above, in 2007, New Zealand introduced a new defence of parental control, which sets out that reasonable force can be used for the purpose of:[406]

- preventing or minimising harm to the child or another person
- preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence
- preventing the child from engaging or continuing to engage in offensive or disruptive behaviour or
- performing the normal daily tasks that are incidental to good care and parenting.

Define 'parent' and 'person in place of a parent'

434. The defence of domestic discipline applies to a legal parent or guardian of the child, and to an adult in a domestic relationship with the child's parent. For the defence to apply to a 'person in place of a parent' the child must be under their care.[407] Whether a person is 'in place of a parent' is a question of fact in the circumstances. It is unclear whether the defence extends to

other adults who have care or authority over children, including familial caregivers.[408] It also does not expressly account for the sharing of parenting responsibilities among extended families in Aboriginal and Torres Strait Islander communities.

435. New South Wales is the only Australian jurisdiction that defines those to whom the defence applies.

436. 'Parent' means 'a person having all the duties, powers, responsibilities and authority in respect of the child which, by law, parents have in relation to their children'.[409]

437. 'Person acting for a parent' means step-parents, a de facto partner and relatives (by blood or marriage) of the child's parent, or a person to whom the parent has entrusted the care and management of the child.[410] This definition is limited to those 'who would normally have the closest emotional ties with the child and parent' and 'who would understand the child's temperament, likes and dislikes, medical and personal history'.[411] It also requires the parent to have authorised the person to use physical punishment, departing from the common law, where there is an implied delegation of the parental right.[412]

438. The New South Wales definition also expressly recognises the sharing of parenting responsibilities among extended families in Aboriginal and Torres Strait Islander communities and exempts them from the authorisation requirement, recognising it would be inconsistent with Aboriginal and Torres Strait Islander culture, particularly in the case of elders.[413]

439. During our interviews with police, there was significant variation in what they understood to be a 'person in place of a parent' which illustrates the current lack of certainty. If the defence is retained, in whole or part, it may be appropriate to define the terms 'parent' and 'person in place of a parent' to provide clarity about who can use the defence.

Define 'schoolteacher' or 'master'

440. Section 280 applies to a 'schoolteacher' or 'master'. School master has been interpreted broadly to cover 'any person employed by the school authorities to maintain the school as an educational community', such as a teacher's aide.[414]

441. Schools and other organisations employ a range of staff who may need to manage or control children. If the defence were retained, there may be some benefit in providing legislative clarity of the term 'teacher' and 'master' and extending the protection to teacher's aides or others who have regular care of children, such as day care workers.

442. The Education (Queensland College of Teachers) Act 2005 defines 'teacher' to mean a person who undertakes duties in a school, including any of the following:[415]

- delivering an educational program
- assessing student participation in an educational program or
- otherwise administering or providing consistent and substantial educational leadership to an educational program.

443. The definition also includes a person who undertakes duties other than in a school for a prescribed educational program.[416]

444. Despite policies prohibiting the use of force for the purpose of punishment, which appear consistent with community attitudes, teachers and others who care for children may still rely on the defence of domestic discipline to avoid criminal liability. This suggests that further changes may be necessary to ensure that teachers and other people who care for children cannot use force for the purposes of punishment.

Question

Q21 Do you support:

(a) option 1: repeal section 280 of the Criminal Code or

(b) option 2: limiting the application of section 280 (and if so, how) or

(c) some other approach?

Appendix: Consultation proposals and questions

P1 Repeal sections 271, 272, 273 of the Criminal Code and replace with a provision that provides that a person acts in self-defence if:

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

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

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

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

The provision should also provide:

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

(d) Self-defence does not apply if –

i. the person is responding to lawful conduct and

ii. the person knew the conduct was lawful.

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

Q1 What are your views on proposal 1?

Q2 For the purposes of proposal 1:

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

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

P2 The new self-defence provision should provide that evidence that the defendant experienced domestic violence (as defined in section 103CA Evidence Act 1977) is relevant to an assessment of self-defence. It should further provide that the person may believe that the person's conduct is necessary in self-defence, and the conduct may be a reasonable response in the circumstances as the person perceives them, even if:

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

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

Q3 What are your views on proposal 2?

P3 The new self-defence provision should provide that self-defence is not available where the person's belief that their actions were necessary and reasonable was substantially affected by self-induced intoxication.

Q4 What are your views on proposal 3?

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

Q6 In light of proposals 1 and 2 (about self-defence), are changes to the defence of duress in section 31(1)(d), and the exclusions in section 31(2), of the Criminal Code required?

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

Q7 What are your views on proposal 4?

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

Q8 What are your views on proposal 5?

Q9 Should the Criminal Code be amended to add a new trauma-based partial defence to murder that applies when a victim-survivor of domestic violence kills their abuser? How should this be framed?

Q10 Should the Criminal Code be amended to add a new partial defence to murder that applies where the defendant has acted excessively in self-defence and, if so, should the defence apply:

(a) only in the context of DFV where the person in most need of protection kills their abuser or

(b) generally?

Q11 Should the mandatory life sentence for murder be:

(a) retained for all murders

(b) retained but only for particular cases

(c) replaced with a presumptive life sentence or

(d) replaced with a maximum life sentence?

Q12 Should the minimum non-parole periods for murder be:

(a) retained

(b) amended to allow a discount for a guilty plea or cooperation with law enforcement authorities, or both

(c) replaced with a presumptive non-parole period or

(d) replaced with an entirely discretionary approach to setting the non-parole period?

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

P6 The defence of provocation in section 269 of the Criminal Code should be amended so that the defence does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

P7 The defence of prevention of repetition of insult in section 270 of the Criminal Code should be amended so that the defence only applies to offences of which assault is an element and does not apply to domestic violence offences as defined in section 1 of the Criminal Code.

Q14 What are your views on proposal 6?

Q15 What are your views on proposal 7?

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

Q17 What reforms are needed to criminal law practice and procedure to facilitate:

(a) early identification of self-defence in criminal investigations and prosecutions

(b) early resolution of criminal prosecutions?

Q18 What reforms are needed to criminal law practice and procedure to facilitate the admission of evidence about the nature and impact of DFV on victim-survivors who offend?

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

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

Q21 Do you support:

(a) option 1: repeal section 280 of the Criminal Code or

(b) option 2: limiting the application of section 280 (and if so, how) or

(c) some other approach?

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122 See, eg, Anthony Morgan and Amanda McAtamney, 'Key issues in alcohol-related violence' (Research in Practice Summary Paper No 4, Australian Institute of Criminology, December 2009) 3-4, 13; Jack Dearden and Jason Payne, 'Alcohol and homicide in Australia' (Trends and Issues in Crime and Criminal Justice No 372, Australian Institute of Criminology, July 2009) 4–6; Patrick Noonan, Annabel Taylor and Jackie Burke, 'Links between alcohol consumption and domestic and sexual violence against women: Key findings and future directions' (Compass Paper No 08, ANROWS, November 2017) 6.

123 Pickering v The Queen (2017) 60 CLR 151, 157-159 [20]–[24]. The High Court held that s 31(1) Criminal Code (Qld) is not available to deny criminal responsibility on a charge of any of the offences described in s 31(2), but may be available in relation to any other offence that is charged or that is available as an alternative verdict. In this case, the protection afforded by s 31(1)(c) was available to the appellant for the offence of manslaughter, which was not an offence described in s 31(2).

124 See, eg, Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, September 2007) 172–173; Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 110–124; South Australian Law Reform Institute, The Provoking Operation of Provocation: Stage 1 (Report, April 2017) 91–94.

125 Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, 2007) 173, recommendation 24; Criminal Law Amendment (Homicide) Act 2008 (WA).

126 Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, 2007) 173.

127 R v Pickering [2016] QCA 124, [19].

128 See R v Rowan – A Pseudonym (2024) 278 CLR 470, 493 [65].

129 R v Taiapa [2008] QCA 204, [30].

130 R v Taiapa [2008] QCA 204, [30]. An appeal against this decision was dismissed: Taiapa v R (2009) 240 CLR 95.

131 QLRC, A review of the excuse of accident and the defence of provocation (Report 64, September 2008) 489–491.

132 QLRC, A review of the excuse of accident and the defence of provocation (Report 64, September 2008) 10–11, 491.

133 Geraldine Mackenzie and Eric Colvin, Homicide in Abusive Relationships: A Report on Defences (Report, July 2009) 10 [1.29], 11 [1.32].

134 Criminal Code and Other Legislation Amendment Act 2011 (Qld) s 6.

135 Women's Safety and Justice Taskforce, Hear Her Voice: Addressing coercive control and domestic and family violence in Queensland (Report 1, December 2021) vol 2, 259–60.

[136] We have conducted qualitative case analysis and quantitative courts data analysis for homicide matters between 2010 and 2024, the findings of which will be reported in QLRC, Homicide Case Analysis (Research Report 6, forthcoming).Queensland's defence of section 304B and the Victorian modifications to self-defence in section 322M of the Crimes Act 1958 (Vic) were identified as examples of best practice in a report by Penal Reform International comparing the relevant laws of Australia, Brazil, Hong Kong, India, Japan, Mexico, Poland, Spain and the USA: Penal Reform International, Women who kill in response to domestic violence (Report 2016) 5.

[137] Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2283.

[138] Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2292–2293.

[139] South Australian Law Reform Institute, The Operation of Provocation: Stage 2 (Report 11, April 2018) 174–175.

[140] Tasmania Law Reform Institute, Review of the Law Relating to Self-defence (Final Report 20, October 2015) 71 [5.4.26].

[141] Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, September 2007) 289.

[142] Australian Law Reform Commission and New South Wales Law Reform Commission, Family Violence – A National Legal Response (ALRC Final Report No 114, NSWLRC Final Report No 128, October 2010) 638-642, 650 [14.95].

[143] See QLRC, Homicide Case Analysis (Research Report 6, forthcoming).

[144] Geraldine Mackenzie and Eric Colvin, Homicide in Abusive Relationships: A Report on Defences (Report, July 2009) 45-46 [4.29], [4.33].

[145] Geraldine Mackenzie and Eric Colvin, Homicide in Abusive Relationships: A Report on Defences (Report, July 2009) 53–56 [5.6]–[5.22].

[146] Geraldine Mackenzie and Eric Colvin, Homicide in Abusive Relationships: A Report on Defences (Report, July 2009) 48–49 [4.42].

[147] Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2292–2293.

[148] R v Sweeney (Supreme Court of Queensland, Henry J, 3 March 2015).

[149] R v Sweeney (Supreme Court of Queensland, Henry J, 3 March 2015) 2; Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2284, 2292–2293.

[150] QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 113–114.

[151] Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2284, 2292–2293.

[152] See Pollock v The Queen (2010) 242 CLR 233.

[153] Masciantonio v The Queen (1995) 183 CLR 58, 69-70; Pollock v The Queen (2010) 242 CLR 233.

[154] Stingel v The Queen (1990) 171 CLR 312, 326; Masciantonio v The Queen (1995) 183 CLR 58, 67.

[155] Stingel v The Queen (1990) 171 CLR 312, 332; Masciantonio v The Queen (1995) 183 CLR 58, 67.

[156] Stingel v The Queen (1990) 171 CLR 312, 331; Masciantonio v The Queen (1995) 183 CLR 58, 67. See also DPP v Camplin [1978] AC 705, 717 (Lord Diplock); Cf Green v The Queen (1997) 191 CLR 334, 343 where Brennan CJ referred to gender in applying the 'ordinary man' test.

[157] Masciantonio v The Queen (1995) 183 CLR 58, 67; Johnson v The Queen (1976) 136 CLR 619, 639. See also Phillips v The Queen [1969] 2 AC 130, 137 (Lord Diplock).

[158] Criminal Code and Other Legislation Amendment Act 2011 (Qld) s 5; Criminal Law Amendment Act 2017 (Qld) s 10.

[159] Criminal Code (Qld) s 304(2).

[160] Criminal Code (Qld) s 304(3).

161 Criminal Code (Qld) s 304(4), (11).

162 Criminal Code (Qld) s 304(9).

163 James Duffy, 'Provocation, Murder and the Modern Approach to Interpretation: How Do You Solve a Problem Like Peniamina?' (2024) 47 Criminal Law Journal 342, 344.

164 See, eg, Moffa v The Queen (1977) 138 CLR 601, 606–607 (Barwick CJ); R v Jeffrey [1967] VR 467, 478; Osland v The Queen (1998) 197 CLR 316, 337, 378–380, 409–411; Criminal Code (Qld) s 304(5). See Andreas Schloenhardt, Joseph Lelliott and Carl Tessmann, Criminal Law in Queensland: Principles, Offences and Defences (Lawbook Co, 2nd ed, 2023) 466, also citing Crimes Act 1900 (NSW) s 23(4); Coroners and Justices Act 2009 (UK) s 55(5).

165 Van den Hoek v The Queen (1986) 161 CLR 158, 168.

166 Pollock v The Queen (2010) 242 CLR 233, 247–248, 250. Note the suddenness requirement has been abolished in the Northern Territory (Criminal Code (NT) ss 158(4), 158(6)(b)) and United Kingdom (Coroners and Justice Act 2009 (UK) s 54(2). See also Andreas Schloenhardt, Joseph Lelliott and Carl Tessmann, Criminal Law in Queensland: Principles, Offences and Defences (Lawbook Co, 2nd ed, 2023) 478–9.

167 QLRC, A review of the excuse of accident and the defence of provocation (Report 64, September 2008) 476–481 [21.62]–[21.88].

168 QLRC, A review of the excuse of accident and the defence of provocation (Report 64, September 2008) 475 [21.56]–[21.57], 479–481 [21.80]–[21.88].

169 See, eg, Andreas Schloenhardt, Joseph Lelliott and Carl Tessmann, Criminal Law in Queensland: Principles, Offences and Defences (Lawbook Co, 2nd ed, 2023) 475–6, citing Women's Safety and Justice Taskforce, Hear Her Voice: Women and girls' experiences across the criminal justice system (Report 1, 2021) vol 2, 261, 322–323, which observed that the application of s 304(3) in Peniamina 'significantly defeats' the purpose of the provision; Hon Justice Peter Davis, suggests that Peniamina v The Queen demonstrates that the amendment of Criminal Code s 304(3) has 'largely failed' to achieve its intended purpose: Peter Davis J, 'Ongoing issues with the defence of provocation' (Conference paper, Country Special Professional Development Conference, 25 February 2023) 11. See also R v Clinton, Parker & Evans, in which Henriques LCJ observed that the application of the 'sexual infidelity' exclusion from the 'loss of control' defence [Coroners and Justice Act 2009 (UK) ss54, 55] creates 'considerable difficulties' and produces anomalies where in addition to sexual infidelity there are other potential loss of control triggers: R v Clinton, Parker & Evans [2012] EWCA Crim 2, [11], [15]–[29]. Note that while our preliminary consultation and qualitative case analysis of intimate partner homicide matters suggest that the partial defence has not been raised as frequently in intimate partner homicide matters as before the amendments, it is still being raised in cases: of homosexual advance, see eg, Transcript of proceedings, R v Walker-Ely (Queensland Supreme Court, 45/2024, Crow J, 3 June-6 June 2024); where the alleged provocation was words alone, see eg, Transcript of proceedings, R v Kelsey (Queensland Supreme Court, 376/2023, Crowley J, 26 February–1 March 2024); and where the surrounding relationship circumstances suggest changes to the nature of the relationship, such as Peniamina v The Queen (2020) 95 ALJR 85, suggests the amendments have not achieved their policy intention.

170 See, eg, R v Howe [1987] AC 417, 435 (Lord Hailsham).

171 AJ Ashworth, 'The Doctrine of Provocation' (1976) 35(2) The Cambridge Law Journal 292, 292–3.

172 Law Commission of England and Wales, Partial Defences to Murder (Report 290, August 2004) 36 [3.30].

173 See, eg, Law Commission of England and Wales, Partial Defences to Murder (Report No 290, August 2004) 36 [3.28]; Felicity Steward and Arie Freiberg, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19(3) Current Issues in Criminal Justice 283, 293.

174 Abolition of provocation as a partial defence is consistent with the approach taken in Tasmania, Victoria, Western Australia, South Australia and New Zealand. It is also consistent with the approach recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 5: Fatal Offences Against the Person (Discussion Paper, June 1998) 83.

175 QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 110–12.

176 QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 82–89.

177 Women's Safety and Justice Taskforce, Hear Her Voice: Addressing coercive control and domestic and family violence in Queensland (Report 1, December 2021) vol 2, 261.

178 See, eg, Andrew Hemming, 'Provocation: A totally flawed defence that has no place in Australian criminal law irrespective of sentencing regime' (2010) 14 University of Western Sydney Law Review 1, 4; QLRC, A review of the defence of provocation (Discussion Paper 63, August 2008) 67.

179 Kate Fitz-Gibbon, Homicide Law Reform, Gender and the Provocation Defence: A comparative perspective, (Palgrave MacMillan, 2014) 81, citing J Horder, Homicide and the Politics of Law Reform (Oxford University Press, 2012).

180 See QLRC, Homicide Case Analysis (Research Report 6, forthcoming).

181 See, eg, Peter Davis J, 'Ongoing issues with the defence of provocation' (Conference paper, Country Special Professional Development Conference, 25 February 2023) 10–11.

182 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code Chapter 5: Fatal Offences Against the Person (Discussion Paper, June 1998) 79.

183 See, eg, Masciantonio v The Queen (1995) 183 CLR 58, 68.

184 See, eg, Transcript of Proceedings, R v Peters, (Supreme Court of Queensland, 1235/2018, Boddice J, 29 October 2018). Ms Peters pleaded guilty to manslaughter on the basis of provocation after she killed a man who had raped her and again threatened to do so. However, it is possible her situation would be covered by an amended self-defence provision depending on how serious injury is defined.

185 New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (Report 139, May 2016) 10.

186 QLRC, Community attitudes to defences and sentences in cases of homicide and assault in Queensland (Research Report 1, November 2024) 99–102, 113–117.

187 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 90.

188 Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 1–2. See also QLRC, Killing for preservation in an abusive domestic relationship (Information Sheet, November 2023) 2–3, citing Anthony Hopkins & Patricia Easteal, 'Walking in her shoes: battered women who kill in Victoria, Western Australia and Queensland' (2010) 35(3) Alternative Law Journal 132, 135–7; Michelle Edgely & Elena Marchetti, 'Women who kill their abusers: how Queensland's new abusive domestic relationships defence continues to ignore reality' (2011) 12 Flinders Law Journal 125, 129–30, 152, 170–71; Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) Australian and New Zealand Journal of Criminology 367, 374–8; Women's Safety and Justice Taskforce, Hear Her Voice: Addressing coercive control and domestic and family violence in Queensland (Report 1, 2021) vol 2 259, 322; vol 3, 714.

189 See, eg, Transcript of Proceedings, R v Emma Louise Ney (Supreme Court of Queensland, BS 597/2008, Dick AJ, 8 March 2011), as discussed in Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) Australian and New Zealand Journal of Criminology 367, 375.

190 For further consideration of battered woman syndrome see: Queensland Law Reform Commission, Women who Kill (Research Report 4, forthcoming).

191 Heather Douglas, Stella Tarrant & Julia Tolmie, 'Social entrapment evidence: Understanding its role in self-defence cases involving intimate partner violence' (2021) 44(1) University of New South Wales Law Review 326, 326–327, 348, citing Stella Tarrant, Julia Tolmie and George Guidice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 03/2019, ANROWS, June 2019) 15–17 and Julia Tolmie et al, 'Social entrapment: A realistic understanding of the criminal offending of primary victims of intimate partner violence' (2018) New Zealand Law Review 181, 204, 206.

192 Stella Tarrant, Julia Tolmie and George Guidice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 03/2019, ANROWS, June 2019) 16–18.

193 See, eg, Domestic and Family Violence Death Review and Advisory Board, Annual Report 2018–19 (2019) 125, which discusses trauma experienced by victims, perpetrators and their families. QLRC, Women who Kill (Research Report 4, forthcoming) also considers the complex trauma histories of some intimate partner homicide defendants.

194 See, eg, R v Rowan – A Pseudonym (2024) 278 CLR 470, [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), in which the defendant had a 'full-scale IQ of 70 and a mild intellectual disability, with her abstract reasoning, vocabulary and general knowledge in the bottom 0.5% of the population'. See also, Brain Injury Australia, The Prevalence of Acquired Brain Injury among Victims and Perpetrators of Family Violence (Report, 1 May 2018) 5–6.

195 See, eg, Stella Tarrant, Julia Tolmie and George Giudice, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report No 03, ANROWS, June 2019) 17–22.

196 See, eg, Transcript of Proceedings, R v Michelle Loretta Cooktown (Supreme Court of Queensland, 98/2019, Henry J, 25 February 2020) where interplay between killing on preservation under s 304B of the Criminal Code and provocation was discussed during sentencing; the Court was required to decide which defence applied that resulted in the conviction of manslaughter. This topic will also be discussed in QLRC, Women who Kill (Research Report 4, forthcoming).

197 Phoenix Australia, Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD: Trauma and trauma reactions (Guidelines, Supporting Chapter 2, Version 7, 24 January 2025) 1–2.

198 Phoenix Australia, Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD: Special populations – Victims of Intimate Partner Violence (Guidelines, Supporting Chapter 9, Version 7, 24 January 2025) 1–2.

199 See, eg, Michael Salter et al, '"A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence' (Research Report 12, ANROWS, May 2020) 12, citing Judith Herman, Trauma and recovery: The aftermath of violence – From domestic abuse to political terror (Basic Books, 1992), which notes the concept of complex PTSD was developed to fully capture the experiences of those 'who have experienced prolonged entrapping and frightening abuse in interpersonal life'; Phoenix Australia, Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD: Special populations – Victims of Intimate Partner Violence (Guidelines, Supporting Chapter 9, Version 7, 24 January 2025) 2.

200 Phoenix Australia, Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD: Special populations – Victims of Intimate Partner Violence, ch 9, 1–2; Michael Salter et al, '"A deep wound under my heart": Constructions of complex trauma and implications for women's wellbeing and safety from violence' (Research Report 12, ANROWS, May 2020) 12.

201 See, eg, Domestic and Family Violence Death Review and Advisory Board, Annual Report 2021–22 (Report, 2022) 42–44, which found that the victim's intuitive sense of fear was a key lethality indicator in 53.2% of intimate partner violence related homicides between 2011 and 2018; Felix Leung & Lily Trimboli, 'Improving police risk assessment of intimate partner violence' (Crime and Justice Bulletin 244, New South Wales Bureau of Crime Statistics and Research, February 2022).

202 Phoenix Australia, Australian Guidelines for the Prevention and Treatment of Acute Stress Disorder, Posttraumatic Stress Disorder and Complex PTSD: Trauma and trauma reactions (Guidelines, Supporting Chapter 2, Version 7, 24 January 2025) 9.

203 New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (Report 139, May 2016) 154 [10.84].

204 New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (Report 139, May 2016) 155 [10.89].

205 New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (Report 139, May 2016) 154 [10.85], citing Model Penal Code, USC § 210.3(1)(b) (American Law Institute, 1985).

206 Law Commission of England and Wales, Partial Defences to Murder (Final Report, August 2004) app F, 272-274 [5]–[13].

207 Law Commission of England and Wales, Partial Defences to Murder (Final Report, August 2004) 41–44 [3.47]–[3.59].

208 Centre for Women's Justice, Women Who Kill: how the state criminalises women we might otherwise be burying (Report, 13 February 2021) 7, 24–32; Law Commission of England and Wales, Defences for victims of domestic abuse who kill their abusers (Background Paper, January 2025) 15.

209 QLRC, Community attitudes to defences and sentences in cases of homicide and assault in Queensland (Research Report 1, November 2024) 113–116.

210 R v Smith (aka Stella) (2021) 8 QR 338, 353 [34]–[36]; [2021] QCA 139, citing R v Biess [1967] Qd R 470; R v Lloyd [1967] 1 QB 175.

211 Zecevic v Director of Public Prosecutions (Victoria) (1987) 162 CLR 645.

212 See Criminal Law Consolidation Act 1935 (SA) s 15(2), as introduced by the Criminal Law Consolidation (Self-Defence) Amendment Act 1991 (SA) and amended by the Criminal Law Consolidation (Self-Defence) Amendment Act 1997 (SA); Crimes Act 1900 (NSW) s 421, as introduced by the Crimes Amendment (Self-defence) Act 2001 (NSW); Criminal Code (WA) s 248(3), as introduced by Criminal Law Amendment (Homicide) Act 2008 (WA). Note that the Government of South Australia is currently considering whether excessive self-defence should be repealed: Attorney-General's Department, 'Excessive self-defence and self-induced intoxication' (Web Page) <https://www.agd.sa.gov.au/law-and-justice/consultation/excessive-self-defence-and-self-induced-intoxication>.

213 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 92–105

214 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 102–104.

215 South Australian Law Reform Institute, The Provoking Operation of Provocation: Stage 1 (Report, April 2017) 77–78; Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, September 2007) 179–182.

216 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 12.

217 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 12–13. See also Law Reform Commission of Western Australia, Review of the Law of Homicide (Final Report Project 97, September 2007) 181-182.

218 See Crimes Act 1958 (Vic) s 9AD (repealed), as inserted by Crimes (Homicide) Act 2005 (Vic).

219 Victoria Department of Justice Criminal Law Review, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, September 2013) viii–ix.

220 Victoria Department of Justice Criminal Law Review, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, 2013) vi.

221 R v Middendorp [2010] VSC 202, [6]-[11]. See, eg, Kate Fitz-Gibbon, 'The Victorian Operation of Defensive Homicide: Examining the Delegitimisation of Victims in the Criminal Court System' (2014) 21(2) Griffith Law Review 555; Bronwyn Naylor and Danielle Tyson, 'Reforming Defences to Homicide in Victoria: Another Attempt to Address the Gender Question' (2016) 6(3) International Journal for Crime, Justice and Social Democracy 72, 81.

222 Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).

223 Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2282, table 2.

224 Caitlin Nash and Rachel Dioso-Villa, 'Australia's Divergent Legal Responses to Women Who Kill Their Abusive Partners' (2024) 30(9) Violence Against Women 2275, 2292, citing Mandy McKenzie, Debbie Kirkwood and Danielle Tyson, 'Throwing away a safety net' (2014) 2(2) DVRCV Advocate 14–19.

225 See, eg, Transcript of Proceedings, R v Samuel Mark Friedman (Supreme Court of Queensland, BS 906/2011, 1013/2010. 253/2011, Dick AJ, 24 November 2011); Transcript of Proceedings, R v Cain Wayne Kevin Pharr (Supreme Court of Queensland, BS 484/2011, A Lyons J, 11 July 2012); Transcript of Proceedings, Jamie Saxon (Supreme Court of Queensland, BS 756/2019, Bradley J, 8 July 2021); Transcript of Proceedings, R v Lee Matthew Hillier (Supreme Court of Queensland, BS 1683/2021, Wilson J, 17 December 2021); Transcript of Proceedings, R v Clayton David Backman (Supreme Court of Queensland, BS 1771/2019, 1772/2019, 828/2020, 726/2022, Freeburn J, 1 July 2022). See also QLRC, Homicide Case Analysis (Research Report 6, forthcoming).

226 See QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 116–117, key finding 11.

227 Stanley Yeo, 'Revisiting excessive self-defence' (2000) 12(1) Current Issues in Criminal Justice 39, 43–45.
228 Stanley Yeo, 'Revisiting excessive self-defence' (2000) 12(1) Current Issues in Criminal Justice 39, 42–43.
229 See Victoria Department of Justice Criminal Law Review, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, September 2013) viii, regarding discussion of similar problems for offence of defensive homicide.
230 Office of the Director of Public Prosecutions (Qld), Director's Guidelines (30 June 2023) [4].
231 This approach may be supported by Stephen v Director of Public Prosecutions (NSW) [2018] NSWSC 1018, where a costs application was ultimately successfully brought against the Crown. In determining the costs application, Button J observed at [94] that 'it would have been unreasonable to prosecute the applicant for murder, because the Crown was incapable of proving, beyond reasonable doubt, the first leg of self-defence'.
232 See, eg, Victoria Department of Justice Criminal Law Review, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, September 2013) viii; New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (Report No 139, May 2016) 141, citing Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to Homicide for Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand' (2012) 34 Sydney Law Review 467, 492 and Victoria Department of Justice, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, September 2013) 27, 30.
233 Victorian Law Reform Commission, Defences to Homicide (Final Report, October 2004) 94.
234 Criminal Code (WA) s 248(3), as introduced by Criminal Law Amendment (Homicide) Act 2008 (WA).
235 Kate Fitz-Gibbon, 'Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of "Extreme" Provocation' (2017) 40 Melbourne University Law Review 769; Victoria Department of Justice Criminal Law Review, Defensive Homicide: Proposals for Legislative Reform (Consultation Paper, 2013) 32; Stanley Yeo, 'Revisiting excessive self-defence' (2000) 12(1) Current Issues in Criminal Justice 39, 41-42. Our preliminary research also indicates that there are cases where defendants are convicted of manslaughter on the basis of provocation where it may have been characterised as excessive self-defence: see, eg, Transcript of Proceedings, R v Allen James Murray (Supreme Court of Queensland, BS 596/2010, Atkinson J).
236 Criminal Code (Qld) s 305(1).
237 Criminal Code (Qld) s 310.
238 See Corrective Services Act 2006 (Qld) s 181(1), (2)(a)–(c); Criminal Code (Qld) s 305(2)–(4).
239 Sofronoff, Queensland Parole System Report (Final Report, November 2016) [814].
240 See R v Appleton [2017] QCA 290, 4 [7] (Sofronoff P); R v Bafico [1996] 2 Qld R 274.
241 R v Appleton [2017] QCA 290, 9 [43] (Sofronoff P).
242 Queensland Sentencing Advisory Council, Sentencing Spotlight on murder (February 2025) 11. See also QLRC, Sentencing for murder (Research Report 2, forthcoming).
243 Queensland Sentencing Advisory Council, Sentencing Spotlight on manslaughter (February 2025) 13.
244 See, eg, QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 95; Email from Parole Board Queensland to Queensland Law Reform Commission, 31 January 2024. See also Explanatory Notes, Criminal Law Amendment Bill 2012 (Qld) 2.
245 Queensland Sentencing Advisory Council, Sentencing Spotlight on murder (February 2025) 8.
246 Queensland Sentencing Advisory Council, Sentencing Spotlight on manslaughter (February 2025) 8.
247 See QLRC, Sentencing for murder (Research Report 2, forthcoming).
248 See, eg, QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 90.
249 QLRC, Sentencing for murder (Research Report 2, forthcoming).
250 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

251 Such an approach would require a unanimous verdict on the issue of intention which would further complicate directions, whereas at the moment, juries may disagree on the pathway to a murder conviction. See, eg, R v Spencer [2023] QCA 210 [88]–[119], in which Bowskill CJ (Morrison JA and Crow J agreeing) considered 'whether unanimity is, or is not, required, not only as to the verdict, but also as to the route or pathway by which that verdict is reached' where there is more than one possible basis for a jury verdict, observing that a unanimity direction is required where alternate bases of criminal liability 'involve materially different issues or consequences'. In Spencer, the jury were required to be unanimous as to whether the appellant was criminally responsible for the murder of the deceased, not the pathway by which they arrived at the conclusion: [119].

252 Sentencing Act 2002 (NZ) s 102.

253 Van Hemert v The King [2023] NZSC 116, [62].

254 R v Rapira [2003] 3 NZLR 794, [101], [120]–[121] (Elias CJ).

255 Criminal Code (WA) s 279(4).

256 See, eg, Penalties and Sentences Act 1992 (Qld) s 9(4)(c).

257 Queensland Sentencing Advisory Council, The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld) (Final Report, May 2022) recommendation 10.

258 [2024] NZHC 1704.

259 [2024] NZHC 182.

260 [2024] NZHC 381.

261 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

262 See QLRC, Sentencing for murder (Research Report 2, forthcoming).

263 See, eg, QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 95.

264 See, eg, Sentencing Act 1991 (Vic) s 5B.

265 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

266 See, eg, R v Hallcroft [2016] SASCFC 137, [69].

267 See, eg, R v KAK [2013] QCA 310, [43].

268 Penalties and Sentences 1992 (Qld) ss 9(2)(i), 13, 13A and 13B.

269 See, eg, Sentencing Act 2017 (SA) s 40.

270 Sentencing Act 2017 (SA) s 48(2)(a).

271 Sentencing Act 2017 (SA) ss 48(2)(b), 48(3).

272 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

273 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

274 See the interjurisdictional table for further information: QLRC, Review of particular criminal defences: Quick reference jurisdiction guide (November 2023).

275 See Criminal Code (Qld) ss 245, 246. The use of force against another person with their consent will still be unlawful if the consent was obtained through fraud or under application of force or threat to apply force.

276 Kaporonovski v The Queen (1973) 133 CLR 209; [1973] HCA 35.

277 See, eg, R v Coupland (Brisbane Courier Reports, 28 May 1901).

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279 R v Martyr (1962) Qd R 398, 414. See also R v Johnson (1964) Qd R 1.

280 R v Sleep [1966] Qd R 47.

281 Kaporonovski v The Queen [1973] HCA 35; 133 CLR 209.

282 See R v Major (2013) 230 A Crime R 577, citing R v Sleep [1966] Qd R 47 in which Hart J held that both the defence of provocation to assault and the defence of prevention of repetition of insult were available on a

charge of manslaughter, should be interpreted consistently with each other and with the definition of assault in section 245 Criminal Code, given each contains the proviso 'and the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm' and define provocation by s 268).

283 Andreas Schloenhardt, Joseph Lelliott and Carl Tessmann, Criminal Law in Queensland: Principles, Offences and Defences (Lawbook Co, 2nd ed, 2023) 488.

284 The definition also applies to s 270 (prevention of repetition of insult), s 271 (self-defence against unprovoked assault) and s 272 (self-defence against provoked assault): Criminal Code (Qld) ss 270, 271, 272.

285 R v DCE [2024] QCA 165 [54], citing Stingel v The Queen (1990) 171 CLR 312, 321.

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289 QLRC, Community attitudes to defences and sentences in cases of homicide in Queensland (Research Report 1, November 2024) 102–104, 110–112, key findings 3 and 8.

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331 R v Songcuan (No 3) [2022] NSWSC 188.

332 Currently, the defendant does not have a right to raise an interlocutory appeal, although section 668B of the Criminal Code can allow a defendant to 'reserve' a 'point of law' which will be transmitted to the Court of Appeal if the defendant is convicted. The Attorney-General has the right to appeal a 'point of law' arising from a pre-trial direction or ruling under section 668A of the Criminal Code, however, a 'point of law' is limited to matters of 'general importance, particularly [points of law] gaining wide circulation in the criminal justice system' and does not include decisions based on an exercise of discretion by the trial judge.

332 This high threshold means the power can only be used in exceptional circumstances.

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