

Review of particular criminal defences

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The Attorney-General of Queensland has asked the Queensland Law Reform Commission to conduct a review of particular defences and excuses in the Queensland Criminal Code. This paper introduces the review, its background and scope. It highlights some of the issues raised about the defences and their operation in the particular context of domestic and family violence.

The role of the Queensland Law Reform Commission

The Queensland Law Reform Commission (Commission) is an independent body.¹ It receives references from the Attorney-General, undertakes research and consultation, and provides a report and recommendations to the Attorney-General. The Commission aims to make recommendations for the development of a fair, modern and simple legal framework for Queensland. It contributes to this purpose through practical, innovative and just law reform recommendations. The Commission reaches its recommendations without outside influence or interference. The Commission's work is guided by principles of impartiality, equity and social justice.²

Background to the review of particular criminal defences

The Women's Safety and Justice Taskforce (Taskforce) was established in 2021 and operated for 16 months, examining coercive control and the experiences of women and girls across the criminal justice system. The Taskforce considered an extensive range of issues and recommended many law and practice reforms.

According to the Taskforce:³

the existing defences and excuses in the Criminal Code are urgently in need of review to ensure they meet our current knowledge about the effects of domestic and family violence – including coercive control over time. They must evolve beyond outdated, gendered understandings about the types of behaviour that cause fear and create an imminent threat to safety. These provisions require review not only to ensure that

¹ Law Reform Commission Act 1968 (Qld) s 10.

² See Queensland Law Reform Commission, 'About', 2024, <https://www qlrc.qld.gov.au/about>

³ Women's Safety and Justice Taskforce, Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland, 2021, vol 1, p xl.

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they reflect the impact of domestic violence on victims but also to ensure that they do not reinforce stereotypes that inappropriately reduce the culpability of perpetrators.

The Taskforce recognised that changing the defences would have far-reaching implications – going beyond coercive control and domestic and family violence and likely affecting more men than women. In its first report in 2021, the Taskforce recommended that the Attorney-General ask the Queensland Law Reform Commission to review defences and excuses in the Criminal Code, including their operation in relation to homicide.⁴

The review's scope and considerations

Queensland's criminal law contains a number of defences that may apply when a person is charged with a criminal offence. The Commission has been asked to review the following defences in the Criminal Code:⁵

- self-defence in sections 271 and 272;
- provocation in sections 268, 269 and 304;
- killing for preservation in an abusive domestic relationship in section 304B; and
- domestic discipline in section 280.

These defences are a combination of complete and partial defences. A complete defence entitles the person to be found not guilty (acquitted) of the charge. For the offence of murder, a partial defence reduces, but does not remove, the person's criminal responsibility. Instead of being guilty of murder the person is guilty of manslaughter.

TABLE 1: The defences subject to review in Queensland

Complete defences	Partial defences to murder
Lead to acquittal – not guilty	Lead to conviction for manslaughter, not murder
<ul style="list-style-type: none"> • Self-defence • Provocation to assault • Domestic discipline 	<ul style="list-style-type: none"> • Killing on provocation • Killing for preservation in an abusive domestic relationship

⁴ Women's Safety and Justice Taskforce, Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland, 2021, vol 1, rec 71.

⁵ See Terms of Reference para 2.

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Criminal trials for indictable offences, like murder and manslaughter, are usually heard by a judge and jury.⁶ The judge's role is to ensure a fair trial according to the law. It is for the jury to consider the evidence and decide if it accepts a defence, applying directions on the law from the judge.

The Commission has also been asked to consider the mandatory penalty of life imprisonment for murder. The Commission is asked to consider its impact on the operation of the defences and whether it should be removed.⁷

As part of the review the Commission must consider many factors and principles, including:⁸

- ensuring just outcomes by balancing the rights and interests of victims and accused persons;
- compatibility of any reforms with human rights;
- the need to ensure Queensland's criminal law reflects contemporary community standards;
- the experiences of victims and survivors and their families in the criminal justice system; and
- the nature and impacts of domestic and family violence and criminal conduct on victims and survivors and their families.

The Commission is also required to consider the findings and recommendations of the Taskforce.

Women's Safety and Justice Taskforce

The Taskforce expressed that understandings of domestic and family violence are continually evolving and laws and procedures must keep pace.⁹ The Taskforce said that the criminal justice system tends to focus on incidents of 'physical violence and abuse', missing more subtle 'patterns of coercive and controlling behaviours.'¹⁰

⁶ See Criminal Code (Qld) ss 3(3), 300, 604. See also pt 8 ch 62 div 9A (trial by judge alone).

⁷ See Terms of Reference para 3.

⁸ See Terms of Reference para 7.

⁹ Women's Safety and Justice Taskforce, Options for Legislating against Coercive Control and the Creation of a Standalone Domestic Violence Offence, Discussion paper 1, 2021, p 11.

¹⁰ Women's Safety and Justice Taskforce, Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland, 2021, vol 2, p 8.

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The Taskforce noted that:

- the harm experienced by victim-survivors can go beyond the physical and can be cumulative;¹¹
- coercive control can affect the ability to leave a relationship, the capacity to obtain support, and the way victim-survivors resist abuse and protect others, such as their children;¹² and
- victim-survivors are not all the same. Aboriginal and Torres Strait Islander victims, those with a disability, those who are culturally and linguistically diverse and those who identify as part of the LGBTIQ+ community can face additional discrimination and structural inequality.¹³

The Taskforce identified concerns with the use of criminal defences:

- by victim-survivors of domestic and family violence who commit an offence of force; and
- by perpetrators of domestic and family violence who commit offences of force.

The Commission's review is not limited to looking at the defences only in the context of domestic and family violence. The defences can apply to a wide variety of factual circumstances beyond cases of domestic and family violence. However, the focus of this paper is the use of the defences in the context of domestic and family violence.

Defences to homicide

An offence that involves killing in the context of domestic and family violence may result in a charge of murder or manslaughter. Some of the defences in this review apply only to murder. These are the partial defence of killing on provocation and the partial defence of killing for preservation in an abusive domestic relationship. Self-defence applies to homicide offences (as well as to other offences of force).

Killing on provocation

Provocation is a defence to murder if the person was provoked by the other person to such an extent that they lost and acted without self-control, killing the other person 'in the heat of passion'.

¹¹ Ibid.

¹² Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland*, 2021, vol 2, pp 13–16.

¹³ Ibid pp 43–52.

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For murder, provocation is a partial defence, in section 304 of the Queensland Criminal Code, that reduces murder to manslaughter.

304 Killing on provocation

- (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of an exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of an exceptional character, if—
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the **deceased**); and
 - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.
- (4) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.
- (5) For subsection (3)(a), despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
- (6) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.
- (7) For proof of circumstances of an exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
- (8) For proof of circumstances of an exceptional character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.
- (9) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
- (10) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.
- (11) In this section—

unwanted sexual advance, to a person, means a sexual advance that—

 - (a) is unwanted by the person; and
 - (b) if the sexual advance involves touching the person—involves only minor touching.

Examples of what may be minor touching depending on all the relevant circumstances—

patting, pinching, grabbing or brushing against the person, even if the touching is an offence against section 352(1)(a) or another provision of this Code or another Act.

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The case of *R v Sebo; Ex parte Attorney-General (Qld)* provides an example of a case involving the defence of provocation to murder.¹⁴

Mr Sebo was charged with murder but convicted of manslaughter. The jury apparently accepted as at least a reasonable possibility that he had been provoked by the victim. He was 28 years old at the time of the killing. The victim was his 16-year-old girlfriend. They had been in a sexual relationship for two years.

The killing occurred when they were returning home by car. The defence case was that the victim who was affected by alcohol, taunted Mr Sebo by saying that she had slept with other men. Mr Sebo became upset, stopped the car and made the victim get out. He attacked the victim with a steering wheel lock, striking her head several times with severe force. He took her to the hospital but she died a couple of days later. Mr Sebo was charged with murder and pleaded not guilty.

Mr Sebo argued that he was provoked by Ms Hunt's words and killed her. The prosecution argued that the jury would reject Mr Sebo's version that the victim taunted him. Alternatively, it was argued that it did not amount to provocation.

Mr Sebo was sentenced to 10 years imprisonment with a consequent serious violent offence declaration which required him to serve 80% before being eligible for parole.

Following *Sebo*, in 2008, the Queensland Law Reform Commission was asked to review the defence of provocation. In that review the Commission noted that the partial defence of provocation had been around for many years, emerging in 16th and 17th Century England when, if people, particularly men, were insulted or attacked, it was accepted that they would respond angrily to protect their honour.¹⁵

The Commission identified the main situations or groups of cases where the partial defence of provocation had been raised in Queensland. Three of these were:¹⁶

- where a person, usually a man, killed another person, also usually a man, in retaliation or response to serious or threatened serious violence;
- where a person, usually a man, killed their partner or former partner at or around the time of separation, or killed a sexual rival as a way to exercise control and deny the woman's right of autonomy; or
- where a person, usually a woman, who was a victim-survivor of a seriously abusive and violent relationship killed in fear to survive.

¹⁴ [2007] QCA 426.

¹⁵ Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, pp 209-210.

¹⁶ Ibid pp 393-4.

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The Commission found that the defence of provocation was gender-biased in its operation and recommended change.¹⁷

Changes to the law were made in 2011 and 2017 to exclude the partial defence of provocation, other than in exceptional circumstances, where the alleged provocative behaviour was based on:¹⁸

- words alone;
- an unwanted sexual advance; or
- anything done, or believed to be done, by the deceased to end or change the nature of their domestic relationship with the person.

Despite these changes, the partial defence of provocation has continued to attract criticism. Following the 2020 case of *Peniamina v The Queen*,¹⁹ community members expressed concern that the provocation defence was outdated and should be abolished.²⁰

Mr Peniamina was charged with the murder of his wife. He suspected she was having an affair and feared she would leave him. On the day of the killing Mr Peniamina discussed with a relative his concerns about his wife's infidelity and said he wanted the marriage to continue. He confronted Mrs Peniamina about the allegation that she had been unfaithful. She said that she didn't want to talk about the matter. He hit her. Mrs Peniamina went into the kitchen and got a knife. He tried to grab the knife and was cut in the process. Mrs Peniamina tried to run away but he took the knife and stabbed her. Mr Peniamina kicked her in the head. She ran outside. He followed and continued to stab her. Mr Peniamina grabbed a concrete bollard from the garden and hit Mrs Peniamina in the head, killing her. Mrs Peniamina suffered multiple injuries. The tip of the knife was embedded in her skull. The medical evidence was that the cause of death was injury to the brain stem caused by the blow (or blows) to the head with the bollard.

At trial, Mr Peniamina argued that his wife's act of 'grabbing the knife, threatening [him] with it and cutting his palm' resulted in him losing self-control and killing her. The prosecution argued that he should not be able to use the defence of provocation because he killed his wife in the context of her trying to leave or end the relationship. He was convicted of murder but successfully appealed. Following his second trial, Mr

¹⁷ Ibid p 472.

¹⁸ See Criminal Code s 304(2)-(8), by virtue of Criminal Code and Other Legislation Amendment Act 2011 (Qld) s 5 and Criminal Law Amendment Act 2017 (Qld) s 10.

¹⁹ (2020) 271 CLR 568.

²⁰ See discussion in The Hon Justice Peter Davis, Provocation: Where to now? The implications of the Peniamina case, Paper delivered to the Queensland Bar Association Annual Conference, 27 March 2022, p 24.

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Peniamina was convicted of manslaughter by majority verdict. He was sentenced to 16 years imprisonment.

In its current review, the Queensland Law Reform Commission has been asked to examine whether the partial defence of provocation should be amended or repealed.²¹ In doing so, the Commission must consider whether the law reflects contemporary community standards.²² The Commission is also required to have regard to developments, reforms and research in other Australian and international jurisdictions.²³

Provocation has been reviewed and abolished in several places, such as Western Australia, Victoria, Tasmania, South Australia and New Zealand.²⁴ The Victorian Law Reform Commission recommended abolition as:²⁵

- it was concerned that reforming the defence would risk creating new problems; and
- it thought the defence was inconsistent with contemporary community values and views on what is excusable behaviour.

However, the defence still exists in other places, like New South Wales, the Australian Capital Territory, the Northern Territory, Canada and Scotland.²⁶

In Queensland, previous reviews have not recommended removing the defence of killing on provocation.²⁷ One concern was that the mandatory penalty of life imprisonment for murder may operate unfairly for victim-survivors of domestic and family violence who killed their abusers.²⁸

²¹ See Terms of Reference para 2(b).

²² See Terms of Reference para 7(d).

²³ See Terms of Reference para 7(h). See generally the Queensland Law Reform Commission, 'Quick reference jurisdiction guide', 'Timeline of legislative reforms and proposals in Queensland', and 'Killing on provocation information sheet', November 2023, <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.

²⁴ See Criminal Code (WA) s 281, repealed by the Criminal Law Amendment (Homicide) Act 2008 (WA) s 12; Crimes Act 1958 (Vic) s 3B; Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas) s 4(b); Criminal Law Consolidation Act 1935 (SA) s 14B; Crimes (Provocation Repeal) Amendment Act 2009 (NZ)

²⁵ Victorian Law Reform Commission, Defences to Homicide (Final report, 2004) p 56.

²⁶ Crimes Act 1900 (NSW) s 23; Crimes Act 1900 (ACT) s 13; Criminal Code (NT) s 158; Canada Criminal Code RSC 1985 c C-46 s 232; and in the common law of Scotland: see generally Judicial Institute for Scotland, 'Provocation' in Jury Manual, 15 August 2023, pp 38.1–38.8, <https://judiciary.scot/home/media-information/publications/judicial-institute-publications>.

²⁷ See e.g. Report of the Taskforce on Women and the Criminal Code, February 2000, ch 6 pt 5; Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008.

²⁸ Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, p 474.

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Recently published academic research examined Australian cases involving women prosecuted between 2010 and 2020 for killing an abusive partner.²⁹ The research uncovered 69 cases. Of those 69 cases throughout Australia, 71% (that is 46 of them) resulted in a manslaughter conviction, with about one-third of them relying on partial defences. Only 3 resulted in convictions (one on a plea of guilty and the other 2 following trial) of manslaughter on the basis of provocation. None of those women were in Queensland.³⁰ The research found that victim-survivors of domestic and family violence tend to rely on the defences of self-defence and killing for preservation in an abusive domestic relationship.

Self-defence

In Queensland, self-defence is a complete defence to the offence of homicide. With certain limitations, the defence allows a person to use force that is reasonably necessary to defend themselves.³¹

Different rules apply to self-defence depending on whether the accused person provoked the attack or started the fight. The law also recognises that the amount of force that may be used in self-defence will depend on the seriousness of harm being confronted.

The law concerning self-defence has been criticised for its complexity.³² The Commission has been asked to examine whether it should be made clearer or simpler.³³ The Commission has also been asked to examine whether self-defence should be 'expanded to cover circumstances when a victim of domestic and family violence (including coercive control) acts reasonably to protect themselves from a perpetrator'.³⁴

²⁹ C Nash and R Dioso-Villa, 'Australia's divergent legal responses to women who kill their abusive partners', Violence Against Women, 16 February 2023, doi:[10.1177/107780122311561542023](https://doi.org/10.1177/107780122311561542023), 1.

³⁰ Ibid pp 10–11.

³¹ See generally, Queensland Law Reform Commission, 'Self-defence information sheet', November 2023 [https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences](https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences).

³² See e.g. *R v Dayney* [2023] QCA 62 at [76] (Dalton JA); *R v Gray* (1998) 98 A Crim R 589 at 592 (and generally at 591–5); *R v Messent* [2011] QCA 125 at [29].

³³ See Terms of Reference para 2(a)(i).

³⁴ See Terms of Reference para 2(a)(i).

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271 Self-defence against unprovoked assault

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

272 Self-defence against provoked assault

- (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
- (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

Self-defence has also been criticised for its gendered origins. Commentators have observed that historically the defence was used in cases involving a single encounter between 2 people, usually men, of relatively equal size and strength.³⁵ It has been said that victim-survivors of domestic and family violence who use force against their abuser may have difficulty relying on this defence.³⁶ This may be because of the different way women respond to violence.

Research shows that women who kill often do so in non-confrontational situations, and usually arm themselves.³⁷ These non-confrontational killings to protect themselves from the threat of future harm do not fit well within the traditional understanding of the defence. The Taskforce recognised that self-defence has been interpreted so that it does not require an imminent threat. But it noted that the defence still requires 'a

³⁵ See e.g. R Bradfield, 'Is near enough good enough? Why isn't self-defence appropriate for the battered woman?', *Psychiatry, Psychology and Law*, vol 5(1), 1998, doi: [10.1080/13218719809524921](https://doi.org/10.1080/13218719809524921).

³⁶ See e.g. Women's Safety and Justice Taskforce, *Options for Legislating against Coercive Control and the Creation of a Standalone Domestic Violence Offence*, Discussion paper 1, 2021, p 24; G Mackenzie & E Colvin, *Victims who Kill their Abusers*, Discussion paper, April 2009, pp 21–2; Report of the Taskforce on Women and the Criminal Code, February 2000, p 148.

³⁷ C Nash and R Dioso-Villa, 'Australia's divergent legal responses to women who kill their abusive partners', *Violence Against Women*, 16 February 2023, doi: [10.1177/107780122311561542023](https://doi.org/10.1177/107780122311561542023), pp 14, 16.

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precipitating assault or an apparent ability on behalf of the other person to carry out a threat of an assault'.³⁸

Previously, the Commission has said:³⁹

It is extremely difficult, if not impossible, to apply the defence of self-defence to a woman who kills her sleeping abuser. The defence requires that the woman have a reasonable apprehension of death or grievous bodily harm, and a belief, on reasonable grounds, that she has no other way of saving herself from death or grievous bodily harm.

The case of *R v Falls, Coupe, Cummings-Creed & Hoare (R v Falls)* is an example of self-defence being successfully relied on.⁴⁰ Ms Falls argued that she killed her abusive husband in self-defence. She was acquitted of murder.

Ms Falls shot and killed her husband while he was dozing in a chair after she had drugged him. She had been subjected to significant physical and emotional abuse during the relationship and had previously given statements to police. Before the killing, the violence had escalated. Her husband had threatened to kill one of their children, and in the days before his death Mr Falls had punched Ms Falls to the chest with such force that it was painful to cough or sneeze.

At the trial, experts gave evidence about 'the long-term effects of abuse, the cycle of violence, why an abused person might find it impossible to leave their abuser and the sense of hyperarousal and heightened ability to assess the seriousness of threats, risk and imminence of harm.'⁴¹ The trial judge directed the jury about how self-defence should be considered in light of Ms Fall's experience of living in an abusive relationship.⁴²

Academic research highlights the characteristics of cases like *R v Falls* where women have successfully relied on self-defence. Professor Heather Douglas says these women were usually:⁴³

³⁸ Women's Safety and Justice Taskforce, Options for Legislating against Coercive Control and the Creation of a Standalone Domestic Violence Offence, Discussion paper 1, 2021, p 24.

³⁹ Queensland Law Reform Commission, A Review of the Excuse of Accident and the Defence of Provocation, Report 64, September 2008, p 313.

⁴⁰ Queensland Supreme Court, Applegarth J, 26 May 2010. Facts about this case can be found in H Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women', Australian and New Zealand Journal of Criminology, 45(3), 2012, p 374.

⁴¹ H Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women', Australian and New Zealand Journal of Criminology, 45(3), 2012, p 376.

⁴² Ibid p 377.

⁴³ Ibid p 374.

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smaller than their partners, white, drug-free, monogamous and without a criminal record. They suffered fierce physical abuse over many years, actively protected their children from the abuser and the killing was, apparently, the first time they had physically fought back. [They] had attempted to leave the relationships and ... had sought assistance from police in the past.

Professor Douglas argues that women who do not fit this description may find it more difficult to argue self-defence.⁴⁴

Killing for preservation in an abusive domestic relationship

In 2010, the defence of 'killing for preservation in an abusive domestic relationship' was introduced in response to the perceived limits of provocation and self-defence. It is similar to self-defence but is a partial defence.⁴⁵ People who successfully rely on the defence would be convicted of manslaughter, not murder.⁴⁶

304B Killing for preservation in an abusive domestic relationship

- (1) A person who unlawfully kills another (the **deceased**) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if—
 - (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
 - (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
 - (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.
- (2) An **abusive domestic relationship** is a domestic relationship existing between 2 persons in which there is a history of acts of serious domestic violence committed by either person against the other.
- (3) A history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation.
- (4) Subsection (1) may apply even if the act or omission causing the death (the **response**) was done or made in response to a particular act of domestic violence committed by the deceased that would not, if the history of acts of serious domestic violence were disregarded, warrant the response.
- (5) Subsection (1)(a) may apply even if the person has sometimes committed acts of domestic violence in the relationship.
- (6) For subsection (1)(c), without limiting the circumstances to which regard may be had for the purposes of the subsection, those circumstances include acts of the deceased that were not acts of domestic violence.
- (7) In this section—
domestic violence see the Domestic and Family Violence Protection Act 2012, section 8.

⁴⁴ Ibid p 377.

⁴⁵ Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009, 1–2.

⁴⁶ See generally, Queensland Law Reform Commission, 'Killing for preservation in an abusive domestic relationship information sheet', November 2023, <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.

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Unlike self-defence, the partial defence in section 304B does not require an assault by the deceased to immediately precede the person's act of self-preservation.⁴⁷ This defence applies if:

- the deceased had committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
- the person believed on reasonable grounds that they needed to engage in the conduct causing death to preserve themselves from death or grievous bodily harm.

The Women's Safety and Justice Taskforce was concerned the defence has been underused and had not provided an effective remedy for victim-survivors of domestic violence who resort to lethal violent resistance.⁴⁸

The defence has been successfully used in Queensland, once at trial and at least once as the basis for a plea to manslaughter.⁴⁹

In one of those cases, the woman was charged with murdering her controlling de facto partner.⁵⁰ She was of Aboriginal descent, used drugs and alcohol, had some criminal history and had physically retaliated against the deceased on previous occasions. The woman 'experienced an extensive history of domestic violence from her partner. She was physically assaulted immediately before the killing, including being grabbed by the throat, dragged along the ground, and urinated upon.'⁵¹ She claimed that during this incident, the deceased said: 'Should I get rid of her? I think she's got to go'. The woman grabbed a knife to protect herself and stabbed him in the belief that she was at risk of death or serious injury. She pleaded guilty to manslaughter on the basis of the partial defence and was sentenced to 7 years' imprisonment, with parole eligibility after serving one third.

In light of the history of violence, it has been argued that the woman in this case should have been entitled to a complete acquittal on the basis of self-defence.⁵² Commentators have used this case to demonstrate 'concerns that partial defences have operated to undermine legitimate self-defence claims'.⁵³ This case shows how a

⁴⁷ *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015 at 2.

⁴⁸ Women's Safety and Justice Taskforce, *Hear Her Voice Report One: Addressing coercive control and domestic and family violence in Queensland*, 2021, vol 2, p 322.

⁴⁹ *R v Cooktown*, Supreme Court of Queensland, Henry J, 25 February 2020 and *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015

⁵⁰ *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015.

⁵¹ C Nash and R Dioso-Villa, 'Australia's divergent legal responses to women who kill their abusive partners', *Violence Against Women*, 16 February 2023, doi:[10.1177/107780122311561542023](https://doi.org/10.1177/107780122311561542023), p 10 – referring *R v Sweeney*, Supreme Court of Queensland, Henry J, 3 March 2015.

⁵² *Ibid.*

⁵³ *Ibid.*

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partial defence may operate to result in a plea of guilty to manslaughter, rather than risking conviction of murder and facing a mandatory sentence of life imprisonment.

The mandatory penalty for murder

The Commission has been asked to consider the impact of the mandatory penalty for murder on the operation of the defences in the review and whether it should be removed.⁵⁴

The penalty for murder in Queensland is mandatory life imprisonment (or in exceptional cases an indefinite sentence).⁵⁵ This means the court does not have the choice of imposing a shorter or different sentence.⁵⁶

305 Punishment of murder

- (1) Any person who commits the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under part 10 of the Penalties and Sentences Act 1992.

Every person convicted of murder is given the same head sentence of life imprisonment – regardless of the individual circumstances of the offender or the offending. The case of *R v Kina* is an example.⁵⁷

Ms Kina was an Aboriginal woman with a criminal history, including violent offending. Since childhood she had suffered significant trauma. Ms Kina had a 3-year relationship with Mr Black, who was violent towards her. He regularly threatened her, tied her up, punched, kicked and raped her. On the morning of the event, Ms Kina and Mr Black fought. Ms Kina ran from the room, grabbed a knife and upon return stabbed Mr Black. Ms Kina was charged with murder.

Ms Kina went to trial and did not give or call any evidence, as was her right. No evidence was given of what happened in the room before the stabbing. Ms Kina was convicted of murder. In accordance with the mandatory requirement of the law, she was sentenced to life imprisonment.

A number of years after the trial Ms Kina told a social worker that on the morning of the event, Mr Black had wanted to have anal intercourse with her and upon refusal he punched her in the face and stomach. Mr Black then told her that if she did not have anal sex with him, her 14-year-old niece, who also lived in the house, would. She then

⁵⁴ See Terms of Reference para 3.

⁵⁵ On indefinite sentences, see Penalties and Sentences Act 1992 (Qld) pt 10.

⁵⁶ See generally, Queensland Law Reform Commission, 'Penalty for murder information sheet', November 2023, <https://www.qldrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.

⁵⁷ [1993] QCA 480.

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left the room and when she returned with the knife he approached her, holding a chair, before she stabbed him.

If the jury had been given that information in evidence, the judge may have left defences of self-defence or killing on provocation to the jury. It would then have been up to the jury whether to accept those arguments.

Following a petition for a pardon, the case was referred back to the Court of Appeal. The Court quashed the conviction and ordered a retrial.⁵⁸ The Director of the Public Prosecutions exercised his discretion not to proceed to a retrial.

The mandatory penalty for murder restricts the court's ability to take individual circumstances into account. In contrast, the penalty for manslaughter is not mandatory. Accordingly, if a partial defence to murder is relied on to reduce murder to manslaughter, the circumstances of victim-survivors can be taken into account on sentence.

Commentators have identified an issue with the mandatory sentence for murder as it applies to victim-survivors charged with murdering their abusive partner. Research mentioned earlier found that abused women who kill their partners are usually charged with murder (rather than manslaughter) and most often plead guilty to manslaughter (rather than go to trial).⁵⁹

Victim-survivors are faced with a difficult decision:

Do they go to trial on murder and argue self-defence? Then there is a possibility of no conviction and no penalty but if they are unsuccessful there is a certain penalty of life imprisonment.

OR

Do they plead guilty to manslaughter on the basis of a partial defence? Although there is certainty of conviction and penalty, it is for a lesser offence and has the possibility of a lesser sentence.

Some commentators have suggested that removing mandatory life imprisonment for murder may result in more victim-survivors being willing to take the risk in arguing for

⁵⁸ *R v Kina* [1993] QCA 480.

⁵⁹ In the first instance 90% were charged with murder: C Nash and R Dioso-Villa, 'Australia's divergent legal responses to women who kill their abusive partners', *Violence Against Women*, 16 February 2023, doi:[10.1177/107780122311561542023](https://doi.org/10.1177/107780122311561542023), p 8.

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a complete defence at trial. The stakes would not be as great. If unsuccessful, the judge could still take the circumstances into account on sentence.

Defences to other offences of force

Perpetrators of domestic and family violence, or victim-survivors, may be charged with offences of force other than homicide – such as assault, wounding, grievous bodily harm or strangulation in a domestic setting.⁶¹ Depending on the type of offence and the circumstances, the defences that may apply include self-defence, provocation and domestic discipline. The discussion below focuses on the latter 2 defences.

⁶⁰ J Stubbs and J Tolmie, 'Defending battered women on charges of homicide: The structural and systemic versus the person and particular' in W Chan et al (eds), *Women, Mental Disorder and the Law*, Glasshouse Press, 2005.

⁶¹ See Criminal Code (Qld) ss 315A, 320, 323, 335, 339, 340.

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Provocation to assault

The defence of provocation to assault is a complete defence. It has some similarities with the partial defence of killing on provocation but is a separate defence with its own requirements. Like the partial defence that applies to murder, it focuses on a loss of self-control provoked by the victim.

268 Provocation

- (1) The term provocation, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

269 Defence of provocation

- (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.
- (3) A lawful act is not provocation to any person for an assault.

An example of a case involving this defence is *R v WBZ*.⁶² In this case, the accused was charged with numerous offences, arising out of 2 separate events. The discussion that follows is limited to the facts and charges arising out of the first event.

After an argument with her partner, a woman struggled to feed her infant daughter and suggested that her partner should sleep in the spare room. Her partner then said that she should sleep in the spare room. The woman responded by saying 'are you

⁶² [2023] QCA 256.

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kidding me' and hitting her partner on the arm. There is some contest as to the level of force that the woman used in doing so, her evidence changed from hitting to touching.

Her partner then grabbed the woman's hair and pulled it back. He then left the room, holding the baby. The woman told her partner to give the baby back. At trial the woman said that she 'could've provoked him by maybe insinuating he was going to hurt [the baby] or me' and that's when she was thrown to the floor and kicked in the mouth. This resulted in a cut on her lip for which she did not seek medical assistance. After being kicked, the woman crawled over and sat on a wooden shoebox. Her partner grabbed her around the neck and pushed her against the wall.

The woman sent a photo of the injury to her face to her mother the next night. She told her mother that she had fallen over in the bath. She did not tell anyone about the event and did not make any complaint to police. Two days after the event the woman visited friends who noticed bruises on her arms and on her neck and a split lip. She told those friends that she had fallen over in the bath. Her partner was charged with common assault, assault occasioning bodily harm and strangulation.⁶³

The complete defence of provocation in Queensland applies only to offences involving the legal element of assault.⁶⁴ It does not apply to strangulation in a domestic setting. The limitations that apply to provocation in the case of murder do not apply to provocation for an assault. For example, words alone can amount to provocation to assault.

For both assault charges arising out of this event in *R v WBZ* the judge directed the jury about provocation. The provocation alleged in the first instance was the hit to the arm in the bedroom and in the second, the woman's insinuation that the man was going to hurt the baby. For both of these offences, the jury found the man not guilty. He was found guilty of the strangulation.

The basis on which the jury found the man not guilty of the assaults is not known because jury deliberations are confidential. It may be that the jury did not think the victim-survivor was a reliable witness. Alternatively, it may be that the jury thought it could not exclude the defence of provocation beyond reasonable doubt.

During its review, the Commission will consider whether the complete defence of provocation meets contemporary community expectations and whether it should be changed or removed. The Commission has also been asked to make recommendations

⁶³ There were other charges also from a second event that are not discussed further here.

⁶⁴ *R v Williams* [1971] Qd R 414; *Kaporonovski v The Queen* (1973) 133 CLR 209.

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about practices and procedures, which may include considerations about evidence and jury directions.⁶⁵

The laws of evidence have recently been broadened to help juries hear from experts and to be directed by judges about the effects of domestic and family violence.⁶⁶ It is too soon to know how effectively these reforms are working.

Domestic discipline

The defence of domestic discipline is sometimes called lawful correction or chastisement. It exists in each Australian state and territory.⁶⁷ The defence allows parents, persons in their place, schoolteachers and masters to use force that is 'reasonable under the circumstances' to correct, discipline, manage or control a child in their care.⁶⁸

280 Domestic discipline

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

It may sometimes be argued as a defence to charges in the context of family violence against children.

In a 2013 Queensland case, a father was charged with assault occasioning bodily harm while armed against his 14-year-old daughter. He struck her on the buttocks multiple times with a bamboo stick after she had sworn at him and defied him in the use of an iPod. Medical evidence showed bruising. The girl said she could not sleep because of the pain. The father relied on the defence of domestic discipline. The jury rejected this argument and he was convicted.⁶⁹

In a later case a stepfather was charged with assaulting his 14-year-old stepson. He said that the boy had been ignoring him and needed discipline. He dragged the boy out of bed and out of the house. He slapped the boy three times and, while wearing

⁶⁵ See Terms of Reference para 5(a).

⁶⁶ See the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023.

⁶⁷ It is part of the common law of the Australian Capital Territory, Victoria and South Australia and is legislated in Crimes Act 1900 (NSW) s 61AA; Criminal Code (NT) ss 11, 27(p); Criminal Law Consolidation Act 1935 (SA) s 20; Criminal Code (Tas) s 50; Criminal Code (WA) s 257.

⁶⁸ See generally, Queensland Law Reform Commission, 'Domestic discipline information sheet', November 2023 <https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences>.

⁶⁹ *R v DBG* [2013] QCA 370.

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steel-cap shoes, kicked him twice to the chest. The Magistrate did not accept this was reasonable.⁷⁰

A 2016 South Australian case is an example of where the ‘discipline’ was found to be reasonable.⁷¹ The father was charged with assaulting his 12-year-old son. A therapist observed that the boy had poor frustration tolerance, did not always respond to discipline and could be argumentative. The boy had been disrespectful throughout the day of the incident. The father told the boy to use his manners. The boy responded dismissively and looked elsewhere. The father turned the boy’s face towards him, telling him that what he was doing was disrespectful and immature. As the boy moved away, he fell on the ground and the father smacked the boy’s thigh 3 times in quick succession. The boy said the pain in his leg was not serious and his thigh did not bruise. The Magistrate convicted the father but on appeal the conviction was quashed because his conduct was considered reasonable.

The defence of domestic discipline was based on earlier common law and has been in the Queensland Criminal Code since it came into force in 1901. The defence has been criticised due to different views on what is ‘reasonable’.⁷² There is also a growing body of research showing that the use of physical punishment on children is ineffective and can be harmful.⁷³

The Commission’s review will consider whether the defence remains fit for purpose and should be changed or removed. The Commission will take into account relevant research, contemporary community standards and Queensland’s human rights framework.

Going forward

The Commission launched its review on 15 February 2024, with an expert panel discussion. On 27 November 2023 the Commission released the first in a short series of background papers planned for the review. This first background paper introduces the terms of reference, outlines the scope of the review and describes the current law. Along with that paper, the Commission has published a set of information sheets on the defences and the penalty for murder, with some comparative information about

⁷⁰ *ACP v Queensland Police Service* [2019] QCA 9.

⁷¹ *Police v Gray* [2016] SASC 39.

⁷² See e.g. S McInnes-Smith, ‘The inconsistency of the “lawful correction” of children defence with Queensland’s new Human Rights Act 2019 (Qld)’, *University of Queensland Law Journal*, vol 41(3), 2022, pp 327–62, doi:[10.38127/uqlj.v41i3.6439](https://doi.org/10.38127/uqlj.v41i3.6439); Tasmania Law Reform Institute, *Physical Punishment of Children*, Final report 4, October 2003, pp 22–6, 29–30, 32–6.

⁷³ See e.g. SS Havinghurst et al, ‘Corporal punishment of children in Australia: The evidence-based case for legislative reform’, *Australian and New Zealand Journal of Public Health*, vol 47(3), 2023, doi:[10.1016/j.anzjph.2023.100044](https://doi.org/10.1016/j.anzjph.2023.100044).

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the laws in other parts of Australia and in some other countries. These resources can be found on the Commission's website [https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences](https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences).

In conducting the review, it is critical that the Commission hear not only from the legal profession, but from victim-survivors, their families, support workers, First Nations peoples and communities, and academics with expertise in diverse fields. Hearing those voices will help the Commission form the best recommendations for effective laws. The Commission welcomes your interest, input and involvement in the review and any observations, stories, experiences or comments you would like to share.

The Commission aims to release some further background papers throughout the year. The Commission will meet and consult widely with interested people and groups. The Commission is planning some research on previous cases and on community attitudes to learn more. Towards the end of 2024 the Commission will publish a consultation paper, with a formal call for submissions on key questions and options for reform. The Commission is required to report to the Attorney-General by 1 December 2025.

Please get in touch and send comments or feedback to qlrc-criminaldefence@justice.qld.gov.au. The Queensland Law Reform Commission website (www.qlrc.qld.gov.au) has an area to register interest in the review and contains all the publications and updates on the review.