

Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009

Explanatory Notes

Objectives of the Bill

The objective of the Bill is to amend the Criminal Code by inserting a new partial defence to murder of “killing in an abusive domestic relationship” and a new offence of unlawfully possessing equipment.

Reasons for the Bill

Partial defence to murder of ‘killing in an abusive domestic relationship’

In 2008 the Queensland Law Reform Commission (QLRC) conducted a review of the excuse of accident and the defence of provocation. Whilst not strictly within the boundaries of their terms of reference, the QLRC had regard to the limitations of existing defences for a person in a seriously abusive and violent relationship who kills his or her abuser. The QLRC recommended that consideration be given to the development of a separate defence of battered persons (recommendation 21-4 of the *Review of the Excuse of Accident and the Defence of Provocation* report).

In furtherance of this recommendation, the Department of Justice and Attorney-General (DJAG) retained professors from Bond University to examine the development of such a defence. The examination involved consultation with key stakeholders including the judiciary, the QLRC, legal stakeholders, community stakeholders and other academics.

The outcome of the professors’ examination was the *Homicide in Abusive Relationships: A Report on Defences* report (the Bond Report) in which they recommended the introduction of a separate partial defence to murder into the Criminal Code applicable to victims of seriously abusive domestic relationships who kill their abusers, believing their actions are necessary for self-defence where there are reasonable grounds for such belief.

The Bond Report identified unfairness primarily associated with the lack of sentencing discretion when a victim of a seriously abusive relationship is

convicted of murder and recognised that this category of offender is deserving of some mitigation of punishment to reflect reduced culpability. It also recognised that the actions of this category of offenders often fall outside the operation of existing defences because of the circumstances in which they offend.

Contemporary research on the actions of victims of abuse who kill their abusers, outlined in the Bond Report, demonstrates they are usually motivated by fear, desperation and a belief that there is no other viable way of escaping the danger. The option of leaving the relationship is often seen as an unrealistic option; research indicates that persons who suffer violence may perceive a lack of alternatives. The history of abuse in the relationship can allow a person who has suffered violence to read cues and note changes in the abuser's behaviour which signal the onset of escalating violence. Decisive action for self-preservation can then be taken before the abuser is in a position to physically overpower them; that action carried out with no loss of self-control and without a deficiency in cognitive processes.

The use of violence against the abuser may be reasonable under the circumstances as the person who has suffered prolonged abuse perceives them to be, but to an ordinary person may be judged as unnecessary or excessive. Even though there may be a history of extensive abuse, because the immediate threat may be modest (viewed in isolation) the hyper vigilance typical of a battered person may result in a killing that is not proportionate to the threat.

The research suggests in some cases the effectiveness of existing defences such as provocation or self-defence are limited for people in this category of offending because of the way in which it has been identified that they kill. It is these limitations that section 304B intends to address.

The effect of section 304B is that if a jury is not satisfied beyond reasonable doubt that the defence has been disproved by the Crown in a trial, the accused would be found not guilty of murder, but guilty of the offence of manslaughter. The court would then sentence the accused in relation to the conviction for manslaughter.

Unlawfully possessing equipment used to obtain or make identification information

Identity crime is an issue of international concern and a significant problem in Australia. Identity crime covers a wide range of criminal conduct, including the unlawful use of stolen credit card details to make purchases

over the phone or internet, or the assumption of another person's name to conduct financial transactions or conduct business.

The issue was considered by the Standing Committee of Attorneys-General both in the context of debit/credit card skimming and in the context of general identity crime. The Model Criminal Law Officers' Committee developed model criminal offences relating to debit/credit card skimming (2006) and identity theft (2008).

In 2007, Queensland's Criminal Code was amended by the insertion of section 408D, which provides the offence of obtaining or dealing with identification information. Pursuant to subsection (1), it is an offence to obtain or deal with another entity's identification information for the purpose of committing or facilitating the commission of an indictable offence. Section 408D of the Criminal Code does not cover the possession of equipment necessary to commit identity theft.

Whilst section 510 of the Criminal Code provides the offence of instruments and materials for forgery it is limited in its application and carries a maximum penalty of 14 years imprisonment.

The new offence will make it unlawful to possess equipment for the purpose of committing an offence of obtaining or dealing with identification information and will carry a maximum penalty of three years imprisonment, consistent with the offence of section 408D (1).

Achievement of the Objectives

The Bill, by virtue of Clause 3, inserts section 304B, the partial defence of Killing in an Abusive Domestic Relationship, into the Criminal Code.

The defence represents a balance between necessarily punishing those who would otherwise be guilty of murder, and providing some legal protections for victims of serious abuse.

It provides a sentencing discretion for those to whom the defence could apply, instead of mandatory life imprisonment. However, it will operate with constraints by linking the category of offenders who can rely on the defence to prescriptive definitions of relationship and violence, and requiring an element of reasonableness with regard to the history of the relationship to avoid unmeritorious abuse of the defence. The use of the term 'serious' within the provision in relation to the level of domestic violence represents an appropriate threshold for the application of a defence that protects accused who would otherwise be guilty of murder.

The new defence will operate to reduce a charge of murder to manslaughter. It will operate in addition to, not instead of, other defences/excuses. Therefore, a victim of abuse charged with the murder of their abuser may wish to raise the complete defence of self-defence for the purposes of an acquittal, the partial defence of diminished responsibility or provocation to reduce a charge of murder to manslaughter, as well as the new partial defence depending on the circumstances of the case. It will then be a matter for the jury having regard to all the defences/excuses left to them to determine criminal responsibility.

The Bill, by virtue of Clause 4, inserts subsection (1A) into section 408D, the offence of possessing equipment for the purpose of committing an offence of obtaining or dealing with identification information.

Estimated Cost for Government Implementation

Any costs in relation to the amendments to the Criminal Code will be met from existing agency resources.

Consistency with Fundamental Legislative Principles

The creation of a new offence, with a maximum penalty of three years imprisonment, will affect the rights and liberties of individuals. However, the defences and excuses available under Chapter 5 of the Criminal Code will apply and the offence is dependant on proof of an unlawful purpose, that is, that the person possesses the equipment for the purpose of committing or facilitating the commission of an offence against section 408D (1).

Identity theft/fraud significantly impacts businesses and financial institutions. Such conduct can leave individual victims with a lost financial, social or legal reputation that is difficult to recover. Specifically, skimming of bank card information is estimated to have cost Australian individuals, businesses and financial institutions tens of millions of dollars over the past five years. Victims face a loss of savings, damage to their credit rating and the emotional distress of having their bank card information stolen.

The proposed penalty for this offence is consistent with the penalty for obtaining or dealing with identification information under section 408D of the Queensland Criminal Code, which is three years imprisonment. This is consistent with the approach taken in South Australia and Victoria, where the maximum penalties for possessing bank card information skimming devices is also three years imprisonment.

Consultation

In the progression of the QLRC recommendation 21-4, DJAG engaged consultants to examine the development of a new defence and consider the requirement of any ancillary evidentiary provisions to facilitate the operation of any new defence. A Discussion Paper (*Victims Who Kill Their Abusers: a Discussion Paper on Defences*) was distributed in April 2009 to the following stakeholders:

- Premier and Minister for Arts
- Deputy Premier and Minister for Health
- Treasurer and Minister for Employment and Economic Development
- Minister for Police, Corrective Services and Emergency Services
- Minister for Community Services and Housing and Minister for Women
- Minister for Child Safety and Minister for Sport
- Queensland Law Society
- Heads of Jurisdiction: Chief Justice, President of the Court of Appeal, Chief Judge, Chief Magistrate
- Legal Aid Queensland
- Director of Public Prosecutions
- Bar Association of Queensland
- Aboriginal and Torres Strait Islander Legal Service
- Women's Legal Service
- North Queensland Women's Legal Service
- Queensland Homicide Victims Support Group
- Sisters Inside

- Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service
- Aboriginal and Torres Strait Islander Women's Legal Service North Queensland
- Domestic Violence Resource Centre
- Rural Women's Outreach Legal Service
- Queensland Centre for Domestic and Family Violence Research
- Queensland Association of Independent Legal Services
- Head of School of Law, James Cook University
- Dean of Faculty of Law, Queensland University of Technology
- Dean of Law School, Griffith University
- Head of School and Dean of School of Law, University of Queensland
- Acting Dean of School of Law, University of Southern Queensland.

The paper was also posted on DJAG's website inviting comment. A number of agencies and individuals responded orally and in writing to the paper. Their feedback was incorporated into the Bond Report and was considered by Government in the development of the defence. There was widespread agreement among the responding stakeholders to amend the Criminal Code to provide some additional protection for victims of seriously abusive relationships who use violence against their abusers. A majority of those favoured the introduction of a separate defence to operate as a partial defence to murder.

In September 2009, a consultation draft of the Bill was sent to the above listed stakeholders and was posted on the DJAG website with the Bond Report inviting comment.

Notes on Provisions

Clause 1 establishes the short title of the Bill as the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2009*.

Clause 2 provides that the Bill amends the Criminal Code.

Clause 3 inserts new section 304B “Killing in an Abusive Domestic Relationship”, into Chapter 28 (Homicide—suicide—concealment of birth) of the Criminal Code.

The new provision will operate in the following circumstances:

- An accused person unlawfully kills another (the deceased) under circumstances that would ordinarily constitute murder (s.304B(1));
- The accused person and the deceased had been in an “abusive domestic relationship” (s.304B(1)(a)). This term is defined in s.304B(3) as being a domestic relationship between two persons in which there is a history of acts of serious domestic violence committed.
 - “Domestic relationship”, by virtue of s.304B(2), is defined by reference to the *Domestic and Family Violence Protection Act 1989* (DFVPA); that is s.11A, s.12 and s.12A-C of that Act outline the definition of domestic relationship under 304B. These provisions contemplate past and present relationships.
 - “Domestic violence”, by virtue of s.304B(2), is also defined by reference to the DFVPA; s.11 of that Act outlines the definition of domestic violence under 304B. It is therefore intended to include threats, intimidation and harassment as well as physical injury provided it is in the context of a history of acts of serious domestic violence.

Recent District Court decisions (appeals from the ordering of Protection Orders) have provided guidance as to the wording in the definition under s.11 of the DFVPA.

Bottoms v Rogers [2006] QDC 080 defined “intimidation” as referring to a process where the person is made fearful or overawed, particularly with a view to influencing that person’s conduct or behaviour. The case identified that it could include a

single incident of conduct. “Harassment” was defined as involving a repeated or persistent form of conduct which is annoying or distressing rather than something which would incite fear. Yelling was identified as an act that could be part of a course of conduct which amounted to harassment depending on the circumstances.

These definitions were confirmed in the decision of *MAC v MMV* [2009] QDC 276.

In the case of *W v D* [2008] QDC 110, the court concluded that repeated statements to the respondent that she was “sick, crazy, needed help” and so on, in the context of the relationship and the characters or personalities of the parties amounted to intimidation, and that the appellant would have been aware that this sort of language would reduce the respondent’s already depleted self confidence. The repeated uses of the demeaning references were a persistent, annoying and distressing form of conduct and therefore also regarded as harassment.

In the case of *N v P* [2009] QDC 69, the court concluded that frequent unwanted phone contact and attendance at home or school of children despite a lack of interest in contact being communicated, creating a perception of stalking, was confirmed to amount to harassment.

Having regard to the case law on this definition and the wording of the provision, the reference to the s.11 definition within s.304B is with the intention of incorporating a broad range of serious behaviours, including acts of psychological and sexual abuse.

- The term “serious” is not defined and is a matter for the tribunal of fact to determine having regard to all the evidence before them. It is acknowledged that domestic violence of any nature is a serious issue for our community. The reference to “serious” is as a matter of emphasis to place the nature of the domestic violence, particularly at the initial threshold in subsection (1)(a), in the Supreme Court murder trial context; that is, in a context where the defence will operate as a protection to those persons whose acts would otherwise constitute murder.
- S.304B(4) states that a history of acts of serious domestic violence may include acts that appear minor or trivial when

considered in isolation. This is to ensure that all relevant evidence in relation to the relationship is presented to a court for consideration.

- S.304B(5) states that the defence can still operate even if the act of the deceased when viewed in isolation would not have warranted such a response. The intention of subsection (5) is to ensure the acts of the accused person are viewed in the context of the whole of the relationship and not just the final act/omission of the deceased that brought about the killing (if there has been one). The operation of the new defence is to be distinguished from the application of provocation and self defence where issues of proportionality having regard to the actions of the deceased immediately before the accused's acts are essential. The defence will be available even if there has been no act/behaviour of the deceased immediately preceding the killing.
- The intention of subsections (4) and (5) is also to ensure that relevant acts of domestic violence in the context of the history of a relationship involving serious domestic violence will be elevated to be included even if on their own would not be categorised as serious.
- The deceased must have committed acts of serious domestic violence against the person in the course of the abusive domestic relationship (s.304(1)(a)).

Evidence of the accused person perpetrating violence during the course of the relationship does not prevent that person from relying on the defence (s.304B(6)), but may be relevant to the determination of s.304B(1)(b) (see below).

This clarification has been inserted to reflect the reality of the nature of some domestic relationships. It is envisaged that in some relationships where there has been a history of abuse there may have been incidents of domestic violence perpetrated by the accused person towards the deceased. It is not intended that these incidents would prevent an accused person, who has otherwise been the victim of serious abuse by the deceased, from relying on the defence.

- At the time of the killing 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 (s.304B(1)(b)).

This is a subjective test, linking the conduct of the deceased in the relationship outlined in subsection (1)(a) to the belief and actions of the accused, and the killing of the deceased.

Referencing “preservation from death or grievous bodily harm”, compared with lower level injury/harm ensures necessary limitations and maintaining of reasonable thresholds in cases where someone would otherwise be convicted of murder, for example, a deliberate killing.

The subsection will facilitate the admission of evidence regarding the history of acts of serious domestic violence and any other relevant factors to demonstrate the belief of the accused.

- At the time of the killing there are reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case (s.304B(1)(c)).

This element links the subjective belief of the accused person with an objective test and has been inserted to ensure an individual’s belief alone is not sufficient to reduce a charge of murder to manslaughter.

By referencing the abusive relationship to the reasonableness of the belief, it is intended that the provision extends considerations of reasonableness to behaviours and reactions to the relationship having regard to the circumstances of that relationship and how victims of domestic violence behave generally in such relationships in the context of the accused’s actions.

Subsection (1)(c) will facilitate the admission of evidence including information from the accused person, experts, treating practitioners and witnesses, regarding the reasonableness of the belief. The breadth of the phrase “all the circumstances of the case” may also allow consideration of behaviours within and aspects of the relationship that may not technically amount to domestic violence that may impact on an accused’s belief as to the necessity of his/her actions.

The referencing of the reasonable belief to the abusive relationship in s.304B(1)(c) will also facilitate the admission of evidence to raise doubt as to the reasonableness of the belief. By virtue of s.304B(1)(c) the Crown could seek to rely on evidence from various sources, including expert opinion, as to the nature of the relationship to demonstrate that the belief was not reasonable.

Without limiting the considerations under subsection (1)(c) and to reflect the above, subsection (7) allows a court to have regard to conduct of the deceased that is not domestic violence in determining whether the person has reasonable grounds for the belief under subsection (1)(b).

- The onus of proof will be on the Crown. The prosecution, in cases where the defence is raised on the evidence, will have the responsibility of disproving the defence beyond a reasonable doubt; in particular, establish beyond a reasonable doubt any or all of the following:
 - the accused was not in a serious domestic violence with the deceased;
 - the deceased did not commit acts of serious domestic violence against the accused in the course of the relationship;
 - the accused did not hold a belief at the time of the killing that the killing was necessary for the accused's preservation from death or grievous bodily harm;
 - even if the belief was held, that the belief was not reasonable having regard to the abusive relationship and all the circumstances of the case.

The defence is not reliant on the accused person responding to an assault or imminent threat from the deceased and there is no imposition of a timeframe between the actions of the deceased and the killing by the accused person.

Clause 4 inserts subsection (1A) into section 408D of the Criminal Code. Subsection (1A) will make it unlawful to possess equipment for the purpose of committing an offence of obtaining or dealing with identification information, that is, an offence against section 408D(1). The offence requires proof of an unlawful purpose to ensure people with legitimate, innocent possession of common items, such as laptop computers and mobile phones, are not captured.

Clause 5 inserts a transitional provision, section 723, in relation to the new defence so that the defence applies to proceedings for an offence that were started but not finished at the time of commencement of the provision. Further, for the application of the new defence, it does not matter whether the act or omission constituting the offence charged was committed before

or after the commencement. The transitional provision allows the defence to be raised:

- at any proceeding started before the commencement of the Bill, provided the proceeding has not finished, and
- at any proceeding that starts after the commencement of the Bill, regardless of when the act or omission constituting the offence charged was committed.

Section 723(3) does not allow the amendments to apply to an appeal from a conviction or sentence where the conviction or sentence appealed from happened before the commencement of the provision.

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