

## 99. Killing for preservation in an abusive domestic relationship: s 304B

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### 99.1 Legislation

[Last reviewed: August 2024]

*Criminal Code*

[Section 304B](#) – Killing for preservation in an abusive domestic relationship

*Evidence Act 1977*

[Sections 103A-103Z](#) – Evidence related to domestic violence relationships and domestic violence

*Domestic and Family Violence Protection Act 2012*

[Section 8](#) – Meaning of domestic violence

### 99.2 Commentary

[last reviewed: August 2024]

*This defence reduces what would be murder to manslaughter*

The defence of killing for preservation in an abusive domestic relationship operates to reduce what would otherwise be murder to manslaughter. It is a defence to murder only. It is not a defence to manslaughter.

It is for the prosecution to exclude the defence if it is potentially raised on the evidence.

*Elements*

The defence will be excluded if any one (or more) of its following three elements (see s 304B(1)) is excluded beyond reasonable doubt by the prosecution:

- (a) the deceased has committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship;
- (b) the defendant believes it is necessary for the defendant's preservation from death or grievous bodily harm to do the act or make the omission that causes the death;
- (c) the defendant has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

An "abusive domestic relationship" (see s 304B(2)) is a domestic relationship existing between two persons in which there is a history of acts of serious domestic violence, which may include acts that appear minor or trivial in isolation (see s 304B(3),

committed by either person against the other. Section 304B(7) adopts the definition of “domestic violence” in s 8 *Domestic and Family Violence Protection Act 2012*.

#### *Permissive qualifications*

The defence may apply even if the death causing act or omission was in response to a particular act of domestic violence by the deceased which would not, if the history of acts of domestic violence were disregarded, warrant the response (see s 304B(4)).

Element (a) may apply even if the defendant has sometimes committed acts of domestic violence in the relationship (see s 304B(5)).

The circumstances of the case to which regard may be had in element (c) may include acts of the deceased that were not acts of domestic violence (see s 304B(6)).

#### *Part 6A Evidence Act – Jury Directions re Domestic Violence*

Relevant evidence of domestic violence is admissible - per s 103CB(1), part 6A *Evidence Act*. Sections 103Z-103ZC provide prospective content of directions the trial judge may give or repeat, on application or of the judge’s own initiative, in a trial in which domestic violence is an issue. The below suggested direction does not incorporate them. Trial judges should refer to chapter 52A of this Benchbook and part 6A in formulating appropriate additional directions. Note that such directions can also be given earlier than the summing up, for instance before relevant evidence is given.

#### *Interaction of defence with party provisions*

In *R v Tracy* [\[2024\] QCA 19](#) a male offender called Moore killed the deceased by repeatedly stabbing him. Moore and the defendant had gone together to the deceased’s house where the killing occurred. The defendant was charged with murder on the basis she enabled or aided the committing of the offence and was thus deemed to have committed the offence pursuant to s 7(1)(b) or (c). She had allegedly been the victim of domestic violence by the deceased. Despite a s 304A defence being disavowed by her legal representatives at trial it was contended on appeal that the defence should have been left to the jury. A threshold question on appeal was whether the defence could ever apply where the defendant laying claim to it was not the person who committed the fatal act. Morrison JA, with whom Mullins agreed, Callaghan J dissenting, held it could apply, because “a party under s 7(1)(b) or (c) is deemed to be the actor who committed the killing”. In the result though the majority concluded the defence did not arise on the version of events most favourable to the defendant.

### **99.3 Suggested Direction**

[Last reviewed: August 2024]

[Sections 103Z-103ZC *Evidence Act* contain additional prospective content of directions about domestic violence. They are not included below. Trial judges should

refer to those provisions and the commentary about them at chapter 52A of this Benchbook to determine what appropriate additional directions, drawn from those provisions, should be given.]

**A provision of our law known as the defence of killing for preservation in an abusive domestic relationship provides that if a person unlawfully kills another under circumstances that would constitute murder, the person is only guilty of manslaughter, 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 cause 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.**

**I will refer to those three ingredients of the defence as defence elements (a), (b) and (c). (Jurors may be aided by a document drafted by the trial judge, listing these elements.)**

**This defence operates as a partial defence, not a complete defence. If it applies, its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider this defence if you provisionally reach the view that the defendant had the necessary intent to kill, or cause grievous bodily harm, and that the killing was unlawful (but for this defence) so that the defendant would be guilty of murder.**

**Defence element (a) requires your consideration of whether the deceased has previously committed acts of serious domestic violence against the defendant in the course of an abusive domestic relationship. If the past relationship between the deceased and defendant did not have that quality the defence has no application. An abusive domestic relationship is a domestic relationship existing between two persons in which there is a history of acts of serious domestic violence committed by either person against the other.**

**In this context the word "serious" carries its ordinary meaning. Whether acts of domestic violence were serious is a matter for you to assess. However, you should not make that assessment by considering each act in isolation. Rather you should assess it considering the whole history of acts of domestic violence, even those that appear minor or trivial when considered in isolation.**

**[Where relevant: This defence element may apply even if the defendant has sometimes committed acts of domestic violence in the relationship].**

**In the present case** [Here summarise the alleged nature of the relevant past acts. Identify any issues of fact the jury needs to resolve as to whether such acts occurred. Where it is in issue whether such acts, if proved, constitute domestic violence, direct the jury of the content, relevant to the case, of the definition of domestic violence at s 8 *Domestic and Family Violence Protection Act 2012*.].

**Defence element (b) requires your consideration of whether the defendant believed it was necessary for the defendant's preservation from death or grievous bodily harm to** [insert the act or omission that allegedly caused the deceased's death]. **This concerns the defendant's actual belief (not that of some hypothetical person), as to whether that act (or omission) was necessary to preserve the defendant from death or grievous bodily harm.**

**In considering whether the defendant had reasonable grounds for that belief, you should have regard to the evidence as you find it of an abusive domestic relationship and all the circumstances of the case, including acts of the deceased that were not acts of domestic violence.**

**In the present case** [Here summarise the direct and or indirect evidence of the defendant's belief. Identify any issues of fact the jury needs to resolve in weighing what the belief was.]

**Defence element (c) requires your consideration of whether the defendant had reasonable grounds for the belief mentioned in defence element (b). This defence may apply even if the act (or omission) causing the death of the deceased was done or made in response to a particular act of domestic violence by the deceased that would not of itself warrant the response. That is because the defendant's belief about whether such a response was necessary is informed not only by the immediate circumstances but also by the past history of the allegedly abusive domestic relationship, including the alleged acts of serious domestic violence.**

**In weighing whether the defendant had reasonable grounds for believing the act (or omission) which caused death was necessary for the defendant's preservation from death or grievous bodily harm, you must have regard to the abusive domestic relationship and all the circumstances of the case as you find them to be.**

**It is not for a defendant to prove that this partial defence applies. Rather the onus is on the prosecution to exclude the defence. The defence is therefore excluded if the prosecution satisfies you beyond reasonable doubt that any one of the three defence elements is excluded, that is, that:**

- 1. the deceased did not commit acts of serious domestic violence against the defendant in the course of an abusive domestic relationship; or**

2. the defendant did not believe it was necessary for the defendant's preservation from death or grievous bodily harm to do the act or make the omission that caused the death of the deceased; or
3. if the defendant had such a belief, the defendant did not have reasonable grounds for the belief, having regard to the abusive domestic relationship and all the circumstances of the case.

If you come to consider this defence, because you provisionally reach the view that the defendant unlawfully killed the deceased such that the defendant would be guilty of murder, but the prosecution does not satisfy you beyond reasonable doubt that this defence is excluded, then the defendant would be not guilty of murder, but guilty of manslaughter.