



# **REVIEW OF CRIMINAL DEFENCES – DISCUSSION AND POTENTIAL CHANGES**

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# QUEENSLAND LAW REFORM COMMISSION

Independent statutory body for law reform

Review of particular criminal defences

- Commenced 15 November 2023
- Report due 1 December 2025

# TERMS OF REFERENCE

Self-defence (ss 271 and 272)

Provocation as a defence to assault (ss 268 and 269)

Provocation as a partial defence to murder (s 304)

Partial defence to murder of killing for preservation in an abusive domestic relationship (s 304B)


Domestic discipline (s 280)

Mandatory life imprisonment for murder

# SELF-DEFENCE

Self-defence against an unprovoked assault (s 271)

Self-defence against a provoked assault (s 272)



**SELF-  
DEFENCE**  
**(s 272)**

**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.

# Three interpretations

## Self-defence against provoked assault (s 272)

(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 began 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.**

***R v Dayney* [2020] QCA 264**

Fraser and McMurdo JJA

Sofronoff P

***R v Dayney* [2023] QCA 62**

Dalton J (Mullins P and Boddice JA agreeing)

# Special leave granted

**BEECH-JONES J:** Does that not suggest that there might be some cause for this Court to express – conclusively determine which of the three is right?



# Simplification?

## Queensland

### 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.

### 273 Aiding in self-defence

In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person.

## New Zealand

Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

s 48(1) *Crimes Act* 1961 (NZ)



# Other possible changes

Only jurisdiction to keep the distinction between provoked and unprovoked assaults.

Some jurisdictions have a partial defence to murder of excessive self-defence (SA).

Others expressly deal with self-defence in the context of domestic and family violence (Vic).

# PROVOCATION

Two provocation defences:


1. Provocation as a defence to assault (ss 268 and 269)
2. Provocation as a partial defence to murder (s 304)

# PROVOCATION AS A DEFENCE TO ASSAULT

## 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. 

Not a defence at common law.

Not changed since *Criminal Code* came into force in 1901.

Complete defence to an offence with assault as an element.

# Repeal or amendment?

## **Repeal?**

Queensland and WA are the only jurisdictions with a complete defence.

## **Amend?**

Extend to offences without assault as an element?

# PROVOCATION AS A PARTIAL DEFENCE TO MURDER

## 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.

Amendments to date:

2011 Words alone and relationship exceptions introduced

2017 Unwanted sexual advance exception introduced

# Repeal or amendment?

Controversial cases: *Peniamina v The Queen* (2020) 271 CLR 568

Unfair and inconsistent operation?

Out-dated and gender-biased?

Complicated and difficult to understand?

# PARTIAL DEFENCE OF KILLING FOR PRESERVATION IN AN ABUSIVE DOMESTIC RELATIONSHIP

## 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.

Introduced to overcome potential limitations of other defences (and mandatory life for murder) where a person in a seriously abusive relationship kills their abuser.

# DOMESTIC DISCIPLINE

## 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.

Complete defence to an offence involving the use of force.

Most cases involve parents (not schoolteachers, as previously).

Human rights concerns.



# LIFE IMPRISONMENT FOR MURDER

## 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*.

Mandatory minimum non-parole period of 20 years.

Minimum non-parole periods increased in certain circumstances.

Contrast the sentencing discretion for manslaughter.

# GETTING INVOLVED

## Upcoming consultation and submissions

### Terms of reference

#### **Consultation**

The Commission shall consult with:

- (a) legal stakeholders;
- (b) people who have experienced DFV or who have been the victim of other criminal conduct, and relevant bodies that work with or represent victims and survivors, or the family of victims, of DFV and other offences;
- (c) Aboriginal and Torres Strait Islander stakeholders;
- (d) the public generally; and
- (e) any group or individual, in or outside Queensland, the Commission considers relevant having regard to the issues relating to the referral,