

Defence of Residential Dwellings at Law

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ABSTRACT: *Over the centuries, the common law has seen increasing restrictions on the use of lethal force, and the boundaries with respect to what is considered lawful self-defence have increasingly narrowed. At the same time, over the centuries, the right of a householder to defend in his or her home has been a value (and policy consideration) that has remained important to society, dating back to the seminal ‘Semayne’s case’ of 1603 in which the English courts recognised that: “the house of everyone is to him as his castle and fortress, as well for his defence against injury or violence as for his repose”. The purpose of the current report is to assess the current position with respect to the defence of residential dwellings at law with a particular focus on Australia, positioned within the global context.*

Keywords: *Crime and Courts Act (UK); Criminal Code (Qld); Dwellings; Legal Defence; Residential; Section 267 Criminal Code (Qld); Self-Defence.*

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I. INTRODUCTION

The purpose of this report is to consider section 267 of the *Criminal Code* (Qld) “defence of dwelling”. Specifically, to “discuss the background, rationale, elements (and their application and interpretation) and the advantages and disadvantages of this provision” and to consider this within the broader global context.

II. BACKGROUND & RATIONALE

Over the centuries, the common law has seen increasing restrictions on the use of lethal force and the boundaries with respect to what is considered lawful self-defence have increasingly narrowed.¹

At the same time, over the centuries, the right of a householder to defend in his/her home has been a value (and policy consideration) that has remained important to society.² In *Semayne’s case* of 1603 the court recognised that: “the house of everyone is to him as his castle and fortress, as well for his defence against injury or violence as for his repose”.³ Such values and policy remain strong today and, as will become evident below, form the basis of Queensland’s “defence of dwelling” under s 267 *Criminal Code* (Qld) and also the basis of similar provisions in other states.⁴

Essentially, s 267 is designed to allow householders to use force against intruders.⁵ Section 267 was amended (substituted) by s 36 *Criminal Law Amendment Act 1997* (Qld).⁶ Prior to this amendment, the defence was limited to prevention of “forcible breaking and entering of the dwelling house”.⁷ The s 36 amendment extended the defence to the unlawful entry of the dwelling by persons who are believed to have an intent to commit an indictable offence (and removal of such persons already in the dwelling).⁸ The amendment came on a background of increasing public pressure throughout Australia to increase the right to defend at residential premises.⁹ It is evident that this extended defence is based on policy considerations in respect of this.¹⁰ Specific note is made in *R v Cuskelly* per Keane JA that s 267 “gives effect to a policy of the law which recognises the

¹ Law Reform Committee of the Northern Territory, *Self Defence and Provocation*, Report (2000) 5.

² *Ibid* 7.

³ *Semayne’s case* [1603] 5 Co Rep 91(a); 77ER194; *Ibid*.

⁴ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30]; *Home Invasion (Occupants Protection) Act 1998* (NSW) s 5; Law Reform Committee of the Northern Territory, above n 1, 7.

⁵ Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 4th ed, 2015) 486.

⁶ *Criminal Law Amendment Act 1997* (Qld) s 36; see also, Michael Shanahan et al, *Carter’s Criminal Law of Queensland* (LexisNexis, 20th ed, 2015) 364.

⁷ Shanahan et al, above n 6.

⁸ *Criminal Code* (Qld) s 267; *Criminal Law Amendment Act 1997* (Qld) s 36; see also, Shanahan et al, above n 6; Schloenhardt, above n 5.

⁹ Schloenhardt, above n 5, 487; Paul Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis, 4th ed, 2005).

¹⁰ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30]; see also, Shanahan et al, above n 6, 365.

legitimate use of force to defend hearth and home and to prevent the commission of offences by others in one's home".¹¹ Other states have similarly extended defence provisions based on such policy and public pressure.¹² For instance, s 5 *Home Invasion (Occupants Protection) Act 1998* (NSW) declares that "it is the public policy of the State of New South Wales that its citizens have a right to enjoy absolute safety from attack within dwelling-houses from intruders".¹³

III. THE ELEMENTS AND THEIR INTERPRETATION & APPLICATION

Presented below is s 267, *Criminal Code* (Qld).¹⁴

It is lawful for a person who is in peaceable possession of a dwelling, and any person lawfully assisting him or her or acting by his or her authority, to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds—

- (a) the other person is attempting to enter or to remain in the dwelling with the intent to commit an indictable offence in the dwelling; and
- (b) it is necessary to use that force.

1. Peaceable possession of a dwelling

The defence is available to a person who is in peaceable possession of a dwelling and any person lawfully assisting him or her or acting by his or her authority. The definition of dwelling is provided in s 1.¹⁵ In the main, the term dwelling refers to residential buildings and structures and adjacent buildings/structures connected to such residential buildings and structures.¹⁶

In *R v Bartram*, the force by the accused occurred in an area just outside a semi-external laundry.¹⁷ This area was held to be within the term "dwelling".¹⁸ In *R v Cuskelly*, it was considered acceptable that the force occurred on the front steps outside a residential unit.¹⁹

The term dwelling appears to cover other residential structures such as caravans.²⁰ It was also held, in *R v Halloran and Reynolds* [1967] QWN 34, that a motel unit occupied for a week fell within the term "dwelling house" for the purposes of the defence (pre 1997 amendment).²¹ There does not appear to be any suggestion that the 1997 amendment of the term to "dwelling" would change this. If anything, the amendment is intended to have a broadening effect.²²

2. Subjective Elements[†]

- (i) The person using the force believes on reasonable grounds that the other person is attempting to enter or to remain in the dwelling with the intent to commit an indictable offence in the dwelling.

Section 3 provides the definition of indictable offence.²³ In *R v Cuskelly*, the deceased had approached the accused's unit threatening violence. Taking context into account, the Queensland Court of Appeal (QCA) accepted this as capable of resulting in the accused forming a subjective belief on reasonable grounds that the deceased was attempting to enter or to remain in the dwelling with the intent to commit an indictable offence.²⁴ In *R v Bartram*, factors including the following were considered by QCA as capable of supporting that the accused formed a subjective belief on reasonable grounds that the complainant was intending to commit an indictable offence: the complainant had been subject to a domestic violence order in favour of the accused and

¹¹*R v Cuskelly* [2009] QCA 375 (8 December 2009) [30].

¹²Schloenhardt, above n 5, 487.

¹³*Home Invasion (Occupants Protection) Act 1998* (NSW) s 5; see also, *Ibid*.

¹⁴*Criminal Code* (Qld) s 267.

¹⁵*Ibid* s 1.

¹⁶*Ibid*.

¹⁷*R v Bartram* [2013] QCA 361 (6 December 2013) [4]-[5], [19]; see also, Thomas Crofts, *Criminal Law in Queensland and Western Australia* (LexisNexis, 2nd ed, 2014) 181.

¹⁸*R v Bartram* [2013] QCA 361 (6 December 2013) [4]-[5], [19], [24]; see also, Crofts, above n 17.

¹⁹*R v Cuskelly* [2009] QCA 375 (8 December 2009) [4]-[9].

²⁰*R v Rose* [1965] QWN 35; see also, Queensland, *Home Invasions and the Criminal Law Amendment Bill 1996*, Legislation Bulletin No 2 (1997) 4.

²¹*R v Halloran and Reynolds* [1967] QWN 34; see also, Queensland Legislation Bulletin, above n 20.

²²Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 10; Queensland Legislation Bulletin, above n 20, 1-16.

²³*Criminal Code* (Qld) s 3.

²⁴*R v Cuskelly* [2009] QCA 375 (8 December 2009) [4]-[9], [24], [27]-[32], [42]-[45].

had been convicted of breaches; there was a history of aggression and some evidence the accused was possibly armed and threatening violence when the incident occurred.²⁵

(ii) The person using the force believes on reasonable grounds that it is necessary to use that force.

Section 267 does not require that the force is objectively necessary, the requirement being only that the accused has reasonable grounds for their subjective belief that it was necessary.²⁶ In *R v Cuskelly*, the deceased had approached the unit of the accused threatening violence to the accused and (according to the accused) made attempts to punch the accused. QCA considered this as capable of resulting in the accused forming a subjective belief on reasonable grounds that it was necessary to use force to the extent of stabbing the accused in the chest.²⁷

†Whilst the above elements (i) and (ii) are largely subjective,²⁸ it should be noted that there is an objective component to each of (i) and (ii). That is, that there are reasonable grounds for the subjective belief of the accused.²⁹

Section 267 has been considered in a number of cases,³⁰ and appears to be more extensive than self-defence under ss 271-272.³¹ Unlike self-defence provisions under ss 271-272, s 267 does not require the force used be no more than is reasonably necessary and, if lethal force is carried out, it is not a requirement that the accused reasonably apprehended death or grievous bodily harm in respect of the deceased's conduct.³² Further, the defence is not void if the accused possessed an intention to kill or do grievous bodily harm.³³ Unlike other cases of self-defence, this defence does not require the householder to retreat.³⁴

Further supporting that s 267 is not constrained by the limitations of ss 271-272, Keane JA observed in *R v Cuskelly*:³⁵

Where it arises on the evidence, s 267 affords a separate, and more extensive, ground of defence. It is apparent that s 267 is informed by policy considerations different from the affirmation of the legitimacy of proportionate force in self-protection embodied in ss 271-272. Section 267 gives effect to a policy of the law which recognises the legitimate use of force to defend hearth and home and to prevent the commission of offences by others in one's home. This policy would not be well-served if s 267 were to be subsumed by ss 271-272.

Dissenting Views in respect of Interpretation and Application

Andreas Schloenhardt (University of Queensland) takes the position that it is unclear whether s 267 allows for the use of lethal force in situations where the accused does not hold a reasonable apprehension of death or grievous bodily harm.³⁶ Schloenhardt proposes that perhaps s 267 is limited by ss 271(2) and 272.³⁷ Schloenhardt supports this based on the following:³⁸

In *R v McKay*, the court held at common law that lethal force is not justified by the accused based on a belief by the accused that the deceased was stealing.³⁹ The High Court held, in *Zecevic v DPP* (Vic), that the

²⁵ *R v Bartram* [2013] QCA 361 (6 December 2013) [13], [24].

²⁶ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27]-[32], [42]-[45]; *James v Sievwright* [2003] WASCA 251 (17 October 2003) [11], [22]; Crofts, above n 17, 180.

²⁷ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [4]-[9], [27]-[32], [42]-[45].

²⁸ Schloenhardt, above n 5.

²⁹ *R v Cuskelly* [2009] QCA 375 (8 December 2009); *James v Sievwright* [2003] WASCA 251 (17 October 2003) [22].

³⁰ *R v Bartram* [2013] QCA 361 (6 December 2013); *R v Byrne* [2006] QCA 241 (23 June 2006); *R v Cuskelly* [2009] QCA 375 (8 December 2009); *R v McMartin* [2013] QCA 339 (12 November 2013); *R v Spajic* [2011] QCA 232 (13 September 2011).

³¹ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27], [29]-[30]; Shanahan et al, above n 6, 364-365.

³² *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27], [29]-[30]; Crofts, above n 17, 180.

³³ *R v McMartin* [2013] QCA 339 (12 November 2013) [26]; Crofts, above n 17, 180.

³⁴ *R v Hussey* (1925) 18 Cr App R 160, 160-2; see also, Shanahan et al, above n 6.

³⁵ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30].

³⁶ Schloenhardt, above n 5, 486-7.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *R v McKay* [1957] VR 560.

accused is only justified in using lethal force if he or she were faced by an attack which caused a reasonable apprehension of death or serious harm.⁴⁰ Under federal criminal law, the same limitation is imposed.⁴¹ Stanley Yeo notes an opinion that s 267 is limited by ss 271(2) and 272.⁴² This is supported by other legal scholars.⁴³

Analysis of the explanatory notes, second reading speech and Hansard for *Criminal Law Amendment Bill 1996* (Qld) does not clarify this issue for s 267.⁴⁴ The explanatory notes do make it clear the purpose of the s 36 amendment was to “broaden” s 267, however there is no clear detail with regards to whether s 267 is subject to the limitations of ss 271(2) and 272. To further assist interpretation in this respect, it may be helpful to consider similar legislation in other jurisdictions.

In UK, extended defence provisions for home owners against intruders (termed “householder cases”) have been effected by *Crime and Courts Act 2013* (UK).⁴⁵ The result being that, in contrast to self-defence which is conditioned on the use of force which is not “disproportionate”, the availability of the defence for “householder cases” is instead conditioned on the use of force which is not “grossly disproportionate”.⁴⁶ In New South Wales (Australia), the *Home Invasion (Occupants Protection) Act 1998* (NSW) does not appear to delineate any clear restrictions on use of lethal force in defending residential premises.⁴⁷ Section 244 *Criminal Code* (WA) provides extended rights to householders to defend against home invasions. Case law suggests there is no requirement by s 244 *Criminal Code* (WA) that the force used be objectively necessary, the requirement being only that the accused has reasonable grounds for their subjective belief that it is necessary.⁴⁸ Force that is intended or likely to cause death is only authorised in situations where the occupier has reasonable grounds to believe that violence is being used, is likely to be used or is threatened in relation to a person by a home invader.⁴⁹ However, the legal scholars cited by Schloenhardt again, in a similar manner as for s 267 *Criminal Code* (Qld), disagree that s 244 *Criminal Code* (WA) (or any of the similar provisions in other jurisdictions mentioned above) authorises the use of lethal force outside the restrictions imposed by the general provisions of self-defence.⁵⁰ Other legal scholars including Eric Colvin and John McKechnie disagree with the interpretations made by these scholars.⁵¹

There is case law in Queensland indicating that use of lethal force under s 267 is not restricted by the limitations of ss 271(2) and 272.⁵² Yet respected legal scholars dissent in respect of this.⁵³ There is still conjecture surrounding this legal issue. In-depth consideration by HCA may be helpful.

IV. ADVANTAGES AND DISADVANTAGES OF S 267

As indicated above, it seems interpretation of s 267 is still in conjecture. For this reason, the approach taken in regards to detailing advantages and disadvantages of s 267 will be as follows:

- The advantages and disadvantages of s 267 will first be detailed based on the broad interpretation, which includes the authorisation of lethal force without it being restricted by the limitations of ss 271(2) and 272.

⁴⁰*Zecevic v DPP (Vic)* (1987) 162 CLR 645, 645.

⁴¹*Criminal Code* (Cth) s 10.4.

⁴²Stanley Yeo, ‘Killing in Defence of Property’ (2010) 36(2) *Commonwealth Law Bulletin* 281, 284.

⁴³Ian Dobinson and Edward Elliott, ‘A Householder’s Right to Kill or Injure an Intruder under the *Crimes and Courts Act 2013*: An Australian Comparison’ (2014) 78 *Journal of Criminal Law* 80, 95.

⁴⁴Explanatory Notes, *Criminal Law Amendment Bill 1996* (Qld) 10; Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, 4872 (Denver Beanland).

⁴⁵*Crime and Courts Act 2013* (UK) c 22, s 43; Tasmania Law Reform Institute, *Review of the Law Relating to Self-Defence: Issue Paper No. 20*, Report (2014) 35-6.

⁴⁶*Crime and Courts Act 2013* (UK) c 22, s 43; Tasmania Law Reform Institute, *Review of the Law Relating to Self-Defence: Issue Paper No. 20*, Report (2014) 35-6.

⁴⁷*Home Invasion (Occupants Protection) Act 1998* (NSW); Gareth Griffith, ‘Home Invasion and Self-Defence: An Update’ (Briefing Paper No 17, Parliamentary Library, NSW Parliament, 1998); Schloenhardt, above n 5, 487

⁴⁸*James v Sievwright* [2003] WASCA 251 (17 October 2003) [11], [22]; see also, Crofts, above n 17, 180.

⁴⁹*Criminal Code* (WA) s 244(1A); see also, Crofts, above n 17, 186.

⁵⁰Yeo, above n 42.

⁵¹E Colvin and J McKechnie, *Criminal Law in Queensland & Western Australia: Cases & Commentary* (LexisNexis, 5th ed, 2008) 302.

⁵²*R v Cuskelly* [2009] QCA 375 (8 December 2009) [27], [30]; *R v McMartin* [2013] QCA 339 (12 November 2013) [26].

⁵³Schloenhardt, above n 5, 487; Yeo, above n 42; Dobinson and Elliott, above n 43.

- We will then consider how the advantages and disadvantages would change if the narrower interpretation of s 267 (which is restricted by the limitations of ss 271(2) and 272) proves to be the accepted interpretation in the future.

Advantages:

- People are more vulnerable in their homes, as invasions by intruders threaten the householder's privacy, dignity, autonomy and honor.⁵⁴ Crimes which make similar threats, such as rape and kidnapping, allow for use of deadly force.⁵⁵ Therefore, s 267 provides appropriate protection.
- A householder cannot be expected to think completely objectively and respond in proportion when faced by a home invasion when any underestimation of the threat could result in grave consequences (for instance, the death or serious harm of family members).⁵⁶ Appropriately, s267 does not require the force used be objectively necessary and proportionate.⁵⁷
- A householder startled by an intruder in the night is not well-positioned to make a speedy, accurate evaluation regarding the intentions of (and level of threat posed by) the intruder.⁵⁸ Section 267 allows flexibility in the level of force used.⁵⁹
- Section 267 sends a message to society that home invasions will not be tolerated.⁶⁰
- Section 267 acts as a deterrence to potential home intruders.⁶¹
- Section 267 helps provide people a greater sense of security at home.
- Section 267 supports community values and legal policy which revolve around a person's right to defend in his or her home.⁶²

Disadvantages:

- Section 267 may encourage inappropriately violent self-help.⁶³
- Section 267 may unduly compromise the value of human life in order to protect property.⁶⁴
- Section 267 may result in unnecessary deaths.⁶⁵
- Section 267 may compromise a fundamental right, namely the right to life.⁶⁶
- Section 267 may facilitate the abuse of physical force by violent householders.⁶⁷

If the narrower interpretation of s 267 (which is restricted by the limitations of ss 271(2) and 272) is adopted, then the likely impact on the advantages and disadvantages:

The nature/character of the advantages and disadvantages would remain similar but at a lower level of intensity. For instance, the householder would still have some degree of extended ability to defend with the use of force and not be as constrained by objective necessity and proportionality in the level used but this would not be to the point that lethal force could be used without adherence to the restrictions of ss 271(2) and 272. So advantages such as allowing the householder to defend in a vulnerable setting with flexibility in terms of the level of force used, deterring potential home intruders, increasing the sense of security in homes, and so on, would still be present but at a lower level of intensity due to the greater caution that must be exercised given the restrictions of ss 271(2) and 272. Similarly, disadvantages such as encouraging inappropriately violent self-help and facilitating the abuse of physical force may still be present but at a lower level of intensity (for instance, the frequency of unnecessary deaths would likely be less).

⁵⁴ Tasmania Law Reform Institute, above n 46, 34; Stuart P Green, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' (1999) *University of Illinois Law Review* 1, 1.

⁵⁵ Tasmania Law Reform Institute, above n 46, 34; Green, above n 54.

⁵⁶ Tasmania Law Reform Institute, above n 46, 34.

⁵⁷ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27], [29]-[30]; Crofts, above n 17, 180.

⁵⁸ Tasmania Law Reform Institute, above n 46, 34.

⁵⁹ *R v Cuskelly* [2009] QCA 375 (8 December 2009) [27], [29]-[30]; Shanahan et al, above n 6, 364-5.

⁶⁰ Green, above n 54.

⁶¹ *Ibid.*

⁶² *R v Cuskelly* [2009] QCA 375 (8 December 2009) [30]; *Home Invasion (Occupants Protection) Act 1998* (NSW) s 5; Law Reform Committee of the Northern Territory, above n 1.

⁶³ Tasmania Law Reform Institute, above n 46, 5.

⁶⁴ Yeo, above n 42, 281-2; Kenneth Lambeth, 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82, 82.

⁶⁵ Tasmania Law Reform Institute, above n 46, 5.

⁶⁶ *Ibid.*; Schloenhardt, above n 5, 22; Lambeth, above n 64.

⁶⁷ Tasmania Law Reform Institute, above n 46, 5.

V. RELEVANCE OF REPORT

In recent years there has been a multitude of fatal conflicts that have occurred in and around residential dwellings across the globe including Australia, USA and UK.⁶⁸

VI. CONCLUSION

In the main, the advantages and disadvantages of s 267 involve competing tensions between:

1. Giving effect to values and policy considerations revolving around a householder's right to defend in his or her home
And, alternative the coin,
2. Encouraging violence and unduly compromising the value of human life

The exact interpretation of s 267 is not entirely clear and would benefit from further legislative and judicial consideration. The position appears similar, internationally, at law.

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