

88. Defence of a Dwelling House: s 267

88.1 Legislation

[Last reviewed: January 2025]

Criminal Code

[Section 267](#) – Defence of dwelling

88.2 Commentary

[Last reviewed: January 2025]

‘Dwelling’ is defined in s 1 of the *Criminal Code*.

In *R v Bartram* [\[2013\] QCA 361](#), the Court of Appeal considered the area underneath a highset house was part of the building or structure. Muir JA observed at [19]-[20]:

There is no reason why, by reference to the plain words, “building or structure, or part of a building or structure ... kept by the owner or occupier for the residence therein of himself or herself ...” should not extend to the underneath of a highset residence which is accessible and used, or even useable, by the owner or occupier for domestic purposes. The definition does not purport to confine a “dwelling” to any particular part of a “building” or “structure”. It, in fact, extends the meaning of dwelling to include “part of a building or structure”. In everyday speech, reference to a highset “dwelling”, at least as a general proposition, includes reference to the whole of the relevant structure from the top of the roof to the ground.

In this case, a normal, and perhaps integral, part of a dwelling, the laundry, was located under the house and linked to the living area of external stairs. The laundry and the rest of the underneath of the house, part of which was accessible and useable for storage and other purposes, were part of the relevant residential “building” or “structure”.

In *R v Richards* [\[2023\] QCA 7](#), the Court of Appeal upheld the trial judge’s ruling that a concrete pad on the ground between a house with carport attached and a rear shed was not a structure or part of those buildings or structures. McMurdo JA observed at [20]-[21]:

The concrete slab was useful for the parking of vehicles, and for the movement of vehicles between the shed and the driveway. But the slab was no more part of the shed than was the driveway to it.

... [I]t might be accepted that there was some “communication” between the shed and the house/carport. But that did not make the slab a structure within the second paragraph of the definition of a dwelling.

In *R v McMartin* [\[2013\] QCA 339](#), the jury were incorrectly instructed that the defence was excluded if the prosecution proved the Defendant had used force intending to kill

or cause grievous bodily harm to the Complainants. The fact a Defendant intended to kill or do grievous bodily harm in using force does not exclude the defence, for such an intention could accompany the use of force with the purpose and belief referred to by s 267.

See *R v Cuskelly* [\[2009\] QCA 375](#) for a discussion of the defence and a comparison with the requirements of self-defence in ss 271 and 272. The Court of Appeal there allowed an appeal against conviction, the trial judge having failed to direct the jury on the availability of the defence of dwelling where it arose on the facts in addition to self-defence.

For a useful examination of the authorities on ‘peaceable possession’, see *Shaw v Garbutt* [\(1996\) 7 BPR 14](#).

88.3 Suggested Direction

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The law provides certain protection to a householder where there is an intrusion onto [his/her] premises by someone [he/she] believes is intending to commit a crime. Our law provides 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 intent to commit an indictable offence in the dwelling; and**
- (b) it is necessary to use that force.**

(Consider providing the jury with a copy of the words of s 267).

I will refer to this as a defence, but it is important you understand it is not something that the defendant must prove but rather, it is something that the prosecution must rule out beyond reasonable doubt. This it may do by excluding any one of the elements of the defence.

Those elements are that:

- 1. the Defendant was in peaceable possession of a dwelling [(or if the defendant was an agent of the occupier): the defendant was lawfully assisting or acting by the authority of a person in peaceable possession of a dwelling];**
- 2. the Defendant used force to prevent or repel another person from unlawfully entering or remaining in the dwelling;**

3. the Defendant believed on reasonable grounds the other person was attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and
4. the Defendant believed on reasonable grounds it was necessary to use the force.

The first element requires consideration of whether the Defendant was in peaceable possession of a dwelling [adjust if the defendant was an agent of the occupier]. A dwelling is a building or part of it kept by the owner or occupier for [his/her] residence and that of [his/her] family or servants. [Enlarge upon the definition of dwelling if it is in issue whether the relevant building or structure is a dwelling]. On the evidence the Defendant was [describe facts related to the defendant's possessory relationship with the dwelling].

The second element requires consideration of whether the force was used for the purpose of repelling the intruder/s [identify the relevant person/s] from unlawfully entering or remaining. If the prosecution has satisfied you beyond reasonable doubt that the [the relevant person/s] was lawfully on the premises, or that the force was used not to repel [him/her/them] but [e.g. as a form of vengeance (as the case may be)] then this particular defence is not open. [Identify any issues of fact to be resolved re this element.]

The third element requires consideration of whether the Defendant believed on reasonable grounds that the intruder/s was/were attempting to enter or to remain in the dwelling with intent to commit an indictable offence in it. An indictable offence is an offence of sufficient seriousness to require it to be dealt with by a higher court – in this case it being suggested that the Defendant believed [the relevant person/s] meant to [refer to relevant indictable offence(s)]. I instruct you such an offence is an indictable offence. If you are satisfied beyond reasonable doubt that the Defendant did not have that belief, or did not hold it on reasonable grounds, the prosecution has properly excluded the defence and you need not consider it further. [Identify any issues of fact to be resolved re this element.]

The fourth element requires consideration of whether the Defendant believed on reasonable grounds it was necessary to use the force. [Identify any issues of fact to be resolved re this element.]

You should remember that a person defending [himself/herself] or [his/her] home cannot always weigh precisely the exact action which [he/she] should take in order to avoid the threat which [he/she] reasonably believes that [he/she] faces at the time. You should approach your considerations in a practical way. Take account of the situation in which the Defendant found [himself/herself]. Bear in mind that unlike those of us in this courtroom, the Defendant would appear to have had little, if any, opportunity for calm deliberation or detached reflection. It is relevant, of course, to look at the degree of force the Defendant actually used in considering whether [he/she] could have believed on reasonable grounds it

was necessary, but it is only a part of the whole picture. You must consider the whole of the circumstances.

If you conclude in the end that the Defendant did not believe that the force [he/she] used was necessary, or if [he/she] did have that belief, that it was not held on reasonable grounds, that is the end of this particular question and this defence could not apply.

I remind you it is for the prosecution to exclude this defence by excluding at least one of its elements beyond a reasonable doubt. If the prosecution cannot, to your satisfaction beyond reasonable doubt, exclude the possibility that [describe the alleged offence] occurred in the use of force which the Defendant believed on reasonable grounds was necessary to prevent unlawful entry or remaining in the dwelling as I have outlined it to you, that is the end of the case. The Defendant would not be regarded as criminally responsible for the result and you should find the Defendant not guilty.