

## **Section 272 – Self-Defence against provoked assault, when death or grievous bodily harm occurs**

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### **Further commentary on section 272**

Section 272 provides for more restrictive rights of self-defence for a defendant who started a fight with the deceased/complainant, or provoked the deceased/ complainant to assault him/her.

This section applies where the defendant was the first to assault, or has behaved in such a way as to lead to a response from the deceased/complainant in the form of an assault with the degree of violence referred to in section 272 (that is, such violence as to cause reasonable apprehension of death or grievous bodily harm).

The section places restrictions on the extent to which the defendant may resort to retaliatory force and reflects a policy which requires persons who initiate conflict to make some sacrifices to stop it.

A person who is subject to section 272(1) cannot use any defensive force unless the assault they have provoked is so serious as to raise a reasonable apprehension of death or grievous bodily harm and to induce a reasonable belief that a defendant has no other way of avoiding death or grievous bodily harm than their own resort to the lethal or near lethal force in fact used by them.

If a provoked assault is not that serious – then the person who provoked it must tolerate it.

The section is concerned with two states of mind of the defendant, namely –

- i. their apprehension; and
- ii. their belief that force is necessary.

Those states of mind are to be subjectively determined – but they must be objectively reasonable.

If those conditions are satisfied, then, subject to the proviso in section 272(2), a defendant is not criminally responsible for the force reasonably necessary for his or her preservation – including force which may cause death or grievous bodily harm.

In *R v Wilmot* [\[2006\] QCA 91](#), Jerrard JA said:

[47] On the facts described herein, it would have been open to the jury to consider that s 272 applied, in that Mr Wilmot [the defendant] did provoke an assault upon him by Mr Norman [the deceased], who assaulted Mr Wilmot with sufficient violence or threats of violence as to cause a reasonable apprehension of at least grievous bodily harm. I consider Mr Norman's assault with the metal bar constituted by Mr Norman's producing it and threatening to use it on the aggressive and alcohol fuelled Mr Wilmot was an assault which a jury would properly consider lawful. That was why s 272 applied, if self-defence was available, when Mr Wilmot later brutally bludgeoned Mr Norman to death with the bar. Whether s 271(2) was available, or only s 272(1), it is significant in rebuttal of either defence that Mr Wilmot's subsequent explanation for what happened, given to the police, only attempted to justify one blow and not the six that were delivered, and that he attempted to prepare a false account of events and did dispose of the clothing which he was wearing. That conduct was inconsistent with a belief on reasonable grounds that the force he had used was necessary for his own self-defence.

[48] The remaining questions for the jury on a s 272(1) defence were whether Mr Norman's behaviour had caused Mr Wilmot to believe on reasonable grounds that it was necessary for him to use force in self-defence to preserve himself from death and grievous bodily harm, and whether the force Mr Wilmot actually used was reasonably necessary for his self-preservation. The learned judge actually put those very propositions to the jury, in the passages conceded to be misdirections for a defence relying on s 271(2), self-defence against unprovoked assault. The learned judge did not direct the jury on any of the requirements [of] s 272(2) which limit the availability of the plea of self-defence to a provoked assault.

[49] I consider the third obligation specified in s 272(2), namely that before the necessity for using potentially lethal force in self-defence [arose] the person using such force declined the conflict and quitted it or retreated from it as far as was practicable, applies only to the circumstances described in the two preceding clauses in that paragraph. That is, I agree with the view suggested by Hart J in *Muratovic* [at 28] that those two earlier clauses, respectively describing a person who used murderous violence in the first place or else before it was necessary, and who is thereby disqualified from the protection given by s 272(1), can re-qualify for that protection if that person has retreated before using lethal force. I therefore disagree with the suggestion by Stanley J in *Reg v Johnson* [1964] Qd R 1 at 14 that s 272(1) applies only if the defendant has

declined further combat or retreated. Whichever view is correct, a view of the facts was open to the jury which would have entitled Mr Wilmot to plead s 272(1), namely that he had declined further conflict with Mr Norman and attempted to retreat from Mr Norman's assault before ultimately using lethal force ...

Hart J's approach – which allows a defendant to “re-qualify” – was adopted by the Western Australian Court of Criminal Appeal in *Randle v The Queen* [\(1995\) 15 WAR 26](#), in which Malcolm CJ said:

... despite the fact that the first two clauses of the second paragraph of s 249 state cases where the protection would not be available in any event, the effect of the final clause is to qualify that absence of protection by stating particular circumstances under which the defence will nonetheless be available in either of those two cases.<sup>1</sup>

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**Sample direction:**

**The criminal law does not only punish; it protects as well. It does not expect citizens to be unnaturally passive, especially when their safety is threatened by someone else. It does not always follow that the one who wins the struggle has committed a crime. The law does not punish someone for reasonably defending himself or herself.**

**You will appreciate from what I have said earlier about the prosecution bearing the onus of proof that the defendant does not have to satisfy you that this defence applies. The prosecution must exclude or negate it, beyond reasonable doubt, to satisfy you that the defendant acted unlawfully.**

**And if the prosecution cannot exclude, beyond reasonable doubt, the possibility that [the killing or the GBH] occurred in self-defence, as the law defines it, then that is the end of the case. The defendant's use of force would be lawful and you must find him/her not guilty.<sup>2</sup>**

**You should appreciate that the law of self-defence is drawn in fairly general terms to cover any situation that may arise. Each jury has to apply it to a particular**

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<sup>1</sup> See *Kenny: Criminal Law in Queensland and Western Australia*, 9<sup>th</sup> Edition, J Devereux and M Blake, Sydney 2016.

<sup>2</sup> The following cases may be of assistance: *R v Bojovic* [\[2000\] 2 Qd R 183](#); *Gray* [\(1998\) 98 A Crim R 589](#); *R v Prow* [\[1990\] 1 Qd R 64](#); *R v Muratovic* [\[1967\] Qd R 15](#); *Marwey v The Queen* [\(1977\) 138 CLR 630](#); *Zecevic v DPP* [\(1987\) 162 CLR 645](#) (re requirements in a common law summing-up).

situation according to the facts of the particular case. No two cases are exactly alike, so the results depend heavily on the common sense and community perceptions that juries bring into court.

Speaking generally, you will not be surprised to know that if the violence of the attacker is such that the person defending himself/herself reasonably fears for his/her life or safety, then the justifiable (or lawful) level of violence which may be used by the person attacked in self-defence will be greater also.

The level of violence in self-defence that is lawful depends on the level of danger created by the attacker and the reasonableness of the defendant's reaction to it.

Section 272 of the Criminal Code excuses a person from using lethal or near lethal force in certain circumstances. By “lethal or near lethal” I mean force that kills or does grievous bodily harm.

This section may apply where the defendant had good reason to believe he/she was in serious danger of losing his/her own life, or suffering a very serious injury, even though he himself provoked the assault.

Section 272 of our *Criminal Code* reads [you may wish to provide a copy of the section to the jury]:

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.”

**This section raises several matters for your consideration, namely:**

- 1. Whether the defendant unlawfully assaulted the deceased/complainant or provoked an assault from them?**
- 2. Whether the response from the deceased/complainant was so violent as to cause reasonable apprehension of death or grievous bodily harm?**
- 3. Whether the defendant believed, on reasonable grounds, that it was necessary, in order to preserve himself/herself from death or grievous bodily harm, to use force in self-defence?**
- 4. Whether the force in fact used was such as was reasonably necessary for his/her preservation from death or grievous bodily harm?**

[If this is an issue, you may add:

**You will see the proviso in section 272(2).**

**The defence does not apply where:**

- The defendant first began the assault with intent to kill or to do grievous bodily harm to the [deceased/complainant/some person]; or**
- The defendant endeavoured to kill or to do grievous bodily harm to the [deceased/complainant] before the necessity of so preserving himself arose.**

**However:**

**The defendant may “re-qualify” for the defence if, before such necessity of so preserving himself arose, the defendant declined further conflict and quitted it or retreated from it as far as was practicable.]**

**The burden remains on the prosecution at all times to prove that the defendant was *not* acting in self-defence (that is, was acting unlawfully), and the prosecution must do so, beyond reasonable doubt before you may find the defendant guilty.**

So, if the prosecution satisfy you beyond reasonable doubt of any one of the following, the defence has been excluded:

1. The assault by the other person was not of such violence as to cause reasonable apprehension of death or grievous bodily harm; or
2. That the assault did not induce the defendant to believe, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm to use the force used in self-defence; or
3. That the force used was more than was reasonably necessary to save the defendant from death or grievous bodily harm;

[if necessary, or

4. That the defendant first began the initial assault with intent to kill or to do grievous bodily harm to some person; or
5. The defendant endeavoured to kill or do grievous bodily harm to some person before the necessity of so preserving himself arose;

unless

In either case, before such a necessity for self-defence arose, the defendant declined further conflict, and quitted it, or retreated from it as far as practicable.]<sup>3</sup>

Remember it is for the prosecution to satisfy you beyond reasonable doubt that self-defence does not apply. There is no burden on the defendant to satisfy you that he was acting in self-defence, or to establish any one of those things I have described to you. To exclude the defence, the prosecution must exclude any one of those, if it can, beyond reasonable doubt.

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<sup>3</sup> On the question of retreat, contrast *R v Muratovic* [1967] Qd R 15 with *R v Johnson* [1964] Qd R 1 at 14.