

Criminal Code (Defence of Dwellings and Other Premises - Castle Law) Amendment Bill 2024

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REVISED* SUBMISSION OF TOBIAS KENNETT
TO THE
INQUIRY INTO CRIMINAL CODE (DEFENCE OF DWELLINGS AND OTHER PREMISES—
CASTLE LAW) AMENDMENT BILL 2024

* Revised 21 May 2024.

Dear Committee,

Thank you for the opportunity to make a submission. This submission is my own.

SUMMARY

- Regarding the inclusion of all “premises” (eg business/commercial/other properties), there are no special policy reasons why a special defence is required. Sections 266 and 271 of the *Criminal Code* are sufficient for cases involving non-dwelling premises.
- This amendment fails to properly have regard to the right to life, as well as the right of freedom of expression and associated rights. It is very disproportionate and puts the defence of property above the right to life. The Bill should be rejected; section 267 of the *Criminal Code* should be reduced in scope, not expanded.

BACKGROUND - CURRENT OR PAST REVIEW OF S 267

To bring it to the Committee’s attention that the broadening of s 267 to all premises was proposed as part of the drafting of the Criminal Code in 1995.¹ The 1992 Report reviewing the *Criminal Code* has not been digitised, so I have been unable to access a copy. However, the 1992 Report may be of relevance, as the Explanatory Notes do not explain why the proposed broadening of the provision was necessary, but the 1992 Report might explain this.

I also bring to the Committee’s attention that s 267 is **not** being reviewed as part of the Queensland Law Reform Commission’s review of particular criminal offences.²

POLICY REASONING BEHIND S 267

Section 267 is unique.

On one hand, it is not the only Criminal Code provision which makes lawful the use of force against a trespasser. Section 277 provides that an owner or controller of land or a building or

¹ *Criminal Code Bill 1995* (Qld) cl 73; Explanatory Notes, Criminal Code Bill 2009 (Qld) 22.

² Queensland Law Reform Commission, *Review of particular criminal defences: our terms of reference* (Background Paper 1, November 2023).

vehicle can use reasonable force to stop a person from entering, or remove a trespasser, or remove a person behaving in a disorderly way, as long as the owner or controller does not do grievous bodily harm.

On the other hand, s 267 is, in effect, the right to stop a burglar, given under s 419 of the *Criminal Code* the offence of “burglary” is simply “enter[ing] ... the dwelling of another with intent to commit an indictable offence in the dwelling”. Further, s 267 goes beyond s 277 by making lawful the use of lethal harm to repel a trespasser who a person believes is intruding into their home to commit an indictable offence. Indictable offences are not necessarily all as serious as we like to this; non-violent stealing (not robbery), hacking, illegal gambling, match-fixing, observations or recordings in breach of privacy,³ and fraud, concealments, destruction of documents, forgery and similar offences are all indictable.

The Explanatory Notes focus on the right to life being the policy reason behind and justification for the need a provision like s 267. As explained in the Explanatory Notes, s 267 operates as an important defence for homeowners who kill or seriously injure intruders before they have the opportunity of killing them. However, section 267 extends beyond just protecting life.

Section 267 is also concerned with protecting property. Originally, in *Semayne’s Case*,⁴ the castle doctrine was said to be about protecting both life and property (emphasis added):

But if theeves come to a mans house *to rob him*, or murder, and the owner or his servants kill any of the theeves in defence of himself *and his house*, it is no felony, and he shall lose nothing.

Subsequently to *Semayne’s Case*, William Blackstone acknowledged in book 4 of his *Commentaries on the Laws of England*, in his chapter 16 on burglary, “the natural right of killing the aggressor” (meaning the burglar). In *Cook’s Case*,⁵ the King’s Bench affirmed the right to use force to defend one’s home. That case involved the shooting of a bailiff attempting to illegally enter a dwelling. Finally, as Kenneth Lambeth observes:

In 1676, not long before the onset of the English Revolution, Hale sought to provide guidance on the use of lethal force by occupants to repel various attacks in their own homes. His Lordship created a distinction between excusable and justifiable homicide, the latter being available only in response to the attempted commission of a known felony. In circumstances of justifiable homicide, the occupant was not required to retreat from his house.

Nearly a century later, Foster approved, not only of Hale’s excuse/justification split, but also of the absence of any requirement to retreat from one’s own home in the face of an

³ On my reading, any unlawful entry into in a person’s home without their permission for the purpose of recording (even journalism) is an offence under *Criminal Code* s 227A. The offence comprises the following elements: (1) observes or visually records another person, (2) in circumstances where a reasonable adult would expect to be afforded privacy, (3) without the other person’s consent, and (4) when the other person is in a private place. A reasonable adult, when in their own home, expects to be afforded privacy and is in a private place. Thus, a journalist who unlawfully remains in a person’s house is someone s 267 can be invoked against.

⁴ (1604) 5 Coke Rep 91.

⁵ (1639) Cro Car 537.

attempted known felony. According to Foster, deadly force was justifiable in order to prevent any known felony, which included robbery, murder, rape, arson and burglary.

...

... In 1879, the Criminal Code Commission, which included Stephen, upheld the right of a person to use force in defence of property, but limited the use of force with the requirements of necessity and proportion.⁶

However, section 267 has an even broader policy basis than just protecting life and property. As was observed in *R v Cuskelly*⁷ by Keane and Muir JJA and Daubney J, the defence in s 267 draws on different policy reasons to self-defence provisions (emphasis added):

[30] ... Where it arises on the evidence, s 267 affords a separate, and more extensive, ground of defence to an accused. 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 s 271 and s 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 the defence afforded by s 267 were to be subsumed in practice by s 271 or s 272.

The overarching policy reason, in my view, is the right of privacy: the right to be free from interference and let alone. That is why *Human Rights Act 2019* (Qld) s 25 states (emphasis added):

25 Privacy and reputation

A person has the right—

- (a) not to have the person's privacy, family, *home* or correspondence unlawfully or arbitrarily interfered with

...

OPERATION OF S 267

As observed in *R v Cuskelly*⁸ by Keane and Muir JJA and Daubney J (emphasis added):

[25] ... As has been noted, the directions which the learned trial judge gave the jury reflected the notion that the appellant was engaged in the defence of his home without adverting to the *more liberal defence* available in consequence.

...

[27] ... s 267 does not require that the force used by an accused be no more than is reasonably necessary to make an effectual defence of his or her person against a would-

⁶ Kenneth Lambert, 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82, 106 (footnotes omitted).

⁷ [2009] QCA 375.

⁸ [2009] QCA 375.

be intruder. Further, if lethal force is used, *the accused need not reasonably apprehend death or grievous bodily harm from the accused's assault* in order to raise a defence under s 267.

...

[29] An accused person who is defending his or her home need not retreat from a threat *even if retreat is a reasonably available way to make effectual defence against a threatened assault.*

DWELLINGS VS PREMESIS

The Explanatory Notes talk of households. They present the Bill as if it is only intended to further homeowner's rights to defend their homes. However, the inclusion of the word premises means this provision would now extend to any premises, including shop, industrial facilities etc. This provision therefore goes greatly beyond the situations focused on in the Explanatory Notes.

Commercial and industrial facilities are not like homes. They are not usually places where a person does 'vulnerable' things like sleeping, showering etc. with the expectation of absolute privacy. They are also not 'castles' where people separate themselves from the public, employees, customers etc. They also do not contain (except for maybe local business premises) a person's lifelong assets and memories. Similarly, cars, boats and other facilities are not like homes, for the same reasons.

The committee should have carefully consider whether any special policy reasons exist which necessitate a specific *Criminal Code* defence relating to unlawful entry of a commercial or business premises, or personal assets like cars and boats. My view is that there are no special policy reasons why a special defence is required. Sections 266 and 271 are sufficient for cases involving non-dwelling premises.

If, as the Explanatory Notes state, the term 'premises' was included 'for the purpose of including invasions of motor vehicles, caravans, tents, etc' (ie to protect people who live in cars and tents), why just not define dwelling for the purposes of s 267 to include such, and only such, things, instead of using a definition which also extends to any building or structure and includes commercial and industrial uses.

Further, a 'dwelling' under the *Criminal Code* already includes vehicles, caravans, tents and the like because the definition of dwelling includes not just buildings, but also 'structures'. In *R v Rose*,⁹ a caravan was recognised as a 'dwelling' within the meaning of the *Criminal Code* definition.¹⁰ Thus, no change is needed because the definition already covers vehicles, caravans, tents and the like. How was this not picked up during the drafting phase?

⁹ [1965] QWN 35

¹⁰ See also legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Offences/Personal-safety

"You may use reasonable force to prevent someone unlawfully entering or remaining in your dwelling (including a caravan, tent and in some cases holiday accommodation)"

HUMAN RIGHTS AND THE ROLE OF POLICE VS CITIZENS

Example

Say, for instance, a small group of protestors lawfully enter a premises during the day (eg farm, office building). They start a sit in protest and, when asked, they refuse to leave. They are resisting threats from security to leave and have formed a close circle to prevent their removal.

At this point, the protestors are unlawfully remaining. They are likely also committing some form of indictable criminal offence. Would it therefore be lawful for the occupier and their security to assault (eg beat, hit, punch, drag) the protestors to remove them? This force appears reasonably necessary as there is no other way to remove them. After all, the police will ultimately need to use this force/violence to remove them. It also appears irrelevant the homeowner could have called the police. After all, the purpose of s 267 is to make it lawful for owners/occupiers to defend their home (if amended, their property) themselves. As was said in *R v Cuskelly*, a person "need not retreat from a threat even if retreat is a reasonably available way to make effectual defence" of their property.

Further, the protestors are in a group of more than one person, meaning sub-s (2) is enlivened. The same could be said of a single protestor, who protests in a well-lit building after 9pm as they would be "in the night".¹¹ If removing the protestors via force is not working, it would therefore seem lawful to inflict GBH in an attempt to make them leave out of fear of violence, given this is the only way of making them leave.

Through this example, it is obvious to see the current amendments are extremely problematic.

It is also worth mentioning that s 267 is already itself problematic. If a person broke into my house to cause damage to it or steal (both indictable offences) and they refuse to leave, and I threaten to stab them but they still don't leave, it would arguably be lawful for me to stab them in the arm so they run away? After all, it would seem I have no obligation to retreat or call police. Further, given they did not leave when I threatened them with stabbing, actually doing that act seems the only logical way to make them leave, given a mere threat was insufficient.

The observations here do not just apply to protestors. They apply equally to people like journalists doing investigations or simply upset customers or individuals who do not wish to leave at department store.

Comment

The Committee must consider the impact of the proposed new s 267 on the right of freedom for expression and associated rights, as well as the risk to the right to life. My view is that if that this Bill overly impacts upon human rights.

First, except in situations where an individual fears for their or others personal safety, GBH or death should **not** be authorised. The principle in law that life always prevails over property should be respected. We have come a long way since 1600s England. A person should not be authorised to cause serious harm simply because a person is committing any old indictable offence in their house and refuses to leave. Section 267 already goes beyond this as explained

¹¹ The definition of night means 9pm to 6am: *Criminal Code* s 1 (definition of 'night').

above, so further expanding it as proposed by the amendment Bill is unnecessary. If anything, section 267 should be amended so it has a narrower operation.¹²

Second, except where there is some actual risk to safety or property, only police should be authorised to repel/remove individuals from premises if they are resisting and cannot be removed without bodily harm/injury. There are an obvious reasons for this: it is better left to trained police to disperse protestors rather than angry occupiers/owners; we shouldn't be encouraging vigilantism. If this was to be achieved, s 277 would also need amendment.

Third, protection of freedom of expression is required in the bill. My view is that the requirement to have police remove non-violent and non-destructive (of property) people achieves this, as police are left to decide whether or not to remove protestors.

HUMAN RIGHTS STATEMENT OF COMPATABILITY

It is very concerning the Statement of Compatibility does not consider the implications on the right of freedom of expression and associated rights. There is an obvious conflict between the extension of s 267 to all premises and the right of freedom of express as discussed above, so it is bizarre that freedom of expression is not even mentioned in the Statement of Compatibility.

Further, the Statement of Compatibility also does not properly consider the right to life. It does not in any way meaningfully engage in consideration of Bill's compatibility with the right to life in the context of non-dwelling premises. There is no mention of other premises in the Statement of Compatibility. In the "Overview of the Bill" section, the Bill is described as follows;

*The objective*¹³ of the Bill is to amend section 267 of the Queensland Criminal Code (the Code) and provide clearer guidance and legal protection for individuals who use force to defend themselves or others within their homes. This amendment is commonly referred to as the 'Castle Doctrine'.

Section 267 of the Queensland Criminal Code governs the use of force in situations where a homeowner or occupier defends their property. However, an increase in home invasions due to uncontrollable youth crime and crime in general across Queensland have called into question the clarity and applicability of this provision. The proposed amendment seeks to broaden the circumstances in which an individual can lawfully respond to a home invasion with such force that may result in grievous bodily harm or even death to the intruder.

The complete omission from the Statement of Compatibility of any mention of expanding the defence under s 267 to any premises misrepresents the Bill. This is a fundamental and major change to s 267, which currently only concerns dwellings and reflects special policy reasons relating to homes being castles. The purpose of expanding the scope of s 267 is such a key purpose behind the Bill that the Bill's title even refers to it: "Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024".

¹² On this point, I suggest reading Kenneth Lambert, 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82

¹³ Rather than an objective.

The Statement of Compatibility also represents, in my view, a very poor and token attempt at fulfilling the obligations imposed by *Human Rights Act 2019* s 38, which specifically requires an explanation of “the nature and extent of the incompatibility”. I am of the view that it doesn’t even meet the requirements of s 38, because nowhere within the Statement of Compatibility does the Member for Hinchinbrook actually explain the nature and extent of the incompatibility, only that it “may contravene section 16 of the HR Act, the Right to Life.”. How so? How much?

I urge the Committee to strongly consider, as part of its report to the Legislative Assembly, stating some dissatisfaction with the quality of the Statement of Compatibility provided. Human Rights are not a joke and should be taken seriously.

CONFUSED LEGISLATIVE INTERPRETATION

In the Explanatory Notes, it is said that (emphasis added):

“Under the current section 267, when faced with a home invasion, an individual is limited to *only using ‘necessary’ force* to prevent or repel the home invasion *and* it must be done under the ‘reasonable belief’ that the intruder was entering the dwelling with intent to commit an indictable offence.

An individual 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 severe consequences (for instance, their own death or serious harm, or that of a family member).”

However, section 267 says (emphasis added):

267 Defence of dwelling

It is lawful ... to use force ... if the person using the force *believes on reasonable grounds—*

...

(b) *it is necessary to use that force.*

The Explanatory Notes are therefore not correct. The test under s 267 is not whether the force was objectively necessary. Rather, it is whether the user of the force had a belief on reasonable grounds that the force was necessary. This is a lower standard.

FINAL COMMENT

[REDACTED]

I have explained my concerns r s 38 above.

Regarding (b), I myself cannot understand how a Member of Parliament, a person whose job it is to make and scrutinise laws, has said that the intention of including the word ‘premises’ is for the purpose of ‘including invasions of motor vehicles, caravans, tents etc.’. The term ‘premises’ clearly, plainly and obviously extends to well beyond such things, to any building or structure on

it in Queensland. This is blatantly obviously; the definition literally says '**premises** includes- (a) building'. Further, the definition already covers caravans and tents!

Also, I cannot fathom how a Member of Parliament has said that the Bill's 'objective is to 'provide clearer guidance and legal protection for individuals who use force to defend themselves or others *within their homes*.' First, it is blatantly obvious that the term 'premises' includes commercial and industrial places, meaning including it in the provision makes the provision extend well beyond homeowners, home invasions and homes. Second, it is blatantly obvious, given that para (c) says 'the land or water where a building .. is situated', that the proposed new s 267 would extend well beyond 'within [the] home' to places like lawns or yards.

[REDACTED]

| [REDACTED]

| [REDACTED]

The Committee is more than welcome to redact any part of my submission if it is contrary to the rules of Parliament.