

Self-defence law in Australia

Most of us will fortunately go through life without being a victim of a criminal assault committed either against our personal selves, or our property. However, there will also be a significant number of people who will unfortunately face a situation where there is an attempt by another party to inflict personal harm, or to injure property. The law recognises that in such instances, self preservation of either the self or the property is allowed, making way for the defence of self-defence.

Self-defence in the law

The general rule regarding self-defence is that a person is allowed to take any defensive or evasive steps that they believe to be necessary. Unlike other areas of law, self-defence isn't reliant on a specific formulaic approach, but rather, is dependent on the facts of the matter, with the question left for the courts and a jury to decide.

At common law, the leading case on self-defence is *Zecevic v DPP* (1987) 162 CLR 645, where the accused killed his neighbour after an argument. The accused argued he believed that the deceased had a knife and a shotgun in his possession, which compelled the accused to go into his unit to retrieve his gun, and as a consequence, shooting his neighbour dead.

During the trial the presiding judge withdrew the issue of self-defence, resulting in a conviction. On a successful appeal to the High Court, a retrial was ordered with Dawson and Toohey JJ setting out the requirements for self-defence:

“The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide.”

Looking to self-defence in legislation, we can turn to s 10.4(2) of the *Criminal Code 1994* (Cth) which states the following:

A person carries out conduct in self-defence if, and only if, he or she believes the conduct is necessary:

- to defend himself or herself or another person; or
- to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
- to protect property from unlawful appropriation, destruction, damage or interference; or
- to prevent criminal trespass to any land or premises; or
- to remove from any land or premises a person who is committing criminal trespass.

Is self-defence available for the defence of others?

The term ‘self-defence’ may imply that it is only available when the person is under threat themselves, but in actual fact, it can also be used in the defence of another. Traditionally speaking under the common

law, self-defence of another was usually reserved for relationships that fell into the category of child and parent, wife and husband, or 'master and servant'. However, the position may have changed, and many jurisdictions in Australia allow for a person to use force in defence of another such as s 418(2)(a) of the *Crimes Act 1900* (NSW) or s 9AC, s9AE(a) of the *Crimes Act 1958* (VIC) for example.

Self-defence of property

Self-defence as a principle is available for acts in defence of property. However, the use of lethal force is probably not justified under the test set out in *Zecevic*, with the High Court noting that the only justification for the use of lethal force is in situations where the threat was such, that the person held a reasonable apprehension that death or serious harm may be the result of the attack.

Jurisdictions that make reference to the use of force in the defence of property, such as s 267 and s 274-278 of the *Criminal Code 1899* (QLD), generally states any use of force in the defence of property must be reasonable and necessary. Therefore, force that is likely to cause death or grievous bodily harm is for the most part, prohibited.

This article is only a very general overview of the laws regarding self-defence and is not intended to be a comprehensive overview of the defence. If you have any issues regarding criminal law, please seek the assistance of a lawyer who will be able to assist.

Self defence in a home invasion is treated similarly in all jurisdictions -- there are some quirks but generally, the homeowner has to be acting in self defence because they fear for their safety or their family's safety and they need to have a reasonably proportionate response to the threat," Toole said.

"Except in South Australia, where one particular case where an elderly man shot an intruder prompted a change. Now a homeowner's response doesn't have to be reasonable or proportionate."

The case was that of tow-truck driver Kingsley Foreman who shot a robber, armed with a replica pistol, after he stormed into Foreman's bedroom.

Jurors were told the robber was shot in the back, but that Foreman feared for his life, as well as his invalid wife. After a four-day trial, charges of murder and manslaughter were dropped and Toole said the case turned the spotlight on South Australia's laws of self defence.

"The case set a precedent that someone could be acting in self defence but the response is disproportionate to the threat," Toole said.

No matter where you live in Australia, Toole said self defence was dependent on fearing for your safety.

"You have to be acting in self defence -- and that means you need to fear for your life, or that your wife is going to be kidnapped or stabbed.

"You have to be acting for a defensive purpose, not because you're angry or you fear your property will get stolen."