

Review of particular criminal defences

Provocation to assault information sheet

Version November 2023

Provocation as a defence to assault is in sections 268 and 269 of the Criminal Code.

The use of force against a person without their consent is an assault, which is unlawful unless it is authorised, justified or excused by law.¹ If the use of force is covered by the defence of provocation, it is excused by law.

Sections 268 and 269 provide a complete defence to an offence containing assault as an element.² This includes common assault, assault occasioning bodily harm and serious assault.³ But, it does not include an offence such as wounding, grievous bodily harm, and choking, suffocation or strangulation in a domestic setting.⁴ It also does not apply to unlawful homicide.⁵ A separate partial defence to murder for killing on provocation is in section 304 of the Code.⁶

Section 268 defines provocation for the defence. It requires **a wrongful act or insult** by the victim that was **serious enough to cause an ordinary person to lose self-control** and assault the victim. The ordinary person test is an objective standard for measuring the defendant's conduct. The 'governing principles' of the test are 'equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard'.⁷

268 Provocation

- (1) The term provocation, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.
- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

The elements of the defence are in section 269. It requires that:

- there was provocation for the assault,
- the provocation actually deprived the person of their power of self-control,
- the person acted on the provocation **on the sudden, before there was time for their passion to cool**, and
- the force used by the person was not out of proportion to the provocation and not intended or likely to cause death or grievous bodily harm.

If provocation is available on the evidence, the prosecution has the burden of excluding it beyond a reasonable doubt. If it is not excluded, the defence is a complete defence which entitles the person to be found not guilty (acquitted) of the charge.

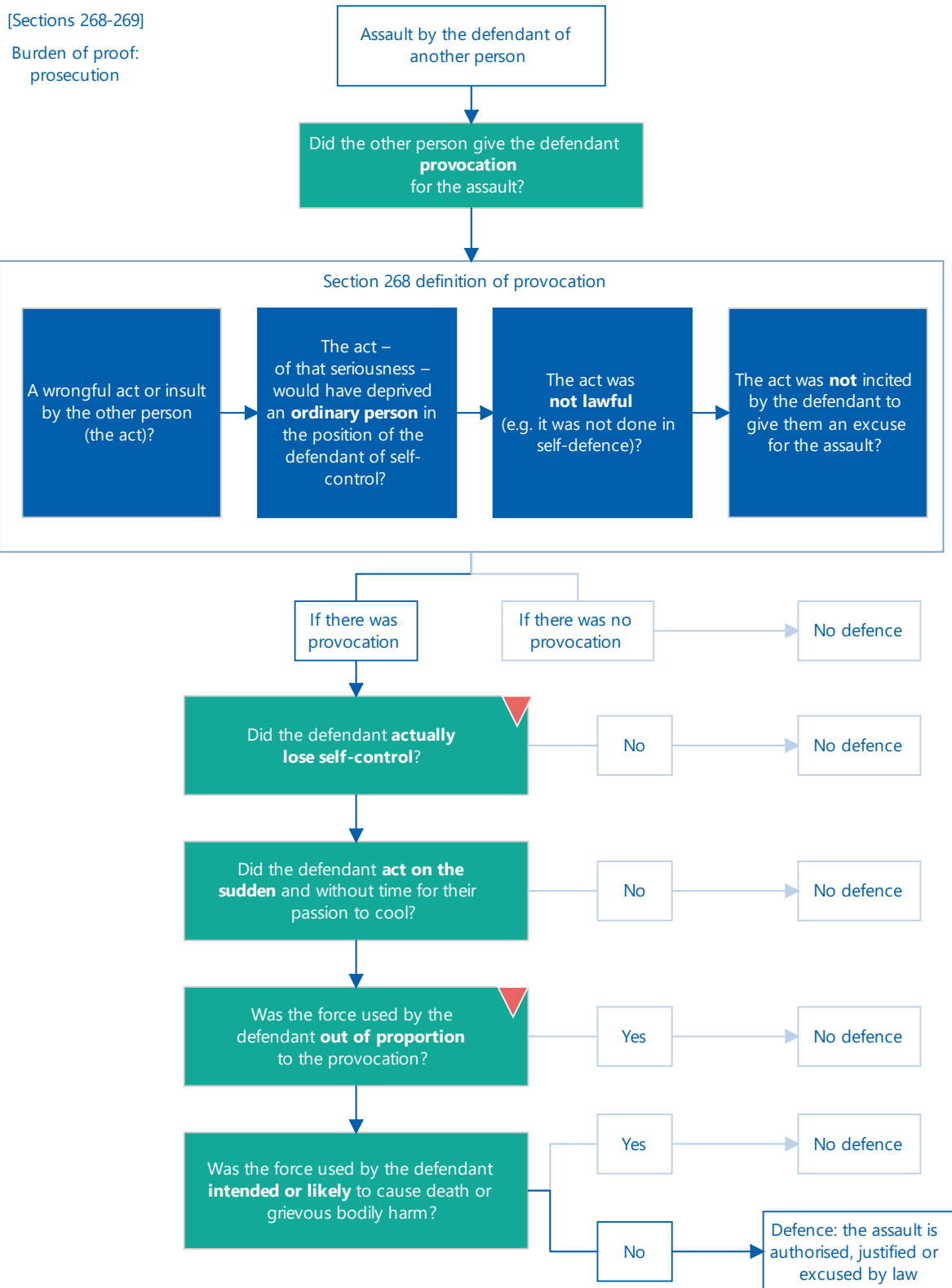
269 Defence of provocation

- (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.
- (3) A lawful act is not provocation to any person for an assault.

Provocation is not a defence to assault at common law.⁸ The defence of provocation to assault was a new defence included in the Criminal Code when it first came into force in 1901. With some differences, it was based on the partial defence of provocation to murder and was said to recognise what was 'in common life assumed to be a natural rule'.⁹ Sections 268 and 269 have not been changed since that time.

Concerns about the defence have tended to focus on the fact it is limited to offences containing assault as an element.¹⁰

Figure 1: provocation to assault provision in Queensland



▼ Taking into account all the circumstances e.g. characteristics of the defendant and the defendant's relationship with the person

As part of their duty to ensure a fair trial, judges in criminal trials are required to sum up the case and give the jury directions about the law and how to apply it, and how to assess the evidence. To help judges with this, suggested directions in the Queensland Supreme and District Courts Criminal Directions Benchbook offer guidance on the directions that should be given.

The following extract is from the suggested directions in the benchbook on the complete defence of provocation under sections 268 and 269. View the full text on the [Queensland Courts website](#).¹¹

Suggested directions for sections 268, 269: provocation

An assault is excused by law if, at the time of the assault, the defendant was acting under what our law defines as 'provocation'. Provocation, as defined in our law, is a defence to an assault.

Provocation is defined in our Criminal Code as

... any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered ...

Our law provides that:

When such an act or insult is done or offered by one person to another, the former is said to give the latter provocation for an assault.

The defence of provocation operates in this way:

A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if –

- the person is in fact deprived by the provocation of the power of self-control; and
- acts upon it on the sudden and before there is time for the person's passion to cool, and
- if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely to cause death or grievous bodily harm.

It is not for the defendant to establish the defence by proving that he or she was provoked to assault the complainant.

It is for the prosecution to exclude the defence by satisfying you, beyond a reasonable doubt, that it does not apply.

You need to consider –

- whether the complainant has offered the defendant provocation for the assault;
- whether the defendant was deprived by the provocation of the power of self-control;
- whether the defendant acted on the sudden and before there was time for their passion to cool; and
- whether their response to the provocation was proportionate.

Suggested directions for sections 268, 269: provocation cont.

... For the wrongful act or insult to amount to provocation, it must be of such a nature as to be likely, if done to an ordinary person, to deprive the ordinary person of the power of self-control.

In other words, the wrongful act or insult must have been serious enough to cause an ordinary person to lose self-control.

An ordinary person in this context is a person with the ordinary human weaknesses and emotions common to all members of the community and with the same level of self-control as an ordinary person of the defendant's age.

It means an ordinary person, in the position of the defendant, who has been provoked to the same degree of severity and for the same reason as the defendant.

So, the first question for you is whether the wrongful act or insult would have deprived an ordinary person in the defendant's position of the power of self-control?

... The next question for you is whether the defendant was in fact deprived of the power of self-control by the wrongful act or insult.

You must consider the gravity of the provocation to the particular defendant. His/her race, colour, habits and relationship to the complainant may all be part of this assessment.

Conduct which might not be insulting to one person may be extremely insulting to another because of that person's age, race, ethnic or cultural background, physical features, personal attributes, personal relationships or past history ...

In considering whether the defendant was in fact deprived of the power of self-control by the wrongful act or insult, you must view the conduct or the words in question as a whole in light of any history or dispute between the defendant and the complainant. Particular acts or words which, considered separately, could not amount to provocation, may, in combination or cumulatively, be enough to cause the defendant to lose self-control in fact.

Also, the wrongful act or insult must have in fact induced the assault. A deliberate act of vengeance, hatred or revenge may not have in fact been induced by the wrongful act or insult despite the fact that such an act or insult was offered.

... Provocation only applies if the defendant has, in response to the provocation, acted on the sudden and before there is time for his/her passion to cool – before there is time for him/her to think about his/her response.

... The force used by the defendant must not be disproportionate to the provocation.

The question of whether force was disproportionate depends on all the circumstances of the case, including the physical attributes of the person offering the provocation, the nature of the attack, whether a weapon was used, what type of weapon and whether the person was alone or in company ...

The focus is on serious provocation, which would cause a sudden and proportionate response to it.

Queensland and Western Australia are the only Australian jurisdictions with a complete defence of provocation to assault. The Model Criminal Code does not include the defence. The Northern Territory previously had a complete defence of provocation for any offence where the defendant's conduct did not cause, and was not intended or likely to cause, death or grievous harm. However the provision was repealed in late 2006 to align with the Model Criminal Code.¹²

Criminal Code (WA)

245 Term used: provocation

The term **provocation** used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another, to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

246 Defence of provocation

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous bodily harm.

Criminal Code (NT) (repealed provision)

34 Provocation, etc.

- (1) A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person or the property of the person who gave him that provocation provided:
- (a) he had not incited the provocation;
 - (b) he was deprived by the provocation of the power of self-control;
 - (c) he acted on the sudden and before there was time for his passion to cool;
 - (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
 - (e) the act was not intended and was not such as was likely to cause death or grievous harm; and
 - (f) the act did not cause death or grievous harm.

Table 1: provocation to assault provisions in Queensland and other jurisdictions

Act name and jurisdiction	Defence of provocation to assault	Definition of provocation	Exclusions from the defence
Criminal Code (Qld)	<p>✓ applies to offences for which assault is an element if:</p> <ul style="list-style-type: none"> the assault is provoked, and the person is deprived of the power of self-control and acts on it on the sudden and before there is time for the person's passion to cool: ss 268–269 	any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another who is under their immediate care or to whom they have a conjugal, parental, filial or fraternal relationship, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered	<ul style="list-style-type: none"> provocation does not include a lawful act, or an act incited and induced by the defendant to give an excuse for the assault an unlawful arrest is not necessarily provocation but may be evidence of provocation if the person knows of the illegality defence does not apply if the force used is disproportionate, or is intended, and likely to cause death or grievous bodily harm
Crimes Act 1900 (ACT)	* no defence	-	-
Crimes Act 1900 (NSW)	* no defence	-	-
Criminal Reform Amendment Act (No 2) 2006 (NT)	* the complete defence of provocation in former s 34(1) of the Criminal Code repealed in 2006: s 8	-	-
Criminal Law Consolidation Act 1935 (SA)	* no defence	-	-
Criminal Code (Tas)	* no defence	-	-
Crimes Act 1958 (Vic)	* no defence	-	-

Act name and jurisdiction	Defence of provocation to assault	Definition of provocation	Exclusions from the defence
Criminal Code (WA)	<ul style="list-style-type: none"> ✓ applies to offences for which assault is an element if: <ul style="list-style-type: none"> • assault is provoked, and • the person is deprived of power of self-control and acts on it on the sudden before there is time for his passion to cool: ss 245–246 	any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered	<ul style="list-style-type: none"> • provocation does not include a lawful act, or an act incited and induced by the defendant to give an excuse for the assault • an unlawful arrest is not necessarily provocation but may be evidence of provocation if the person knows of the illegality • defence does not apply if the force used is disproportionate, or is intended, and likely, to cause death or grievous bodily harm
Criminal Code (Cth)	* no defence	-	-
Crimes Act 1961 (NZ)	* no defence	-	-
United Kingdom	* no defence at common law or in legislation	-	-
Canada Criminal Code RSC 1985 c C-46	* no defence	-	-

References

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- 1 See Criminal Code (Qld) ss 245–246.
- 2 *R v Williams* [1971] Qd R 414; *Kaporonovski v The Queen* (1973) 133 CLR 209.
- 3 See Criminal Code (Qld) ss 335, 339, 340.
- 4 See Criminal Code (Qld) ss 315A, 320, 323.
- 5 See Criminal Code (Qld) ss 300–303.
- 6 See the ‘Killing on provocation information sheet’ on our website [https://www.qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences](https://www qlrc.qld.gov.au/reviews/review-of-particular-criminal-defences).
- 7 *Hart v The Queen* (2003) 139 A Crim R 520 at 532 [49], citing *R v Hill* [1986] 1 SCR 313 at 343.
- 8 See e.g. *McGhee v The Queen* (1995) 183 CLR 82 at 97; *R v Johnson* [1964] Qd R 1 at 4.
- 9 See S Griffith, Draft Criminal Code 1897, pt 5 ch 26 cl 275, note 1 p 114; explanatory letter, p XI; Queensland Law Reform Commission, A Review of the Defence of Provocation, Report 64, September 2008, p 505.
- 10 See e.g. Final Report of the Criminal Code Review Committee to the Attorney-General, June 1992, sch 4 p 175; Report of the Taskforce on Women and the Criminal Code, February 2000, p 196, rec 58; Queensland Law Reform Commission, A Review of the Defence of Provocation, Report 64, September 2008, pp 513–15.
- 11 Queensland Courts, Queensland Supreme and District Courts Criminal Directions Benchbook, 14 September 2021, <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook> (notes omitted). See ch 91 on provocation under ss 268, 269.
- 12 Criminal Code Act 1983 (NT) s 34(1), repealed by Criminal Reform Amendment Act (No 2) 2006 (NT) s 8. See Northern Territory, Parliamentary Debates, Legislative Assembly, 31 August 2006, 3021–24 (P Toyne, Minister for Justice and Attorney-General).
- The Model Criminal Code is not in force as legislation, but is a draft of suggested provisions developed with the aim of providing for uniform or consistent criminal laws around Australia: see Australian Attorney-General’s Department, ‘Model Criminal Law Officers Committee Reports’, viewed 14 June 2023 <https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>.