HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Jan 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B69/2023
File Title:	Dayney v. The King
Registry:	Brisbane
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	23 Jan 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY NO. B29 of 2023

BETWEEN: **MARK VINCENT DAYNEY**
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Statement of issues

2. What is the meaning and effect of s 272(2) of the *Criminal Code* (Qld) ('*Code*')? Does it specify three independent provisos to s 272(1), or does the final clause of s 272(2) modify the effect of the first two?

3. If the final clause of s 272(2) is an independent proviso to s 272(1), does it apply in all scenarios or only where the accused causes death or grievous bodily harm?

Part III: Notices

4. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and does not consider it necessary.

Part IV: Citation

5. *R v Dayney* [2023] QCA 62.

Part V: Factual and procedural background

6. In October 2014, Mark Dayney was involved in a violent altercation resulting in the death of Mark Spencer. He was charged with murder and stood trial before Douglas J and a jury in the Supreme Court of Queensland.[1]

7. The Crown case was that he killed Mr Spencer during a planned burglary of his house. The plan was made after Mr Spencer contacted Mr Dayney's girlfriend, Ms Lorang-Goubran, for prostitution services. Ms Lorang-Goubran told Mr Dayney that Mr Spencer kept drugs in his house. Mr Dayney and Ms Lorang-Goubran hatched a plan that he would steal Mr Spencer's drugs while she had sex with Mr Spencer.

8. Events did not go to plan. While dressed in black with his face covered, Mr Dayney entered Mr Spencer's lounge room where Mr Spencer and Ms Lorang-Goubran were sitting. Mr Dayney's sudden appearance resulted in an altercation, beginning in the lounge room and proceeding down a hallway. During the altercation, Mr Spencer was struck with a number of objects. He was left in an injured state and died. The Crown submitted that the seriousness of Mr Spencer's injuries justified an inference that Mr Dayney intended to kill him or cause him grievous bodily harm.

9. Mr Dayney pleaded self-defence. He testified that Mr Spencer pulled out a pistol immediately after he entered the lounge room. Mr Dayney said everything he did after that point was done for the purpose of saving his own life or that of Ms Lorang-Goubran's.

10. Mr Dayney's counsel submitted that the jury should be directed about the potential applicability of ss 271 and 272 of the *Criminal Code* (Qld) (reproduced in the Annexure). Douglas J declined to put s 271 before the jury but gave directions about s 272.

11. His Honour directed the jury that the third clause of s 272(2) (**the retreat condition**) operated as an independent proviso to s 272(1) (being the substantive defence), rather than as a modification to the first two clauses of s 272(2) (being exceptions to the substantive defence).

[1] The following summary is drawn from CAB 9-11: *R v Dayney* (2020) 10 QR 638 ('*Dayney [No 1]*') at [2]-[18].

12. Mr Dayney was convicted. He appealed his conviction on two grounds, including that Douglas J erred in directing the jury on the retreat condition. He submitted that his Honour should have directed the jury that it operated as a modification to the first two clauses of s 272(2) rather than as an independent proviso to s 272(1).

13. On this point, the Court of Appeal (Sofronoff P, Fraser and McMurdo JJA) divided. Sofronoff P held that the retreat condition operated as a modification to the first two clauses of s 272(2), while Fraser and McMurdo JJA held that it operated as an independent proviso to s 272(1).

14. After setting out an analysis of s 272,[2] Sofronoff P explained the meaning and effect of the final clause of s 272(2) as follows:

> [51] The effect of s 272(2) is to deny an accused, whose case fits into the two kinds of cases referred to in the subsection, a legal excuse for killing unless the accused first removes the necessity (which the accused created) for the deceased to use lethal force. Once the deceased has employed lethal force in response to the accused's lethal force, the time for avoidance of legal consequences is over. However if, having been the first to use lethal force, the accused has declined further conflict or has "quitted it or retreated from it as far as was practicable" before the deceased had to employ lethal force, there can no longer be any reason for the deceased thereafter to resort to a lethal degree of violence. Mortal combat is over before it has gone too far. If, then, despite the accused's voluntary elimination of any need for the deceased to use lethal force before the deceased used it, the deceased still attempts to kill the accused, then the accused is in the same position as if he or she had never used such force in the first place. The accused can rely upon subsection (1).

15. His Honour considered that there was only any doubt about this interpretation because of the "peculiar" drafting of the clause, but apparently considered that doubt was resolved when regard was had to the text, context and purpose of s 272 as a whole. In that regard, his Honour said:

> [53] There is only any doubt about the meaning of s 272(2) because the drafting of the provision is peculiar. On the one hand, the words "in either case" strongly indicate a reference to the two uses of the same word in s 272(2) to describe each "case". On the other hand, the use of the word "nor" to introduce the whole expression "nor, in either case, unless" is capable of being read so that the retreat condition is to apply as an additional exclusion to the two instances in s 272(1),

[2] CAB 15-17: *Dayney [No 1]* at [38]-[51].

> namely to the case of the first assaulter or the provoker. However, in my respectful opinion the final qualification in subsection (2) has no work to do in subsection (1). There is no reason consistent with the principles of self-defence enunciated in the *Code* why an accused who has assaulted a victim by the use of force which threatens neither death nor serious injury should have to retreat before trying to save his or her life in the face of a disproportionate lethal response.

16. On Sofronoff P's interpretation, the retreat condition applies to the two "cases" mentioned in the first two clauses of s 272(2)—ie, where the accused begins an altercation intending to kill or do grievous bodily harm or where the accused endeavours to use such force during an altercation before the necessity to do so arises.

17. So construed, the retreat condition had no relevance to Mr Dayney's trial, on his account of what transpired. That is because, on his account, he neither began the altercation intending to kill or do grievous bodily harm, nor endeavoured to use such force before the need arose; rather, he intended to use such force only after the need arose (ie, after Mr Spencer produced a gun). Accordingly, the altercation did not fit into "either case" mentioned in s 272(2), with the result that the retreat condition did not apply. On Sofronoff P's interpretation, if the jury accepted Mr Dayney's account (or entertained a reasonable doubt about it), he would have been entitled to rely on the defence in section 272(1)—and thus an acquittal—irrespective of the question of retreat.

18. Fraser and McMurdo JJA agreed with Sofronoff P that "[t]he difficulty in construing this last clause of subsection (2) is created by the words 'either case'".[3] Despite that difficulty, their Honours rightly held that "those words cannot be disregarded, and it is necessary to identify the two 'cases' to which they refer."[4]

19. Their Honours postulated two possibilities. First, that the words refer to "two cases which are respectively the subjects of what we have called the first and second exceptions within sub-section (2)";[5] second, that they refer to "firstly, the use of force which causes death, and, secondly, the use of force which causes grievous bodily harm".[6] Their

[3] CAB 27: *Dayney [No 1]* at [102].
[4] CAB 27: *Dayney [No 1]* at [102].
[5] CAB 27: *Dayney [No 1]* at [103].
[6] CAB 27: *Dayney [No 1]* at [104].

Honours noted that the first possibility accorded with Mr Dayney's interpretation of s 272, while the second accorded with the interpretation contended for by the Crown.[7]

20. Their Honours preferred the Crown's interpretation.[8] They considered that a difficulty with Mr Dayney's interpretation, which reads the third clause as restoring the protection of self-defence denied in the first two clauses, was that, "by the terms of the two preceding clauses, no defence is available anyway in a case to which either relates".[9] Their Honours observed that Mr Dayney's interpretation seemed "at odds with the structure of sub-section (2). The structure of sub-section (2) is to deny the protection of self-defence, otherwise conferred under sub-section (1), in three sets of circumstances, the second and third of which are defined by text which commences with the word "nor". The structure suggests there are not two, but three exceptions to the protection conferred by sub-section (1)."[10]

21. Having regard primarily to these factors, their Honours held that it was more likely that the retreat condition was intended to qualify the protection given by s 272(1) "in every case" (ie, in all cases where the use of force causes death, and all cases where the use of force causes grievous bodily harm).[11] Their Honours considered this was "logically consistent with the distinction between cases within s 271 and those within s 272".[12] Their Honours also noted that, on Mr Dayney's interpretation, the retreat condition would seldom have much work to do, it being unlikely that an "accused person, having used murderous violence on the victim before it was necessary to do so, abandoned his or her intent, and declined further conflict and retreated from it."[13]

22. Thus, their Honours made it clear that the retreat condition did not operate in all scenarios. Rather, they noted that it operated only "where death or grievous bodily harm was caused".[14] In effect, "death or grievous bodily harm" were the two "cases" to which the words "in either case" refer.

---

[7] CAB 27: *Dayney [No 1]* at [103]-[104].
[8] CAB 32: *Dayney [No 1]* at [119].
[9] CAB 30: *Dayney [No 1]* at [110].
[10] CAB 30: *Dayney [No 1]* at [111].
[11] CAB 30: *Dayney [No 1]* at [112].
[12] CAB 30: *Dayney [No 1]* at [112].
[13] CAB 32: *Dayney [No 1]* at [118].
[14] CAB 31, 32: *Dayney [No 1]* at [114], [117].

23. Fraser and McMurdo JJA upheld Mr Dayney's appeal on another ground and, as a result, a retrial was ordered. At the retrial, the jury was directed in accordance with Fraser and McMurdo JJA's interpretation of s 272(2), namely that the retreat condition operated as an independent proviso to s 272(1).[15] This meant that self-defence under s 272 would be excluded if the prosecution proved that Mr Dayney did not retreat as far as practicable. This afforded a straightforward pathway to exclude the defence.

24. Mr Dayney was convicted again. He appealed his conviction on two grounds[16] including that the trial judge (Bowskill CJ) erred in adopting Fraser and McMurdo JJA's interpretation of s 272(2) because that interpretation was plainly wrong.

10 25. The Court of Appeal (Dalton JA, with whom Mullins P and Boddice JA agreed) rejected that ground.[17] Dalton JA identified that the issue to be resolved was one of statutory interpretation of s 272.[18] Her Honour considered that an examination of the text, having regard to its context and purpose, revealed the provision to be ambiguous.[19] In reaching that conclusion, her Honour said:

> [40] It is plain in my view that something went a little astray in the drafting of the first few words of the third clause of s 272(2), "nor, in either case, unless, …". I say this because whichever interpretation is proposed, the words are not entirely apt to convey a clear meaning. The appellant's contention requires reading those words as if they
> 20 said, "unless, in either case, …". The respondent's construction obliges a disregard of the words, ", in either case," or alternatively requires that some sensible meaning be given to these words. The latter task is difficult. The majority in the 2020 appeal suggested that the two cases were: (i) the use of force which caused death, and (ii) the use of force which caused grievous bodily harm. R S O'Regan QC (above) suggested that the two cases were: (i) a case where a person has unlawfully assaulted another, and (ii) a case where a person has provoked an assault from another. (footnote omitted)
>
> [41] Neither suggestion is convincing. The first suggestion seems unlikely
> 30 given the composite nature of the phrases "death or grievous bodily harm", and "to kill or to do grievous bodily harm" used in ss 271 and 272. There is no suggestion anywhere in the sections that a different result flows from a consideration of death (or killing) on the one hand,

---

[15] CAB 53, line 30 – 56, line 35.
[16] Mr Dayney's second ground of appeal before the Court of Appeal is irrelevant to the appeal before this Court.
[17] CAB 92: *R v Dayney* [2023] QCA 62 ('*Dayney [No 2]*') at [4].
[18] CAB 105: *Dayney [No 2]* at [38].
[19] CAB: 105-106: *Dayney [No 2]* at [38]-[43].

and grievous bodily harm on the other. As to the second suggestion, it seems undoubted that the first two cases described by s 272(2) each apply both when the initial aggressor has unlawfully assaulted another, and where they have provoked an assault from another. It therefore seems odd that only in the third case would Sir Samuel Griffith have decided to make that express. This latter point also arises in respect of the first suggestion.

[42] As noted in the 2020 appeal decision, the use of the word "case" three times in quick succession in s 272(2), where it is used nowhere else in ss 271 or 272 supports the idea that the two cases being spoken of "in either case" are the two cases just mentioned. The appellant additionally relied upon the phrase "such force", in the underlined part above. It was said to be a reference back to the words "using force" in both the first and second cases described in s 272(2). I find this less persuasive, because the words "such force" also appear in s 272(1).

[43] My conclusion from the language alone is that s 272(2) does not permit an entirely literal construction; that is, it is ambiguous.

26. To resolve the ambiguity, her Honour considered the historical context of s 272, including the legislative history of the *Code* and the common law, and then considered its legislative context, in particular its interaction with s 271.

27. As to the historical context of s 272, and the legislative history of the *Code*, her Honour had regard to Sir Samuel Griffith's draft *Code* and the notations made therein, as well as the letter accompanying its provision to the Attorney-General.[20] Her Honour observed that Griffith used the English Bill of 1880 as a model for the drafting of ss 271 and 272.[21] Her Honour observed that the Bill of 1880 contained an analogue to the third clause of s 272(2) which "plainly impose[d] an independent limit on the defence of self-defence in the analogue to s 272(1)".[22] Her Honour considered that it unlikely that Griffith intended a deliberate change to the analogue provision in the Bill of 1880.[23]

28. Also as to the historical context of s 272, and in particular the common law as it stood at the time of the Bill of 1880 and Griffith's drafting of the *Code*, her Honour observed that the Bill of 1880 was based on a draft produced by a Royal Commission headed by Lord

[20] CAB 106-109: *Dayney [No 2]* at [46]-[54]. It is noted that, in the draft *Code*, the provision which later became s 272 was s 279. For ease of reference, it is referred to here, as it was by Dalton JA, as s 272.
[21] CAB 107: *Dayney [No 2]* at [47], [49].
[22] CAB 109: *Dayney [No 2]* at [54].
[23] CAB 109: *Dayney [No 2]* at [54]. Fraser and McMurdo JJA also considered that neither the text of s 272, nor Griffith's notes to his draft *Code*, indicated that he intended s 272(2) to be a deliberate departure from the analogue provision in the Bill of 1880: CAB 31-32: *Dayney [No 1]* at [115]-[116].

Blackburn. Having reviewed the Report of the Royal Commission, her Honour concluded that the provisions regarding self-defence were based on what the committee believed to be the common law at that time.[24]

29. Her Honour also considered *R v Howe*[25] and concluded that, at the time of the drafting of the Bill of 1880, "the common law required a defendant raising self-defence as a defence to homicide to prove 'as an independent and imperative condition' of such a plea that they had retreated from the conflict before employing force, not in every case but in cases where the defendant was not "blameless from the first" because there had been a fight or quarrel'".[26] Her Honour considered that the common law at the time of the draft *Code* was "a strong indicator" in favour of interpreting the third clause in s 272(2) as providing an independent proviso to the protection given by s 272(1).[27]

30. As to the legislative context of s 272, her Honour had regard to *obiter dicta* of Hart J in *R v Muratovic* [1967] Qd R 15 to the effect that the the key to understanding ss 271 and 272 is that they are "successive", the first purporting to deal with self-defence against unprovoked assault, and the second self-defence against provoked assault.[28] Her Honour observed:

> [61] The importance of Hart J's observation that s 271 and s 272 are "successive" cannot be understated. Difficulty is encountered in understanding the operation of s 272 if interpretation starts with the words of s 272(1); as Hart J said in *Muratovic*, "to be understood [ss 271 and 272] must be considered together" – p 25. A failure to recognise this underlies much of the appellant's counsels' submissions as to broad (subjective) ideas of justice which it is said, by their nature, require s 272 to be interpreted as they contend. In this vein, the appellant's counsel submitted that, "The effect of the majority's decision in *Dayney (No 1)* is that any person who offers a minor assault or verbal provocation to another is forbidden from defending himself or herself against an immediate, seriously violent or murderous attack, unless they have first '*declined further conflict, and quitted it or retreated from it as far as was practicable*.' This interpretation radically restricts the scope of the defence." (footnote omitted)

[24] CAB 108: *Dayney [No 2]* at [51].
[25] (1958) 100 CLR 448, 463; [1958] SASR 95, 108-109.
[26] CAB 109: *Dayney [No 2]* at [55]. Citations omitted from quotation.
[27] CAB 110: *Dayney [No 2]* at [57].
[28] CAB 111: *Dayney [No 2]* at [60].

> [62] To illustrate the point of Hart J's analysis by reference to the facts in this case, it has first to be remembered that the jury was instructed that, if they accepted the appellant's version of events, or had a doubt about that version, they were to consider both s 271 and s 272. Dayney's evidence was that he used force in reaction to the deceased's drawing a gun and pointing it at him. This was a serious assault, threatening death or serious injury to Dayney. To determine whether Dayney was entitled to a defence of self-defence, the jury would look first to s 271. If they believed that Dayney had not provoked "the assault" offered by Mr Spencer and accepted that Dayney believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm, then it was lawful for Dayney to use such force by way of defence to the deceased man's pointing a gun at him as was necessary for his defence, even though that force might kill Mr Spencer – s 271(2). He was not obliged to have retreated as an independent condition of that defence being available.
>
> [63] It was only if the jury took the view that Dayney had provoked Mr Spencer to make the assault which Mr Spencer did make (a deadly assault) that they needed to consider s 272. If they did reach that point, there is nothing inherently unjust about a requirement that Dayney had declined further conflict and quitted it or retreated from it as far as practicable. The jury at this point would have determined that Dayney had provoked a deadly assault and, having done so, killed Mr Spencer when Mr Spencer made an assault of the very type which he, Dayney, had provoked.

31. Finally, her Honour considered whether there was any need to apply the penal rule. Her Honour held that there was none because, "[w]hile the words of s 272(2) alone do exhibit ambiguity, that is resolved when resort is had to the historical and legislative context."[29]

Part VI: Argument

Argument in brief

32. The appellant submits that the correct interpretation of the third clause of s 272(2) is that which was given by Sofronoff P in *Dayney [No 1]*. It best accords with the statutory text.

33. Neither of the other interpretations (that given by Fraser and McMurdo JJA in *Dayney [No 1]* and that given in *Dayney [No 2]*) is tenable. The primary flaw in Fraser and McMurdo JJA's interpretation is that the words "in either case" cannot sensibly refer to

[29] CAB 113: *Dayney [No 2]* at [68].

the composite expression "death or grievous bodily harm". The primary flaw in Dalton JA's interpretation is that it does not give any meaning to the words "in either case".

Sofronoff P's interpretation is correct

34. It is submitted that, despite the peculiarity in the drafting of s 272(2), the meaning of the third clause of s 272(2) is, nonetheless, clear: it plainly operates to modify the effect of the first two clauses. To put it in the terms used by Malcolm CJ in *Randle v The Queen*, the final clause "adds a qualification which will bring both cases referred to in the first two clauses of the second paragraph, which are otherwise excluded from the protection of the first paragraph, back within that protection".[30]

35. So much can be understood by reading the words, "nor, in either case, unless…" in the context of the whole of paragraph s 272(2), coming, as it does, after s 272(1). Read in context, it is apparent that the final clause provides that the protection in s 272(1) does not extend to either of the first two cases described in s 272(2) unless, before the necessity for self-preservation arose, the person using the force which causes death or grievous bodily harm declined further conflict, and quitted it or retreated from it as far as practicable.

36. Sofronoff P's analysis of s 272[31] was correct: his Honour's starting point was to consider the text, context and purpose of the section.[32] In doing so, his Honour was able to ascertain the meaning and effect of the third clause of s 272. After such an analysis, there is no ambiguity which requires resort to be had to the common law or the draft *Code*.[33]

37. Finally, it is not insignificant that his Honour's interpretation accords with the preponderance of authority on the point.[34]

---

[30] *Randle v The Queen* (1995) 15 WAR 26, per Malcolm CJ at 37.
[31] CAB 15-18: *Dayney [No 1]* at [38]-[51].
[32] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368.
[33] *Stuart v The Queen* (1974) 134 CLR 426, 437; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 309.
[34] See, *R v Keith* [1934] St R Qd 155 at 184 per Henchman J; *R v Muratovic* [1967] Qd R 15 at 28 per Hart J; *R v Randle* (1995) 15 WAR 26 at 33 per Malcolm CJ; *R v Wilmot* (2006) 165 A Crim R 14. Compare *R v Johnson* [1964] Qd R 1 at 13-14 per Stanley J.

Fraser and McMurdo JJA's interpretation is untenable

38. Fraser and McMurdo JJA's interpretation is untenable because, as Dalton JA recognised[35], it treats the phrase "death or grievous bodily harm" as referring to disjunctive "cases", although that phrase is used in the *Code* as a composite expression.

39. Dalton JA correctly identified that, "[t]here is no suggestion anywhere in [ss 271 and 272] that a different result flows from a consideration of death (or killing) on the one hand, and grievous bodily harm on the other".[36] Almost invariably,[37] the *Code* uses the expression "death or grievous bodily harm" in connection with what a person intends to do or what is likely to occur. Plainly that is because there is little practical distinction between intending to do either or the likelihood of either occurring. By linking the two concepts, the *Code* ensures that criminal liability does not turn on fine, theoretical distinctions but on a straightforward, practical question: whether really serious injury—"death or grievous bodily harm"—was intended or likely. In this way, the *Code* speaks of "death or grievous bodily harm" in a compound fashion.

40. Further, and again as Dalton JA correctly observed, given that, in the first two clauses of s 272(2), the words "death or grievous bodily harm" are used in that composite fashion, it seems unlikely that, in the third clause and for the first time, those words would be used disjunctively.[38] In this way, Fraser and McMurdo JJA's interpretation does not accord with the statutory text.

Dalton JA's interpretation is untenable

41. As noted above, Dalton JA considered the third clause was ambiguous and so went on to examine the historical and legislative context to ascertain its meaning. As submitted above, Sofronoff P's analysis of s 272 demonstrates that it is not necessary to resort to extrinsic materials to ascertain the meaning of the third clause in s 272(2).

42. However, even if there were ambiguity after a consideration of the clause having regard to its text, context and purpose, the ambiguity gives rise to a constructional choice,

---

[35] CAB 105: *Dayney [No 2]* at [41].
[36] CAB 105: *Dayney [No 2]* at [41].
[37] The *Code* uses the phrase "death or grievous bodily harm" (or its cognates) on 16 occasions: in ss 23(1A), 257(2), 258(2), 269(1), 270, 271(1) and (2), 272(1) and (2), 304B(1)(b) and 328A(4). On every occasion except s 23(1A) and s 328A(4), the phrase is used in connection with intention or objective likelihood.
[38] CAB: 105: *Dayney [No 2]* at [41].

namely, whether it operates as an independent proviso to s 272(1) or a qualification of the first two clauses of s 272(2). The presence of the word "nor" at the start of the clause arguably suggests the former; the presence of the words "in either case, unless" (immediately following descriptions of two "cases" in the preceding clauses) suggests the latter. The fatal vice in her Honour's interpretation is that it does not give any meaning to the words "in either case". Her Honour's interpretation treats them as if they are not there. That is not an available interpretative choice. In settling a constructional choice, the Court must "strive to give meaning to every word of the provision".[39] A construction which fails to do so "should not be adopted".[40]

10 43. As to her Honour's consideration of extrinsic materials to support her conclusion that the retreat condition is an independent proviso to s 272(1), each is flawed.

44. *The legislative history of the Code*. As noted above, her Honour had regard to the legislative history of the *Code* in order to interpret the third clause of s 272(2).[41] In particular, her Honour had regard to the letter Sir Samuel Griffith wrote to the Attorney-General in 1897, and his attached draft *Code*.[42] Her Honour observed that the provision which became s 272 in the *Code* was modelled on s 57 of the English Bill of 1880 and that that section imposed an independent proviso to the defence in the analogue to s 272(1).[43] Her Honour considered it unlikely that Griffith intended to depart from this position, on the bases that, first, Griffith would be unlikely to deliberately embark on
20 making a significant change to the common law, but use ambiguous language to do so; second, he did not signal the change in his marginal notes when he referenced the Bill of 1880 and third, it was unlikely he would make a change which complicated the common law.[44]

---

[39] *R v Berchet* (1688) 1 Show KB 106 [89 ER 480]; *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; at 419 per O'Connor J; *Quebec Railway, Light, Heath and Power Company v Vandry* (1920) AC 662 at 676; *Hill v William Hill (Park Lane) Ltd* (1949) AC 530 at 546-547; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12-13 per Mason CJ; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] per McHugh, Gummow, Kirby and Hayne JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [39], [41]-[42] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ and at [76], [79] per Heydon J.
[40] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [97] per Gummow, Hayne, Crennan and Bell JJ.
[41] CAB 106-109: *Dayney [No 2]* at [46]-[54].
[42] CAB 106-107: *Dayney [No 2]* at [46]-[49].
[43] CAB 109: *Dayney [No 2]* at [54].
[44] CAB 109: *Dayney [No 2]* at [54].

45. As to these considerations, it is apparent from Griffith's letter to the Attorney-General and the table of provisions of the draft Code that Griffith did not model s 272 on the common law, but on s 57 of the Bill of 1880. In his letter, Griffith made it clear that, for the provisions of the draft *Code* which were based on the Bill of 1880, "the sources or analogous provisions are indicated by a reference to the section of the Draft Bill of 1880 … to which I have had recourse, with such Notes as appeared to be desirable to elucidate any particular provision".[45] In the table, Griffith identified that the provision which became section 272 of the *Code* was sourced from s 57 of the Bill of 1880 (not the common law, which was provided as the source for other provisions in the draft *Code*).

46. Thus, her Honour's consideration of whether s 272 represented a departure from the common law was not a matter which could assist in the interpretation of s 272. Further, the assistance to be gained by having regard to s 57 of the Bill of 1880 is also limited. That is because there is no indication in Griffith's letter to the Attorney-General that, where the draft *Code* was modelled on a provision of the Bill of 1880, he intended necessarily to replicate that provision. Certainly, the notation "Compare Bill of 1880" does nothing more than invite comparison with the section on which the draft *Code* provision was modelled. Indeed, a consideration of Griffith's defence of provocation (s 276 in the draft *Code*), compared with s 58 of the Bill of 1880 (as noted in his table), demonstrates that, where a draft *Code* provision was modelled on a provision of the Bill of 1880, it was not, in all cases, intended to be a replication of the earlier provision.

47. Indeed, it is tolerably clear that s 272 was not intended to be a replication of s 57 of the Bill of 1880. The first indication that that is so comes from the drafting of the third clause of s 272(2) itself; it is in different terms to the final clause in s 57 of the Bill of 1880. Another indication can be found in the addition of the requirement, in s 272, that, to qualify for the protection in s 272(1), the force used must be "reasonably necessary" for preservation; this requirement is not contained in s 57 of the Bill of 1880.

48. *The common law at the time of the drafting of the Code*. Her Honour also regard to the common law at the time of the drafting of the *Code* to assist her interpretation of s 272.[46] However, given that Griffith stated in his draft *Code* that he modelled the s 272 provision

---

[45] *Griffith, Sir Samuel Walker, Draft of a code of criminal law: prepared for the Government of Queensland; together with an explanatory letter to the Attorney-General, a table of contents, and a table of the statutory provisions proposed to be superseded by the code (Government Printer, 1897)* (Qld), page XIV.
[46] CAB 109-110: *Dayney [No 2]* at [55]-[57].

on section 57 of the 1880 Bill (rather than the common law), recourse to the common law at the time of Griffith's draft *Code* is of limited use as an interpretive tool.

49. *The legislative context*. Her Honour also had regard to the placement of s 272 *in situ* with s 271, and the importance of them as "successive" provisions as providing support for her interpretation of s 272.[47] It is submitted that there is no difficulty in accepting that ss 271 and 272 must be considered together.[48] However, while reading them together might properly have assisted her Honour to conclude there was "nothing inherently unjust" about interpreting the final clause of s 272 as providing an independent proviso s 272(1), it could not assist with resolving the question whether the final clause of s 272(2), as a matter of statutory construction, in fact provided an independent proviso to s 272(1).

50. Indeed, reading ss 271 and 272 (and the paragraphs within those sections) successively tends to support an interpretation of the third clause of 272(2) as providing a qualification to the first two clauses so as to bring those cases back within the protection of s 272(1). That is because, read successively, it is apparent that the three clauses provide for three cases in which the protection in s 272(1) does not apply, as follows:

    a. the first clause provides for one case in which the protection in s 272(1) does not apply (namely, when the person using lethal force first began the assault with intent to use lethal force);

    b. the second clause provides for a second case in which the protection in s 272(1) does not apply (namely, when the person using lethal force endeavoured to do so before the necessity of preserving himself or herself arose); and

    c. the third clause provides for a third case in which the protection in s 272(1) does not apply (namely, when the person using lethal force first began the assault with intent to use lethal force or when the person using lethal force endeavoured to do so before the necessity of preserving himself or herself arose, unless, before such necessity arose, the person using such force declined further conflict).

[47] CAB 110-112: *Dayney [No 2]* at [58]-[66].
[48] CAB 111: *Dayney [No 2]* at [61], citing Hart J in *R v Muratovic* [1967] Qd R 15, 25.

51. In this way, the successive reading of the provisions (and, in particular, the clauses of s 272(2)) supports the interpretation given by Sofronoff P.

52. Ultimately, each of Dalton JA's reasons for concluding that the retreat condition is an independent proviso to s 272(1) are flawed. Even if they have merit, they cannot justify the conclusion because "legislative history and extrinsic materials cannot displace the meaning of the statutory text."[49] Here, the statutory text—particularly the words "in either case"—"strongly indicate"[50] that the retreat condition qualifies the preceding two "cases" in s 272(2), rather than the substantive defence in s 272(1). The legislative history and extrinsic material do not controvert that strong textual indication.

10 ***Conclusion***

53. Within s 272(2), the words "in either case" are stubbornly present. They must be given meaning and effect. They do not sensibly refer to disjunctive "cases" of death or grievous bodily harm. The only sensible construction is that they refer to the two "cases" previously mentioned in the first and second clauses of s 272(2).

54. The words "in either case" are words of limitation, restricting the application of the retreat condition to the two preceding clauses of 272(2). Since the jury at Mr Dayney's trial were not so directed, his trial was affected by an error of law resulting in a departure from the requirements of a fair trial.[51]

55. Since the error related to an available defence, the proviso is inapplicable.[52] Mr Dayney's
20 conviction should be set aside and a retrial ordered.

---

[49] *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] per French CJ, Hayne, Crennan, Bell and Gageler JJ.
[50] CAB 18: *Dayney [No 1]* at [53] per Sofronoff P.
[51] *Huxley v The Queen* [2023] HCA 40 at [43] per Gordon, Steward and Gleeson JJ; *Kalbasi v Western Australia* (2018) 264 CLR 62 at [57] at per Kiefel CJ, Bell, Keane and Gordon JJ.
[52] *Kalbasi v Western Australia* (2018) 264 CLR 62 at [15] per Kiefel CJ, Bell, Keane and Gordon JJ, citing *Weiss v The Queen* (2005) 224 CLR 300 at [44] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; *AK v Western Australia* (2008) 232 CLR 438 at [53]-[55] per Gummow and Hayne JJ.

Part VII: Orders

56. The appellant seeks the following orders:

(1) Appeal allowed.

(2) Set aside the order of the Court of Appeal given on 6 April 2023 and, in its place, order that:

(a) the appeal be allowed;

(b) the appellant's conviction be set aside; and

(c) there be a new trial.

(3) There be no order as to costs.

Part VIII: Time required for oral argument

57. The appellant estimates that he will require 1 hour to present his oral argument.

Dated: 23 January 2024

Ruth O'Gorman KC
Higgins Chambers
T: 07 3008 5598
E: rogorman@qldbar.asn.au

Joshua Underwood
8PT Chambers
T: 07 3511 7169
E: junderwood@8pt.com.au

ANNEXURE

Pursuant to Practice Direction No 1 of 2019, the Appellant sets out below a list of the statutes and provisions referred to in these submissions:

No.	Description	Version	Provisions
1	Criminal Code (Qld)	Current (reprint effective date 5 September 2014)	ss 271, 272