

**CRIMINAL CODE AMENDMENT (HOME INVASION) BILL 2000**

*Second Reading*

Resumed from 12 October.

**HON N.D. GRIFFITHS** (East Metropolitan) [4.05 pm]: The Australian Labor Party has no hesitation in supporting this Bill, as it supports all reasonable measures to deal with the safety of our community. We regret very much that the Government brings this Bill before the House at such a late stage of this Parliament. We will not delay its passage.

The Bill seeks to extend the operation of section 244 of the Criminal Code. Currently the section dealing with the defence of a dwelling refers to the use of such force as a person believes, on reasonable grounds, to be necessary to prevent the forcible entering of a dwelling. The section is to be changed so that it would be lawful to use any force or do anything else that the occupant believes on reasonable grounds to be necessary to deal with certain matters set out in the detail of the Bill. Specifically, the Bill seeks to extend the operation of section 244 to the surrounds of a dwelling, and to extend the operation of section 244 to include offences other than forcible entry. It seeks to widen the definition of “defence”, to give the occupant the right to use any force or do anything else to defend against an intruder.

The Australian Labor Party has a longstanding concern about the safety of our community, a concern which regrettably is not in reality shared by the Government, as is demonstrated by its incapacity to bring sensible law and order matters speedily before the Parliament; rather the Government seems to want to waste the House's time on other, rather silly measures.

**HON HELEN HODGSON** (North Metropolitan) [4.07 pm]: I shall refer to some comments that I have before me from a speech that I will identify in a moment. They read -

Defence of property: There has been considerable community concern about the extent and limits of a person's current right to use force to protect personal property . . .

However, the Government recognises that the Criminal Code should be more substantially amended to provide better protection for victims of crime and to provide citizens with a clear indication of the circumstances in which “reasonable” force may be used in the protection of property.

The finish of the section reads -

The amendments recognise the community's concerns and the need for clear and extended rights under the law for those citizens who are unfortunate enough to be placed in the position of needing to defend their property.

Those words do not come from the second reading speech for this Bill; they come from the second reading speech for a Bill that was introduced to the Parliament and reported in the Assembly *Hansard* of Thursday, 14 November 1991.

What has changed in the past nine years? It would seem that very little has changed by the looks of it. That is one of the reasons I am not at all convinced that this legislation is the right way to go. We are tinkering around the edges of the legislation and trying to impose statutory definitions and expansions which will not make any significant changes to the legislation as it stands and as it is interpreted by the courts. This is essentially dishonest legislation because it is leading people to believe that the rights and remedies available to them are being improved and extended. The minister sent all members of Parliament a letter telling them that because they were not aware of the changes in 1996, obviously they were misunderstanding the extent of the provisions being introduced now. In 1991, there was the same issue of public concern about the ability of people to defend their properties. That is why I believe this legislation will have no real effect or impact on crime, home invasions and the ability of people in this State to defend their homes.

The offence of home invasion is extremely serious. The Australian Democrats are very concerned about people who feel threatened when their home is invaded because that is where they should feel safe and protected. That is why we do not have any problem saying that a person should be able to defend his home and its surrounds. However, there is a borderline at which the response to prevent the crime becomes more serious than the crime itself.

This issue is not about the basic principle of the ability to defend our home and surrounds; it is about where that line is drawn. That is largely where the confusion in the community seems to exist, which has been promoted by some of the hysteria and hype surrounding the introduction of the Bill.

It is essential that, while giving individuals the right to self-protection, we do not condone behaviour that will sanction extreme responses. Some of the hype and comments surrounding this Bill have the potential to do that.

Although it is a trite saying, it is true that two wrongs do not make a right. If we commit a graver crime than that which has been committed against us, we will only aggravate the problem in society.

I am very concerned about some of the detail in this legislation. Proposed section 244, for example, includes the ability to “do anything else”. What does “do anything else” mean? Does it extend the interpretation of what is permitted. Advice to me is that it probably does not, but it will still be up to the courts to make that determination in the long run. Why are we proceeding down this path if a matter must be determined by the courts, which will probably not make any real difference to the situation?

I agree with the principle of extending the boundaries of the home to the boundaries of the property. Once again, I have some concerns about the definition of the detail in this Bill. The Bill essentially refers to “associated place.” I have been asked why we have not used the word curtilage, which has a precise legal meaning. An “associated place” is defined in this Bill in a way that may or may not be interpreted in exactly the same sense. That is a fairly legal, technical definitional issue; nonetheless, it causes me to wonder about the agenda with this legislation.

One of the other issues that concerns me is the ability to “make effectual defence” against a person who is attempting to wrongfully enter a dwelling or an associated place. My problem is that the offender does not need to be on the premises for the owner to claim protection under this legislation. I agree that if someone is in a yard and trying to break into a home, it is an indication that an offence is likely to be committed.

However, what if a person lives alongside a public footpath and someone walking along the path looks as though he will enter the yard? Can the home owner claim protection under this legislation if he thought the person walking by was attempting to enter an associated place; that is, the owner's yard? What evidence is required? Again the courts will need to determine what is reasonable. I reiterate that this Bill is fundamentally dishonest. It will do nothing except allow the courts to interpret many of these issues. Its implementation will amount largely to what the courts think is reasonable in the circumstances.

The issue remains one of reasonableness, which is ultimately, and by definition, an objective test that will be applied by the standards of the judge and the jury presiding over a matter. I sought legal advice about the way “reasonable” would be interpreted and whether it would alter the current interpretation. I was advised that the proposed section would require examination of the four factual issues that are currently examined under section 44. That will involve description of the weapon used in the defence, the level of force used by each person involved, any injury incurred by the defender and the circumstances surrounding the defensive action. Why are we changing the Act if the same four issues will be used to determine the test of reasonableness?

This is political posturing in the lead up to the election to make it appear that the Government is dealing with home invasion issues and responding to some of the recent high profile cases.

The Bill will remove the need for the offender to be attempting to forcibly enter the home of the victim for section 244 to apply in defence of the dwelling. Although I can see the reason for that intended amendment, it raises further concern about determining whether a person was entering the property with good or bad intent. Perhaps the use-of-force issue needs to be considered in making that decision. A person making that assessment may make one judgment, yet the court may make another judgment on the question of reasonableness. Perhaps the entire thing is totally irrelevant. This is my main concern.

It is essential that home occupiers know the limitations of what they can do to defend themselves and their property. However, this Bill in no way defines those limits. The problem is that the community has been given the impression that this legislation will make matters clearer for them, but that is not the case. Other than extending the boundaries of the home to the edges of the property, little appears to be gained through the Bill. The situation will remain very much the same for occupiers.

Parliament must consider methods to prevent home invasions and the trauma victims suffer. People should not be required to make a choice between confrontation, protection or defence. Everyone to whom I have spoken acknowledges that the safest thing to do in such circumstances is to seek assistance rather than attack the offender. Confrontation appears to be the only option in some circumstances; however, generally speaking, flight is far safer than fight. More often than not, victims who attempt to defend their home are hurt more seriously than would have been the case if they had not confronted the offender.

Where is the evidence that this legislation will make Western Australians safer in their home and will prevent home invasion? We should look at prevention rather than defence to lessen the chance of someone getting carried away. This Bill has more to do with the self-interest of the Government and the Opposition to win votes than with concern about home invasion. Until we address causes of criminal activity in the first place, we will not limit or prevent the current spate of home offences, which is undeniably taking place. This Bill will achieve nothing other than an opportunity for a little political posturing in the lead-up to the election.

**HON DERRICK TOMLINSON** (East Metropolitan) [4.19 pm]: I rise with considerable trepidation because I know that the Leader of the House will have some words in my ear shortly. However, I cannot help but respond to Hon Helen Hodgson. Clearly we are not talking to the same people. The people who talk to me are aware that the current incidence of break and enter in this State is 11 per cent - one in nine houses is unlawfully entered - and people are offended by that. I have had my house unlawfully entered and goods stolen on five occasions, and I was gravely offended. I was thankful that it was only my property that was stolen. On four of the occasions we were not at home at the time of the invasion and on the fifth occasion we were asleep in the house. I am grateful that only property was taken. People like me are offended by these events. People complain to me about the number of break and enter offences committed. They tell me that they want the right to defend their property.

I fully agree with Hon Helen Hodgson that in some circumstances flight is better than fight, discretion is the better part of valour and it is good sense not to engage in an altercation with a home invader. In spite of those good-sense arguments, people have said, "We want the right to defend our property. We want our rights made clear."

Hon Helen Hodgson: This Bill does not do that.

Hon DERRICK TOMLINSON: One at a time! I listened to the member's argument in silence. I had to bite my tongue, but I listened in silence.

Hon Norm Kelly: You should do it more often.

Hon DERRICK TOMLINSON: Yes, I should. However, I am being provoked.

The Bill provides that a person may use reasonable force or do that which he or she believes is reasonable. What is reasonable depends to a degree on the circumstances; that is, what is reasonable in one circumstance is not reasonable in another. It is very difficult to define what is reasonable when the circumstances differ so much. The term "reasonable" is often used, but what does it mean? It refers to actions that a reasonable person would accept under the circumstances. Hon Helen Hodgson asked, "What if someone were walking past a front yard and the occupant decided that the passer-by intended to enter his property?" The Bill is clear about that - it provides that an occupant may prevent a home invader wrongfully entering a dwelling or an associated place. The Bill refers to the occupant believing on reasonable grounds that the person intends to commit an offence or has committed an offence. If someone were walking past a front yard, no-one would say it was reasonable to assume that he or she intended to commit an offence. That would be ludicrous. Unfortunately, if a person did enter, and if the occupant who has lawful possession used what he or she judged to be reasonable force, that judgment could come before the court and the court would have to make a decision about whether it was reasonable. What is wrong with that?

Hon Helen Hodgson said that we are making this law only for the courts. It will apply only if a case gets to the court and, if it does, the court will then have to decide whether the action was reasonable in the circumstances. Did that person make a reasonable decision that his property was going to be invaded unlawfully for criminal purposes? It is the court that will ultimately decide these things.

As legislators, our responsibility is to define the limits of reasonable behaviour. A person who goes beyond the limits of reasonable behaviour goes beyond the law and commits an offence. The law simply defines the limit. In the circumstance we have here, the limit is reasonableness, and that limit of reasonableness applies to the activity of entering a property for unlawful purposes to commit an offence. Hon Helen Hodgson's argument is unsound. The people of Western Australia want this Parliament to tell them what they can do to defend their property against unlawful entry for criminal purposes. That is what this Bill does; it defines the law. If Hon Helen Hodgson is not satisfied with reasonableness, then I suggest she is not satisfied with a fundamental precept of criminal law in Australia.

**HON PETER FOSS** (East Metropolitan - Attorney General) [4.26 pm]: I thank Hon Derrick Tomlinson for pointing out the inconsistencies in Hon Helen Hodgson's argument. Yesterday, Hon Helen Hodgson argued against the matrix on the basis that sentencing should be in broad terms and it should be left to the judges to decide. Today, she is arguing that it should not be left to the judges to decide. The other inconsistency is that she said she is concerned that people might be shot if they walked past someone's front gate, yet on the other hand she said she did not think any changes had been made.

I will draw members' attention to a couple of things. Section 244 of the Criminal Code, which is the section that we are seeking to amend, states that it is lawful for any person to use such force as he believes, on reasonable grounds, to be necessary in order to prevent the forcible entering of the dwelling. It is a subjective test. It is what a person believes, on reasonable grounds. A person cannot believe on unreasonable grounds, but it is that person's belief, not a reasonable man's belief. Whether the grounds are reasonable is something that is up to the reasonable man. The problem with that section is that a person can use only such force as is necessary to prevent

the forcible entering of the dwelling by any person. A person who fired a gun in the air would not be covered by that section, because that person would be scaring the other person rather than using such force as was necessary to prevent that person from forcibly entering the dwelling.

Section 243 states that it is lawful for any person to use such force as is reasonably necessary in order to prevent the commission of an offence. That is an objective test. Section 251 states that it is lawful for any person who is in peaceable possession of any movable property to use such force as is reasonably necessary to resist the taking of such property by a trespasser. To take a current situation, a person who saw another person come into his front yard to steal his car must rely on either section 251 or section 253, both of which are objective tests rather than subjective tests. If that person were to discharge a firearm in order to scare the other person into going away, he might be charged with discharging a firearm.

Because the proposed amendment is to section 244, which starts with the words, "It is lawful", it is caught by section 5 of the Criminal Code Act Compilation Act, which states -

When, by the Code, any Act is declared to be lawful, no action can be brought in respect thereof.

That stops it not only from being a criminal matter but also from being a civil matter. What is useful about this amendment is that it takes the objective test to the boundary of the person's property. There is a difference.

It is not a minor change; it is a significant change. It will be decided by the court and the jury. The police will also rely on it. Our laws are always framed in that way. It is not based on the premise that "I believe that I obeyed the law; therefore, I get off." It is a matter in which the police ultimately decide whether to lay charges, the prosecution decides whether to prosecute, the judge decides how to direct the jury on the law and the jury decides on the facts. The important thing is that there will be a test which the courts can use and which will be understood by the jury and, most importantly in this case, by the public.

The public has asked for two things: Firstly, that home burglary offences be stopped; and, secondly, that if members of the public decide to protect themselves - and we are not suggesting that they should - that the law protect them. That is not a big ask by the community. It wants a simple law that has reasonably broad terminology. However, it must stop somewhere and this Parliament is saying that it should stop at the boundary of a person's property. It is a reasonably objective test that allows not only for the prevention of forcible entry into a home, but also for people to stop offenders entering a home or an associated place. It allows people to make an offender leave their property. That is another reasonable thing that people want.

Clause 4(1) allows a person -

- (c) to make effectual defence against violence used or threatened in relation to a person by a home invader who is -
  - (i) attempting to wrongfully enter the dwelling . . .
  - (ii) wrongfully in the dwelling or on or in an associated place;
- or
- (d) to prevent a home invader from committing, or make a home invader stop committing, an offence in the dwelling or on or in an associated place.

It takes all those possibilities that I mentioned - of preventing an offence, defending movable property and defending the whole home - and provides an objective test. Each of those is significant. Each amendment has taken the Bill a little further. The Act provides that an offence must not be one that requires a warrant for the arrest of the offender. Most people would not have the slightest idea whether a warrant was required to arrest an offender for a particular offence. This means that this requirement was difficult for the public to understand. However, I believe that the public can understand the amendment Bill. The Bill now states that the test is the boundary of the home. A person may use the force that he believes - not what the man on the Clapham omnibus believes - on reasonable grounds, to be necessary. A person's frailties, background and other concerns are considered in conjunction with that.

Hon N.D. Griffiths: I do not have concerns. I value the opinion of the gentleman on the Clapham omnibus.

Hon PETER FOSS: I am glad that Hon Nick Griffiths values that opinion.

Hon N.D. Griffiths: A very learned gentleman.

Hon PETER FOSS: The Government is not saying that people should use force if they can do something else, like sounding a siren, firing a gun in the air or whatever the person considers is necessary. A person is not required to engage with the offender. That is important. The Government prefers that a person not engage with an offender. On the other hand, a person should not go so far as to shoot an offender. However, if he felt it was necessary and if that was the only thing left to him to protect himself, then the law will protect him. The

Government has tried to establish a more reasonable regime. It is a significant change. I welcome the enthusiastic support of the Opposition.

Hon N.D. Griffiths: We always enthusiastically support reasonable measures.

Hon PETER FOSS: I regret the confusion in the mind of Hon Helen Hodgson, but I hope I have clarified the matter.

Hon B.K. Donaldson: What happens if you discharge a firearm in a built-up area?

Hon PETER FOSS: This Bill says that it is lawful. That is why I drew the attention of the House to section 5 of the Criminal Code Act Compilation Act 1913. Under those circumstances it could be argued that under section 5 of the Criminal Code Act Compilation Act 1913 - if the act were done in accordance with the new section - it would be lawful because the person did what was necessary to prevent an offence. I am glad the member asked that question because it is now in *Hansard*. If someone were to do that, this report could now be cited in support.

Question put and passed.

Bill read a second time, proceeded through remaining stages without debate, and passed.