

House of Representatives
Supplementary Order Paper

Tuesday, 29 March 2005

Arms Amendment Bill (No 3)

Proposed amendments

Stephen Franks, in Committee, to move the following amendments:

Clause 27

To add the following subclause:

- (4) Section 48 of the principal Act is amended by adding, as **subsection (3)**, the following subsection:
 - “(3) For the purposes of this section, a defence established under **section 71A** (protection of rights of self-defence of person and property) has established reasonable cause.”

Clause 28

To omit *subclause (3)*, and substitute the following subclause:

- (3) Section 49 of the principal Act is amended by repealing **subsection (2)**, and substituting the following subsections:
 - “(2) Except as provided in **subsection (3)**, in any prosecution for an offence against **subsection (1)** in which it is proved that the defendant used, discharged, or carried a firearm of a kind described in that subsection, or wore, used, or carried any body armour, the burden of proving the existence of some lawful, proper, and sufficient purpose lies on the defendant.
 - “(3) For the purposes of this section, a defence established under **section 71A** (protection of rights of self-defence of person and property) has established a lawful, proper, and sufficient purpose.”

Clause 32

To add the following subclause:

- (5) Section 52 of the principal Act is amended by adding the following subsection:

- “(6) For the purposes of this section, a defence established under **section 71A** (protection of rights of self-defence of person and property) establishes a lawful and sufficient purpose.”

Clause 33

To add the following subclause:

- (6) Section 53 of the principal Act is amended by adding the following subsection:
- “(6) For the purposes of this section, in considering whether a defendant has been careless, or failed to take reasonable precautions, or has been reckless, the court must recognise as a reasonable cause the purposes specified in **section 71A** (protection of rights of self-defence of person and property) and must take into account the exigencies of defence.”

New clause 45A

To insert, after *clause 45*, the following clause:

45A New sections 71A to 71C inserted

The principal Act is amended by inserting, after section 71, the following sections:

“71A Protection of rights of self-defence of person and property

- “(1) No prosecution under this Act in respect of any use of force (which in this section includes the presentation of, or use of, or threat to use, a firearm) may be brought without the consent of the Attorney-General, where—
- “(a) the use of force was in the exercise of any of the rights in any of sections 35 to 43 (which relate to citizen arrest and prevention of crime), or sections 48, 52, 53, 55, and 56 (which relate to self-defence) of the Crimes Act 1961; or
- “(b) the use of force was otherwise in the defence of person or of property, or in the prevention of crime.
- “(2) **Subsection (1)** applies where the circumstances raise a significant possibility that such a defence will be upheld.
- “(3) It is a defence to any charge under this Act that the otherwise offending conduct or omission was reasonably a part of the defence of person or of property, or of the prevention of crime (including by the apprehension of criminal intruders), or of reasonable preparation for such defence, prevention, or apprehension.
- “(4) The defence under **subsection (3)** is available under this Act, whether or not it is sufficient under any other law, if the use of force by the defendant was a response to reasonable fears, in the circumstances as the defendant believed them to be—
- “(a) that any person was at material risk of physical harm from an unprovoked offender; or

- “(b) that any property would be unlawfully taken by the offender and not recovered, or damaged and not repaired at the cost of the offender; or
 - “(c) that any trespass or crime by a trespasser would proceed, in circumstances contributing to contempt for the law by such offenders.
- “(5) The defence under **subsection (3)** is negated if the prosecution establishes that a reasonable defender would have considered the defendant’s use of force to be grossly disproportionate, even if it is established that it was a response or a precaution against circumstances described in **subsection (4)**.
- “(6) To avoid doubt, neither the limitations in the Trespass Act 1980 nor the provisions of sections 52, 53, and 56 of the Crimes Act 1961, that negate the right to strike or to harm a person in defence of property, apply to restrict the effect of **sections 71A and 71B** of this Act, or to affect consideration of the reasonableness of a defendant’s beliefs, or the proportionality of a defendant’s conduct or omissions.
- “(7) The protections of this section extend to justify any breach of regulations made under this Act to the extent that the conduct in breach of the regulations was reasonably necessary to ensure the availability of the means to offer the threat or the use of force.

“71B **When reasonable to threaten or to inflict harm**

Without authorising conduct that is grossly disproportionate in the circumstances as a defender believes them to be, and without limiting the generality of **section 71A**, in applying that section the court must take into account the desirability of ensuring that the law—

- “(a) tells offenders, and in particular criminal intruders, they have good reason to fear physical harm more than their victims; and
- “(b) gives confidence to defenders who observe ordinary New Zealanders’ generally accepted standards of morality, that they will not face imprisonment or the ruinous costs of legal proceedings; and
- “(c) plainly will not frustrate a victim’s practical steps to protect their person and property against trespassers warned to leave, or to stop committing an offence; and
- “(d) tells offenders not to expect less risk to themselves by offending in remote areas or where assistance is otherwise limited by access, or communication difficulties or any other circumstances, where—
 - “(i) **assistance** means police action likely to result in a prompt and complete stop of the relevant taking, trespass, or offending, whether by arrest or otherwise; and

“(ii) **other circumstances** may include the time of day, the absence of neighbours, previous crime experiences in the neighbourhood or in comparable localities, or any other factor likely to result in belief by the defender that assistance may not be forthcoming.

“71C **Reimbursement of costs**

If the court considers that a defendant has successfully raised a defence provided in **section 71A**, and is acquitted on the relevant charge, or the charge is withdrawn, the court must award full and reasonable solicitor/client costs to the defendant, unless the court considers that would be repugnant to justice.”

Explanatory note

This Supplementary Order Paper contains amendments designed to limit abusive prosecutions under the updated Arms Act 1983. Arms Act offences are broadly defined, to ensure that firearms are handled carefully, and are not used for crime. Those broad provisions have also been used against victims of crime who have used, or threatened to use, a firearm against criminals, or in defence of their property. Unlike the Crimes Act 1961, the Arms Act 1983 does not expressly provide for self-defence, nor reflect the long-established duty of ordinary citizens to help prevent crime.

Though the law governing self-defence is confused and obscure, self-defenders are usually acquitted of Crimes Act charges.

When the prosecution proceeds with Arms Act charges, the victims incur ruinous lawyer costs, whatever the outcome. They must defend themselves, because conviction still carries serious consequences. Defenders risk imprisonment. They can lose their right to own firearms. Their reputations can be lost, along with freedom to travel overseas.

More importantly, they defend their innocence on behalf of their outraged communities. While defenders grind through protracted trials, the real criminals can be out preying on their neighbours again.

Unfortunately these amendments cannot change the law of self-defence. They cannot change the Trespass Act 1980. They cannot restore the Crimes Act rights lost in the early 1980s when provocation ceased to be a defence. Accordingly, the risk of Crimes Act prosecution remains, for “striking” or “doing harm” in defence of property or to eject intruders.

The amendments nevertheless point out the desirable direction of eventual reform for those laws.

The amendments protect self-defenders as follows:

- by requiring the Attorney-General’s leave for an Arms Act prosecution where self-defence is an issue. This is a common statutory device to protect against the overuse of overly broad charges.

- by providing that self-defence is also a legal defence. For example, a farmer charged with presenting a firearm after taking a shotgun to investigate noises in the farmer's quad bike shed, could advance in defence a fear of being bashed, or recent neighbourhood experience of thieves carrying on despite warnings and disappearing with quad bikes long before any police could even be contacted, let alone attend.
- by requiring the court to take account of the encouragement to criminals, when victims are convicted.
- by requiring courts to recognise the impracticality of "not taking the law into your own hands" when there are no other hands to take it.
- by requiring courts to award legal costs to victims who successfully raise the defence, so they are not punished by the costs even when they are innocent.

There is a provision against open slather. Drawing on English precedent, a defender will remain liable if the force used against an intruder is "grossly disproportionate".

The State has no right to punish citizens for defending themselves and their property when the State cannot defend them.