



Legislative Assembly

Right To Self-Defence Bill Hansard

Extract

05/04/2001

Second Reading

Mr HARTCHER (Gosford) [10.02 a.m.]: I move:

That this bill be now read a second time.

The right to self-defence is a basic right of all individuals in our society. It is fundamental to the maintenance of social order and wellbeing. Self-defence—of one's property, oneself or another person—is a commonly accepted notion in our community, provided that the level of force used is reasonable in the surrounding circumstances at the time. However, what is considered reasonable has never been adequately set down in our laws. In an age where violence is escalating and home invasion is an all-too-common occurrence, enormous community concern exists among people about how far is too far to go when using physical force to defend themselves, their loved ones or their property.

The Government's Home Invasion (Occupants Protection) Act 1998 has not allayed the concerns of the ordinary citizen of New South Wales, who still does not know where he or she may stand before the law when confronted with the need to defend himself or herself in the face of danger. This was highlighted recently in Maitland where a shopkeeper was charged with assault for attempting to make a citizen's arrest of a youth caught stealing videos from his shop. The Government's Act does not define the extent to which force may be used reasonably. When the then bill was first introduced, the Government chose to support it rather than the Coalition's Home-Owners Defence Bill, which was far broader in scope and covered all situations, not just the home, in which an individual may be required to use self-defence.

If the Government had chosen to support the Coalition's bill, the definition of reasonable force would already be codified and the Maitland shopkeeper may not then have suffered the indignity of arrest for attempting to use what he considered reasonable force to protect his property. For four years, under a Carr Labor Government, we have debated bill after bill on this issue—a clear indication of the need for comprehensive legislation to ensure that people are aware of their rights and obligations under the law. The Government has now supported the Workplace (Occupants Protection) Bill that passed through this House on 29 March 2001. But the Government has also indicated that it plans to introduce its own self-defence legislation this year that will make the home invasion and workplace legislation redundant. On 13 October 2000 in the other place the Hon. John Della Bosca stated:

[It] is the Government's intention that next year we will bring the elements of the home invasion laws and this proposed law, along with the broader concept of self-defence and defence of property in general, into a single Bill to be presented to the House.

But this intention merely retraces the footsteps of the Coalition. If the Coalition's bill is supported, it will negate the need to continually introduce self-defence legislation, because our bill is comprehensive. The Right to Self-defence Bill is a single bill that clearly and simply states the law on self-defence in defence of the person, in defence of property and in ejecting or preventing criminal trespass to one's property. It also defines the amount of force that may be used to escape from an individual who is confining a person unlawfully.

Under this bill, persons convicted of a criminal offence will not be able to sue their victims for compensation as a consequence of actions taken by the victims to protect themselves or their property. This will ensure that we no longer encounter such ridiculous situations as that reported in the *Daily Telegraph* of 17 November 2000 where a man who broke into a house and attacked the home owner is now launching a civil action against his victim for compensation. Every individual has the right to use reasonable force to protect his or her property, themselves or another person when under attack. This was stated in the leading Victorian case of *Zecevic v Director of Public Prosecutions* (1987) 162 CLR at page 645, where the High Court said:

The defence of self-defence is embedded deeply in ordinary standards of what is fair and just. It sounds as readily in the voice of a schoolchild who protests that he or she was only defending himself or herself from the attack of another child as it does in that of the sovereign state which claims that it was but protecting its citizens or its territory against the aggression of another state.

In *Zecevic*, one general legal test was set for the defence of self-defence. This test stated that the jury must find that the accused believed on reasonable grounds that it was necessary in self-defence to act the way that he or she acted. Effectively this means that if a person is charged with murder or assault and claims they were acting in self-defence, they must show they believed at the time: first, that the resort to force was reasonable in the surrounding circumstances, which is a subjective test; and second, that it was necessary, in all the given circumstances, which is an objective test. Despite the *Zecevic* decision, the law of self-defence is still murky. Even the Government's Home Invasion (Occupants Protection) Act goes nowhere towards clearing the waters.

Only last year Justice Badgery-Parker, in *Regina v Munro* [2000] New South Wales SC 1225 found that the Government's law was the same as the common law relating to self-defence. In that case the accused person was found guilty of manslaughter for killing his neighbour with a cricket bat after the neighbour entered his house armed with the bat. In that judgment, the judge said:

The question is not whether the accused acted reasonably; it is whether he had reasonable grounds for the relevant belief. The relevant belief is not a belief that he had a 'right' to act; if it were, s 5 [of the Home Invasion (Occupants Protection) Act] might be relevant as creating a ground for that belief. But that is not the relevant belief. The relevant belief is a belief on the part of the accused person that it was necessary to act as he did in self defence; and the relevant question is whether he had reasonable grounds for that belief.

This decision cements the Coalition's determination to ensure that although the Government is unable to develop effective legislation to ensure the law regarding the defence of self-defence is stated clearly, that such a law is passed by this Parliament. The Right to Self-defence Bill will do this. It inserts a new part 8B into the Crimes Act 1900. New section 344C is based on section 10.4 of the Criminal Code, as set out in the Criminal Code Act 1995 of the Commonwealth and replaces the common law in its application to offences punishable under the Crimes Act. New section 344C (1) provides that a person is not criminally responsible for an offence if he or she carries out the conduct in self-defence. New section 344C (2) sets out the situations in which a person may claim his or her action was necessary in self-defence of the person or of property.

The amount of force used should be a reasonable response to the circumstances as the person using the force perceives them. The bill provides that a sufficient level—if necessary a higher level—of force may be used to overcome an assailant. The criteria by which this is to be measured are the decision of the person at the time and how he or she perceived the circumstances in the agony and stress of the moment. Proposed section 344C (3) provides that a person may use force that intentionally inflicts death or grievous bodily harm only to defend himself or herself or another person. In October last year, shopkeeper Kolja Nikolic, a shopkeeper in western Sydney, was accosted by a man who demanded that he give him \$20 or he would be thrown into the shop's deep fryer. When Mr Nikolic gave the man the cash, the thief threatened to return for more money.

The police were called, and they informed Mr Nikolic that he had the right to protect himself if the man returned. When the thief—only minutes after the call to police—did come back, walking around the shop towards the counter, threatening to belt the shopkeeper if he did not give him more money, Mr Nikolic pulled a gun from under the counter and fatally wounded him. The jury took less than one hour to acquit the shopkeeper of murder. The presiding judge, Justice Michael Adams, dismissed claims the shopkeeper could have used the gun as a baton, stating, "He might well have thrown a few frozen Chiko Rolls at him". Such a situation, where a person's life was endangered by the criminal actions of another, would fall under this subsection.

Proposed subsection (4) prevents such use of force in the defence of property. Where there is no threat to the life of a person, there can be no justification for intending to kill or to do grievous bodily harm. If when defending property a person accidentally kills or inflicts grievous bodily harm the defence of self-defence is still available. The question, of course, goes to the intent behind the force used. In 1998 a shopkeeper in Orange was faced with this situation when he shot dead a man during an armed robbery. Mr Cikaric's shop had already been robbed three times within a year, causing him to fear for the safety of his wife, who worked in the store. When a thief armed with a rifle walked in and demanded the day's takings, the shopkeeper produced a handgun and fired several shots. The thief was shot and died from his injuries. In this case, the Director of Public Prosecutions decided not to press charges against the store owner.

The bill makes it clear that the defence of self-defence is not available if a person is responding to lawful conduct that the accused person knew was lawful at the time the force was used. Proposed section 344C (5) covers situations where a person may be required to use force to protect themselves from a deadly attack by a child or an insane person, who are not criminally liable for their conduct. Proposed section 344D restates the current law in relation to the burden of proof. It provides that the prosecution bears the burden of proving that conduct was not carried out in self-defence when it has been established that the evidence points to a possibility that the action was carried out in self-defence. This is regardless of whether the defendant raises the plea of self-defence.

Finally, but importantly, proposed section 344E of the bill provides that a person who carries out conduct in self-defence is immune from civil liability resulting from his or her conduct. A criminal should not be allowed to claim damages from his or her victims for injuries—psychological or physical—sustained as a result of victims acting in self-defence of property or of the person. This goes against the grain of community perceptions of justice, and only serves to entrench rather than eradicate, criminal behaviour. Victims of crime face a difficult time coming to terms with the incident without then having to defend themselves in court against their attacker. It is a ludicrous situation, and an indictment on our society, that we have come to such a stage that a thief can legally waste the court's valuable time and money suing for \$40,000 because his victims took action to protect their property.

The principle of self-defence must be upheld by the law and in the courts if the community is to feel they are afforded appropriate protection against home invaders and assailants. I have countless letters from members of the community supporting the Coalition's bill. I have received petitions from community members requesting the Government support this legislation. Clearly this is a burning issue that must be resolved. For years the Government has been playing games with the public's need to know where they stand when their property or their family is under attack. This bill will ensure that every citizen in New South Wales knows that when defending themselves the law is for them, not against them. I commend the bill to the House.