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The *Criminal Law (Amendment) (Protection of Property) Bill*

Bill 18 of 2005-06

The *Criminal Law (Amendment) (Protection of Property) Bill*, (Bill 18 of 2005-06) is sponsored by Anne McIntosh.

The Bill is intended to allow people who tackle burglars and other intruders more latitude, by providing that they will not be guilty of any offence unless they have used grossly disproportionate force.

It would apply to England and Wales and Northern Ireland.

It is due for Second Reading on Friday 2 December 2005.

Miriam Peck

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Summary of main points

The *Criminal Law (Amendment)(Protection of Property) Bill* would make a new defence available to a person who had used force in the prevention of crime, or in self-defence, or defence of another or of property, against an intruder in a building. It would provide an absolute defence unless the force used was grossly disproportionate, and that had been apparent. The Bill would extend to England, Wales and Northern Ireland.

The Bill was introduced in the House of Commons on 22 June 2005 by Anne McIntosh MP, who came fifth in the ballot for Private Members' Bills. It is supported by the Conservatives and by a cross-party group of Members.

During the last 20 years, cases in which intruders and people trying to tackle them have been injured or killed have fuelled debate about whether the existing law strikes the right balance between the intruder and the householder. The law allows a person to use reasonable force in self-defence, or the prevention of crime, but it has been suggested that it is not clear to people what this means. There have also been suggestions that the law does not give enough protection to a person who finds intruders in his home.

The case of Tony Martin, who shot an escaping burglar in the back and was convicted of manslaughter, was an extreme case which has attracted a great deal of publicity, but there have been other cases in which decisions to charge or prosecute householders have been criticised. A press campaign to change the law was launched last year after a man was killed at his home by a burglar he had disturbed.

The Bill would not affect cases like Tony Martin's, where the degree of force used had been grossly disproportionate. The Government has recognised public concern over these issues. Its view is that the existing law is sound, and that the key issue is to ensure that householders understand it. As part of efforts to clarify the law and improve public understanding of it, the Crown Prosecution Service has published advice to householders on the use of force against intruders.

Private Members' Bills are not subject to the requirement of section 19 of the *Human Rights Act 1998* that the Minister in charge of a Bill should make a statement on its compatibility with the European Convention on Human Rights before second reading. The Joint Committee on Human Rights took the view that a similar attempt to modify the law of self-defence, in a Private Member's Bill introduced by Patrick Mercer during the 2004-05 session, would not have been compatible with the European Convention on Human Rights.

CONTENTS

I Self-defence and other similar defences to criminal charges

A person who confronts and kills a burglar or robber may be guilty of murder or manslaughter. If the burglar is injured, the householder could face other charges of offences against the person, such as assault, wounding or even attempted murder. Where the charge is murder, some "partial" defences may be available: the defendant may be found guilty of manslaughter by reason of diminished responsibility or provocation. Whether the charge is murder or a lesser charge, the defendant will be acquitted if he acted in self-defence, rather than being convicted of a lesser offence. In this sense self-defence is an absolute rather than a "partial" defence to a charge of murder.

The "partial" defences of provocation and diminished responsibility apply only in relation to charges of murder and constitute attempts to ameliorate potential injustices arising from the mandatory penalty of life imprisonment for murder. Self-defence is available as a defence at common law in relation to any criminal charge. It applies only where the defendant was acting in defence of himself, some other person, or his property, and was using only force which was reasonable in the circumstances as he believed them to be. Where a person raises a defence of self-defence, the burden of rebutting it rests on the prosecution, which must convince a jury beyond reasonable doubt that self-defence has no basis in the particular case.[1]

Section 3(1) of the *Criminal Law Act 1967* also provides a statutory defence of self-defence where reasonable force is used in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. Although section 3 of the 1967 Act expressly states that it should replace common law rules in the circumstances to which it applies,[2] in practice the courts have continued to talk in terms of the common law rules. Archbold's *Criminal Pleading, Evidence and Practice* suggests that this is of no practical consequence as section 3 reflects the common law.

Section 3(1) of the 1967 Act does not cover all cases involving defence of property, as it refers to force used in the prevention of crime and some forms of trespass, for example, are not criminal. *Archbold* also suggests that section 3 would not cover all cases of defence of the person, noting that if a person were attacked by someone who was insane so as not to be responsible in law for his acts, the common law defence would apply, rather than the defence under section 3 of the 1967 Act.[3]

Whether or not the force used was reasonable is a matter for a jury to decide. The courts have made it clear that in the context of a defence under section 3(1) of the *Criminal Law Act 1967,* "reasonable force" has the same meaning as it does in relation to the defence of self-defence at common law. [4] The classic exposition of the law relating to self-

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[1] Archbold, *Criminal Pleading, Evidence and Practice 2005* paras 19-43 - 19-45
[2] *Criminal Law Act 1967* s.3(2)
[3] Archbold, *Criminal Pleading, Evidence and Practice 2005* para 19-39
[4] *R v Khan* [1995] Crim LR 78

defence is that set out by Lord Morris of Borth-y-Gest in the Australian case of *Palmer v R.*, on appeal to the Privy Council in 1971:

> … the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have [to] avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence.
>
> Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.[5]

The test of whether force used in self-defence was reasonable is largely objective, although the last sentence in the extract quoted above from Lord Morris's speech in *Palmer v. R*. emphasises that there are some subjective elements, that is, elements that would depend on the defendant's particular circumstances. In its judgment on Tony Martin's appeal against his conviction for murder, the Court of Appeal held that whilst a court is entitled to take account of the physical characteristics of the defendant in deciding what force was reasonable, it was not generally appropriate to take account of whether the defendant was suffering from some psychiatric condition.[6]

Where a person acts in self-defence under a genuine mistake of fact, the doctrine of "*mens rea*", or "guilty mind", is likely to prevent them being found liable in criminal proceedings. This is the doctrine under which a person must generally be proved to have

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[5] *Palmer v The Queen* [1971] AC 814

[6] *R. v. Martin (Anthony) [2002] 1Cr.App.R.27, CA.* See Part III of this paper for more information on the case of Tony Martin

had the requisite state of mind for the offence committed, at the time of carrying out the act that constitutes the offence. *Archbold* notes that:

> The reasonableness or otherwise of the mistake is a factor to be taken into account when determining whether the mistake was or may have been a genuine one. Thus, where a defendant is neither under threatened or actual attack, but honestly believed that he was, the jury should be directed to consider whether the degree of force used was commensurate with the degree of risk which he believed to be created by the attack under which he believed himself to be.[7]

II The *Criminal Law (Amendment)(Protection of Property) Bill 2005-06*

Anne McIntosh, who came fifth in the ballot for Private Members' Bills for this session, introduced her *Criminal Law (Amendment) (Protection of Property) Bill* on 22 June 2005. The Bill had its first reading on 22 June 2005[8] and is due to be debated on its second reading on Friday 2 December 2005. The Bill is intended to deal with long-standing concerns about the potential criminal liability of householders and others who have killed or injured intruders. The Bill is intended to apply to cases where intruders enter commercial property as well as private dwellings.

Anne McIntosh's Bill is very similar to the one introduced by the Patrick Mercer during the 2004-05 session of Parliament.[9] The extracts from the second reading debate on Patrick Mercer's Bill set out at the end of this Part of this Paper include comment on the provisions of his Bill, whether or not they were likely to result in substantial changes to the current law, and what those changes might be.

Unlike Patrick Mercer's Bill, the new Bill is intended to extend to Northern Ireland as well as England and Wales.

Like Patrick Mercer's Bill, Anne McIntosh's Bill has the support of Conservatives. It has also been supported by individual Members from several other parties. The Government

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[7] Archbold *Criminal Pleading, Evidence and Practice 2005* para.19-49

[8] HC Deb 22 June 2005 Vol 435 c816

[9] *Criminal Law (Amendment) (Householder Protection) Bill 2004-05* [Bill 20 of 2004-05] Library Research Paper 05/10 on the 2004-05 Bill is available on the internet.

initially suggested that it might support Patrick Mercer's earlier Bill, but it subsequently decided that the law did not need to be changed. It is therefore unlikely to support the current Bill.

A. What the Bill would do

Section 3 of the *Criminal Law Act 1967* provides that:

> **3 Use of force in making arrest, etc**
>
> 1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
> 2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

Clause 1 of the *Criminal Law (Amendment) (Protection of Property) Bill* seeks to insert the following provisions after section 3(1) of the 1967 Act:

> (1A) Where a person uses force in the prevention of crime or in the defence of persons or property on another who is in any building or part of a building having entered as a trespasser or is attempting so to enter, that person shall not be guilty of any offence in respect of the use of that force unless—
>
> (a) the degree of force used was grossly disproportionate, and
>
> (b) this was or ought to have been apparent to the person using such force.
>
> (1B) No prosecution shall be brought against a person subject to subsection (1A) without the leave of the Attorney General.
>
> (1C) In this section 'building or part of a building' shall have the same meaning as in section 9 of the Theft Act 1968 (burglary)

As far as subsection (1C) is concerned, references to buildings in section 9 of the *Theft Act 1968* apply to inhabited vehicles or vessels. The definition in subsection 3(1C) of the Bill was not set out in Patrick Mercer's Bill.

Clause 2 of the Bill seeks to make equivalent changes to section 3 of the *Criminal Law Act (Northern Ireland) 1967*.

The Bill seeks to require the Attorney General's consent before prosecutions are brought against people who are "subject to subsection 1A". As far as the provisions in respect of Northern Ireland in Clause 2 of the Bill are concerned, if the devolution arrangements for Northern Ireland are revived and sections 22 and 27(1) of the *Justice (Northern Ireland) Act 2002* are brought into force, the Attorney General will no longer be Attorney General for Northern Ireland and will instead be Advocate General for Northern Ireland, and there will be a separate Attorney General for Northern Ireland.

The Bill would make a new defence available to a person who had used force in the prevention of crime, or in defence of themselves or another, or in defence of property, against an intruder who was in a building or was attempting to enter it. The Bill would provide an absolute defence unless the force used was grossly disproportionate, and that was apparent.

It would be a general defence, not specific to any particular offences. It could be expected to come into play in cases where burglars are killed or injured in the course of their criminal activities. It would build on the existing legislation which allows reasonable force to be used in the prevention of crime. It would not abolish the common law defence of using reasonable force in self-defence. That would continue to apply in cases not covered by the new defence, such as those where force is used against a person trespassing on open land. In such cases the defence under section 3 of the 1967 Act might not apply if the type of trespass involved was not criminal and a person facing charges would have to rely on the common law defence. But already, as *Archbold* points out, the provisions of section 3 of the *Criminal Law Act 1967* -

> … will in fact cover the great majority of cases of self-defence and defence of others, and many cases of defence of property for in these cases the person who uses lawful force will be doing so for the purpose of preventing crime (although it is unlikely that the person involved will think of it in those terms).[10]

The Bill's new test of force which is not "grossly disproportionate" is likely to be more generous to defendants than the test of reasonable force. The new test appears to be an objective one. The new defence would not apply where the defendant knew that the degree of force used was grossly disproportionate, or where that "ought to have been apparent" to him. The Bill does not offer guidance on when it *ought* to have been apparent to a defendant that his force was grossly disproportionate although he did not *know* that it was. The *Protection from Harassment Act 1997* uses a similar formulation in making it an offence for a person to pursue a course of conduct which involves harassment and which he "knows or ought to know" involves harassment.[11] Section 1(2) of the 1997 Act goes on to emphasise that the question of what a defendant "ought to" have known is to be assessed objectively:

> For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.[12]

The Bill would not apply where a person used force against someone who was not a trespasser, such as someone known to them whom they had invited into their home, or someone who was living with them.

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[10] Archbold, *Criminal Pleading Evidence & Practice*, 2004, 19-39
[11] *Protection from Harassment Act 1997* s.1(1)-(1A)
[12] *ibid*. s.2

B. Meaning of "grossly disproportionate"

The Bill does not define "grossly disproportionate". The same wording has been used in section 329 of the *Criminal Justice Act 2003*, which applies to any case in which a civil claim for damages for "trespass to the person" (that is, a civil claim for assault, battery or false imprisonment)[13] is brought by a person in connection with an incident which led to the claimant being convicted of an imprisonable offence. Section 329 of the 2003 Act provides that in such cases a claim may only be brought with the permission of the court. The court may give permission only if there is evidence that *either*:

- the condition set out in section 329(5) of the Act is met, or
- that in all the circumstances, the defendant's act was grossly disproportionate.

If the court gives permission and the proceedings are brought, it is a defence for the defendant to prove *both*:

- that the condition set out in section 329(5) of the Act is met, *and*
- that in all the circumstances, his act was not grossly disproportionate.

The condition in section 329(5) is that the defendant did the act only because:

> (a) he believed that the claimant-
>
> (i) was about to commit an offence,
> (ii) was in the course of committing an offence, or
> (iii) had committed an offence immediately beforehand; and
>
> (b) he believed that the act was necessary to-
>
> (i) defend himself or another person,
> (ii) protect or recover property,
> (iii) prevent the commission or continuation of an offence, or
> (iv) apprehend, or secure the conviction, of the claimant after he had committed an offence;
>
> or was necessary to assist in achieving any of those things.

References to a defendant's belief are to his honest belief, whether or not the belief was also reasonable. Section 329 of the 2003 Act is concerned with civil proceedings, in which the standard of proof is the balance of probabilities, that is, whether something is more likely than not. In criminal proceedings the standard required is proof beyond reasonable doubt.

Section 329(5) came into force in January 2004 but, as yet, no cases on it appear to have been reported.

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[13] *Criminal Justice Act 2003* s.329(8)(a)

In the case of *R v Clegg*,[14] where a soldier's use of lethal force led to his conviction for murder, the Northern Ireland Court of Appeal described his act as a grossly excessive and disproportionate use of force. It was so "grossly disproportionate to the mischief to be averted" that any tribunal would have been bound to find that the force used was unreasonable. The House of Lords went on to hold that where a person used an amount of force in self-defence which was greater than necessary, he was guilty of murder: there was no half way house which could justify conviction for manslaughter rather than murder.

In its report on Patrick Mercer's *Criminal Law (Amendment)(Householder Protection) Bill 2004-05* the Joint Committee on Human Rights suggested that judges could have problems in interpreting the term "grossly disproportionate" in that Bill in a manner which complied with their duties under the *Human Rights Act 1998*. The Joint Committee's views are set out in full in Part IV of this paper.

III Background

This part of the paper provides details of some instances in which people have sought to use the defence of self-defence, or have been injured or killed while defending themselves and others against intruders, including details of a number of controversial cases. It also provides information on criticisms that have been made of the current position and attempts to change the law.

A. Illustrations

The case of Tony Martin, who killed one intruder and injured another, was by no means the first case where a person prosecuted for harming an intruder has attracted much publicity and some sympathy. But it has been a particular focus, with continuing publicity, partly because of the surviving intruder's claim for damages, and issues raised in Mr Martin's appeal against conviction for murder. Some cases in which the issue of self-defence has arisen in the last 20 years are summarised below.

a. Eric Butler

In May 1987, a retired clerk had a charge of malicious wounding withdrawn by the Crown Prosecution Service after he stabbed a mugger on the London Underground with a swordstick. However, he was later convicted of carrying an offensive weapon. He was fined £200, given a 28-day suspended sentence and had the swordstick confiscated.
Lord Lane, the Lord Chief Justice, said Mr Butler 'quite properly' used the stick in self-defence, but upheld his conviction for carrying an offensive weapon and increased his fine from £200 to £300.The sentence and forfeiture order were quashed on appeal the following year.[15]

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[14] [1985] 1 AC 482
[15] "Swordstick returned", *The Times* 11 June 1988

b. Kenneth Carrera

In May 1991, a disabled middle-aged man was charged with murder after he was attacked with a knife by a drunken, drugged mugger but succeeded in turning the weapon on his assailant. His counsel said: "All he wanted to do was to walk the streets peacefully, a basic human right to which we are all entitled." Mr Carrera was acquitted, but had spent eight months in prison awaiting trial.[16]

c. Tony Evans

In June 1993, a 66 year old man shot an intruder with a small-bore shotgun after eight burglaries and the loss of property worth £50,000 from his home. The Crown Prosecution Service recognised that few juries would convict a man in such circumstances:

> But Sir Nicholas Lyell, then Attorney General, told the Commons: "Any shooting incident must be carefully investigated. It is not for people to take the law into their own hands . . . there was a prompt review of the evidence by the Crown Prosecution Service, acting in close consultation with the police, which showed that Mr Evans had acted only in self defence."
>
> Mr Evans said that he accepted the police could not condone what he had done. "They had to act. It could lead to a vicious circle if everyone starts arming themselves to shoot at burglars. The burglars may start arming themselves and then the police and before we know it we may be living in a gun society.
>
> "I realise there are some gung- ho people around but I don't consider myself one of those. Lots of people sympathised with me. Some said no jury would convict me of any charge. But it was still a terrible anguish for me waiting to hear what was going to happen to me. I really feared going to jail."[17]

d. Hugh Williamson

In August 1994, a retired businessman disturbed a burglar he found in his home, and inflicted a deep wound on his neck with a kitchen knife. The case was studied by police for two months. Mr Williamson was then told that he would not face charges.[18]

e. Andrew Robinson,

A 34 year old man was given a suspended prison sentence in 1994 after a confrontation with drunken youths he found vandalising his property. Mr Robinson was found guilty of assault causing actual bodily harm.[19]

f. Ben Lyon

In January 1995 a 73 year old man was cleared of attempted murder and wounding with intent after firing his shotgun at a man he believed was about to burgle his allotment

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16 "Mugging victim who fought back is acquitted of murder" *The Times* 16 May 1991
17 "Pensioner who shot intruder escapes charge", *The Independent* 24 June 1993
18 "When have a go means death", *The Independent* 4 January 1996
19 "'Vigilante' gets suspended term", *The Guardian* 15 October 1994

shed. He had acted after repeated raids on his allotment. He was convicted of a lesser charge of unlawful wounding and given an 18-month suspended sentence.

> Lyon said after the hearing: "All I want to do now is to go home, look after my sister and feed my pigeons. I am relieved this is all over. I am grateful to the jury for their careful consideration of my case. I think the verdict was fair.
>
> "I also thank the judge for his fair sentence and, as he said, I shall not be in trouble again . . .
>
> "I don't think I should have been treated as I was by the police, and I have no confidence in the law and order system." He said he would "do it again if my life was in danger. It is my biggest regret that I now have a stain on my character."[20]

g. Jon Pritchett

In November 1995 a vineyard owner and Neighbourhood Watch organiser was cleared of deliberately wounding two burglars after they broke into his wine store. He claimed he never intended to harm them when he opened fire in the dark with a 12 bore shotgun. One of them refused to stand witness at the trial because he felt the prosecution should not have been brought. "We were on his property stealing his stuff. He should not have been prosecuted," he said.[21]

h. Barrie Richards

In November 1995 a jury took 10 minutes to reach a unanimous verdict of not guilty of assault occasioning actual bodily harm when a retired engineer was prosecuted for injuring a fleeing thief. He told the court that he had fired into trees above where he saw two villains disappear in the darkness at the flats complex where he lived, intending to scare them off. The judge commented:

> I would invite the attention of those who, in their discretion, decided that this prosecution should be brought, to the fact that it took the jury . . . a few minutes to determine that the right verdict was not guilty.[22]

i. Niklos Baungartner

In January 1996, the CPS decided that there was insufficient evidence to prosecute a man who had surprised a burglar in his kitchen. There had been a struggle and the burglar later died of his injuries.[23]

j. David Kent

In January 1996 businessman David Kent was cleared after shooting a suspected burglar in the leg. Mr Kent had been charged with wounding with intent after Anthony

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[20] "Old soldier who shot at thieves cleared of attempted murder", *The Guardian* 26 January 1995
[21] "Vineyard owner is cleared of illegally wounding burglars", *The Times* 9 November 1995
[22] "Judge criticises CPS for gun assault prosecution", *The Guardian* 29 November 1995
[23] "Man weeps over death of burglar after struggle", *The Guardian* 3 January 1996

Polaczek was shot during a confrontation at a printing works. Mr Kent told the court he feared for his life, and aimed his double-barrelled shotgun at the ground after Polaczek lunged at him.[24]

k. Anthony Martin

Tony Martin had lived at a remote farmhouse, Bleak House, for 20 years. There had been several break-ins, and he had expressed dissatisfaction with the service provided by the police. On the night of 20 August 1999 two burglars, Brendan Fearon and Freddie Barras, entered by breaking a ground floor window. Mr Martin shot at both of them with an unlicensed shotgun. Fearon was injured and Barras died. In April 2002 Mr Martin was found guilty of murder and wounding with intent. Murder carries a mandatory life sentence, and the judge imposed a concurrent sentence of 10 years imprisonment for the wounding. The defence had been self-defence. At his appeal in October 2001, the court described the law and its application to the case as follows:

> When this defence is raised, the prosecution has the burden of satisfying the jury so that they are sure that the defendant was not acting in self-defence. A defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property. (See Beckford v R [1988] 1 AC 130).
>
> In judging whether the defendant had only used reasonable force, the jury has to take into account all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief as long as his belief was genuine.
>
> … the jury could only convict Mr Martin if either they did not believe his evidence that he was acting in self-defence or they thought that Mr Martin had used an unreasonable amount of force.
>
> ..As to the first issue, what Mr Martin believed, the jury heard his evidence and they could only reject that evidence if they were satisfied it was untrue. As to the second issue, as to what is a reasonable amount of force, obviously opinions can differ. It cannot be left to a defendant to decide what force it is reasonable to use because this would mean that even if a defendant used disproportionate force but he believed he was acting reasonably he would not be guilty of any offence. It is for this reason that it was for the jury, as the representative of the public, to decide the amount of force which it would be reasonable and the amount of force which it would be unreasonable to use in the circumstances in which they found that Mr Martin believed himself to be in. It is only if the jury are sure that the amount of force which was used was unreasonable that they are entitled to find a defendant guilty if he was acting in self-defence.
>
> …What has been the subject of debate is whether a defendant to a murder charge should be convicted of murder if he was acting in self-defence but used excessive force in self-defence. It is suggested that such a defendant should be regarded as being guilty of manslaughter and not murder. He would not then have to be sentenced to life imprisonment but usually instead to a determinate

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[24] "Jury rejects charges against man blasted thief with shotgun". *The Guardian* 9 August 1996

> sentence the length of which would be decided upon by the judge, having regard to the circumstances of the offence. If it is thought that this should not be the law then the change would have to be made by Parliament.[25]

However, the court admitted fresh psychiatric evidence that Martin was suffering from a long-term personality disorder. While this was found not relevant to the issue of self-defence, the court substituted a verdict of guilty of manslaughter by reason of diminished responsibility. The new sentences were five and three years' imprisonment.

He was released in August 2003, only days after Fearon, who was serving an 18 month sentence for a drug related offence was released early on home detention curfew. The media had also been following Fearon's civil claim against Martin with critical interest. He had been granted legal aid to claim compensation (reportedly £15,000) for his injury. In September 2003 the case was settled out of court when Fearon dropped his claim and Martin dropped his counterclaim.[26]

l. Kenneth Hall

In 1996 a farmer who shot a thief stealing from his car was acquitted on charges of causing grievous bodily harm. He told the court that he never intended to shoot the thief, Neil Hartley. He had been "frightened to death" by Hartley and only intended to shoot over his head after he threatened to knife him.[27]

m. Ted Newbery

One night in March 1998, retired miner William Edward Newbery shot and injured an intruder through the door of his allotment shed. He regularly slept in his allotment shed to protect his property from theft and vandalism. The intruder pleaded guilty to attempted burglary, and served a prison sentence. Mr Newbery was acquitted on charges of unlawful wounding and wounding with intent to cause grievous bodily harm but was later ordered to pay the injured intruder £4,100 damages for negligence. There was no question of self-defence, and it was held that the mere fact that the intruder was engaged in criminal activities upon the premises when he suffered injury, as a result of Mr Newbery's negligence, was not sufficient of itself to debar him from claiming damages for those injuries. The damages were, however, a reduced amount, to reflect the contributory negligence of the intruder.

The case attracted much publicity and public sympathy, and the judge took the unusual step of writing to the newspapers:

> In a letter to the Editor of The Times, Mr Justice Rougier says that Ted Newbery, 82, planned to frighten the next intruder at his allotment shed by shooting blind through a hole in the door. The judge says that he is convinced that Mr Newbery, a former miner, was not in fear of his life and nor had there been any blood-curdling threats. He had not been too particular about what the shot would hit and

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25 *R v Martin* [2003] QB1

26 "Martin and Fearon strike deal over damages", *The Independent* 23 September 2003,

27 " Jury rejects charges against man blasted thief with shotgun", *The Guardian* 9 August 1996,

> when he did fire he caused "severe and lasting injury to the would-be burglar; a few inches either way and he would have killed him".[28]

The judgment was upheld on appeal.[29]

n. Garfield Davenport,

Two masked men, armed with a claw hammer, went to Garfield Davenport's home at midnight to attack him. He said he was "petrified for his life". He stabbed and killed one of them. He was prosecuted for murder and acquitted by a jury which took 15 minutes to reach a verdict.[30]

o. Barry-Lee Hastings

In October 2002, Barry-Lee Hastings stabbed and killed a burglar who had broken into the flat where his children lived with his estranged wife. Mr Hastings mistakenly thought that they were in, he thought he heard his daughter crying and thought that the burglar was carrying a machete. But the court was told that the burglar had been stabbed 12 times in the back. Mr Hastings was acquitted of murder but convicted of manslaughter on a majority verdict. On appeal his sentence was reduced from 5 to 3 years imprisonment. The Lord Chief Justice explained why self-defence was not available but provocation was, and said:

> It must be an alarming experience for anyone to find themselves outside the home in which they believe their wife and children are living and to know that there is an intruder inside. As we have already indicated, in these circumstances it is not surprising that the person concerned should arm himself with a weapon which was readily available. The problem is that if a person arms himself with a knife and there is then an incident, it is all too easy for him to make use of the weapon in a way wholly disproportionate to the danger in which he finds himself.[31]

p. Thomas O'Connor

An elderly, registered blind man, Thomas O'Connor, stabbed and killed a young intruder who was breaking into his home in June 2003. He was arrested but not charged. At the inquest held in March 2004, the coroner said:

> I am not in any way saying the public should take it upon themselves to kill people entering their premises, I believe Mr O'Connor acted within reasonable grounds to protect himself and his wife and therefore record a verdict that Lee Ross Kelso was lawfully killed.[32]

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28 "Judge tells why shotgun pensioner had to pay", *The Times* 6 December 1994
29 *Revill v Newbery* [1996] QB 567
30 "Man who killed intruder is cleared in 15 minutes", *Daily Telegraph* 9 November 2001
31 *R v Barry-Lee Hastings*, 9 December 2003,
32 "Blind man was 'within law' to kill intruder", *The Times* 19 March 2004

The police had sought legal advice from a barrister, who had said that it would be impossible for the Crown to disprove self-defence.[33]

q. Brett Osborn

In 2003, Brett Osborn, a 23 year old labourer was watching television with friends, including a pregnant woman, when a blood-covered drug addict forced his way into the house. During a struggle Mr Osborn stabbed the man, who died. Mr Osborn was prosecuted, convicted of manslaughter and is serving a five-year jail sentence. Patrick Mercer has used the facts of this case to illustrate how his Bill would lead to a different outcome.[34]

r. Kenneth Faulkner

In 2004 a judge said that a 73-year-old farmer who shot a burglar after being broken into three times could not be criticised for the way he defended his property. When he sentenced the burglar, the judge said it was a pity that prosecutors had even thought of bringing charges of assault against the farmer, who had only recently learned that he would not face charges. Burglars had stolen weapons, including five shotguns, from him in July. One of them returned in August and stole a mechanical digger. When he went back the next day, Mr Faulkner confronted him and fired his shotgun, hitting the burglar's leg with pellets. The judge commented:

> He wrongly believed the burglars had come back armed with those guns that had been stolen. Very sensibly he took out his shotgun.Nobody could criticise him for what he did. For him it has been a most harassing and terrible incident.
>
> It is only a pity that charges were considered against him. Sensibly, the decision was made - which I entirely agree with - that the matter would not be pursued.

Michael Auty, prosecuting, said the "primary reason" that the CPS decided not to charge Mr Faulkner was that Rae had been left with only pellet wounds in his lower leg.[35]

s. Philip Cook

In August 2003 Mr Cook used a hockey stick and a stair spindle to beat off a group of late-night revellers who attacked his wife outside the family home after she went out to ask them to keep the noise down. The revellers then attacked him and his wife both outside and inside their house. Both Mr Cook and his wife were initially arrested and he was later prosecuted. He was acquitted after a trial at Bristol Crown Court.[36]

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[33] "Blind man killed intruder in self-defence", *The Guardian* 19 March 2004

[34] "Even burglars admit it: my Bill will stop them ...but only if the Prime Minister is true to his word, says Patrick Mercer", *Sunday Telegraph* 12 December 2004

[35] "Jury rejects charges against man blasted thief with shotgun", *The Guardian* 9 August 1996

[36] "I was thrown in the cells for defending my family" – 13.2.2005 *Daily Telegraph*

t. Marian Bates

In September 2003 Marian Bates was shot dead during a robbery at her family's jewellery shop in Nottingham when she put herself between a gunman and her daughter, as her husband tried to fend the robbers off. The gunman, who the police have named as James Brodie, is believed to have been killed by other criminals. His accomplice, Peter Williams, who was on licence from a young offenders' institution and had removed his electronic tag, was convicted of murder at Stafford Crown Court in March 2005 and sentenced to life imprisonment, with a recommendation that he serve 22 years.[37]

u. Robert Symons

On 20 October 2004 a schoolteacher, Robert Symons, was fatally stabbed during a violent struggle with an intruder who broke into his Chiswick home during the night.[38]

v. Linda Walker

In March 2005 Linda Walker, a special needs teacher, was sentenced to six months' imprisonment for affray and possessing a firearm after she fired an air pistol at the ground near youths gathered outside her home. Mrs Walker said she fired the gun after youths had terrorised her. Her family said that they had repeatedly called the police to report acts of vandalism and burglary on their property but had apparently received no response. Mrs Walker's sentence was reduced to a conditional discharge by the Court of Appeal and she was released from prison on 4 May 2005, but she was refused leave to appeal against her conviction.[39]

w. John Monckton

In November 2004 John Monckton was killed and his wife Homeyra was seriously injured by intruders who entered their home in Chelsea. Two men are currently on trial at the Old Bailey in connection with this case.[40]

B. Pressure for reform of the law

A spate of cases in the early 1990s led to calls for the law of self-defence to be defined.[41] Following one case where a young man slashing car tyres had killed a man who challenged him, and successfully pleaded self-defence, then Home Secretary Michael Howard said:

> …. Specifically on the law on self-defence, I am satisfied that the individual should always be able to defend himself, his family and his property, as long as he only uses force that is both reasonable and necessary. I am not currently persuaded that there is a need to change the law. However, I intend to study the

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[37] "Tag teenager who helped jeweller's killer jailed for 22 years" – *Times* 6 May 2005
[38] "Father killed after confronting burglar" – *Guardian* 21 October 2004
[39] "Teacher who fired airgun at youths freed from jail but conviction stands" – *Guardian* 5 May 2005
[40] "City banker widow 'was paralysed'" – *BBC News* 23 November 2005 at http://news.bbc.co.uk/1/hi/england/london/4463306.stm
[41] "Vigilante or victim", *The Times* 12 December 1995

> Law Commission's recent report on offences against the person very carefully and will be interested in the public reaction to its recommendations. [42]

After the Newbery and Lyon cases, he was reported as saying that people who used violence to defend themselves should be treated more sympathetically.[43] The debate gathered pace again after the Tony Martin case in 1999. In April 2000, William Hague said that the law should be changed to put the state "on the side of people who protect their homes and their families against criminals", but then Home Secretary Jack Straw was "yet to be persuaded" that the existing law was at fault.[44]

1. Westminster Hall debate: March 2003

In March 2003, Henry Bellingham asked how it could be right to prosecute people when the law was confused and contradictory, and whether it was reasonable to expect a householder, during a few fearful seconds at the top of the stairs, when he is being menaced and perhaps threatened with a broken bottle or a knife, to guess what the law would say when lawyers do not know.[45] He was not suggesting that the Government should immediately change the law, but that the Law Commission should be tasked with examining whether we need a new law where the relevant test was a new, subjective test of what the householder believes to be appropriate at the time. He also thought it would make sense if a rule were introduced whereby all civil rights are extinguished the moment that a crime is committed: it offended many people when it became apparent that burglars and other criminals can profit from a crime.

John Denham replied:

> On the question of the law on self-defence, it is well-established in law … that a person may use "reasonable force" in self-defence or in the defence of his or her family or property…
>
> What constitutes reasonable force will depend upon the circumstances of each case and is a matter solely for the courts to decide. … For example, some allowances are made for panic in the heat of the moment or the fact that the defendant is small and frail and the criminal is large and threatening.
>
> Some sort of codification of what level of force is permissible is likely to be of only academic interest to people who suddenly find themselves under attack. Such a code is not likely to be the sort of thing one carries round in one's mind in case it is needed. I am not sure whether it would help to resolve the situation. When a case is brought to court, it is best left to the jury to decide, in the light of the circumstances, whether the action taken in self-defence was necessary and proportionate. The law allows a jury to take into account the fact that people defending themselves may not be able to judge to a nicety what level of force to use. Generally, juries are able to come to sensible conclusions that are on the side of the law-abiding public and the victim.

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42 HC Deb 14 December 1993 c533w

43 "Vigilante or victim", *The Times* 12 December 1995

44 "Early ruling sought on self-defence", *The Times* 27 April 2000; "Labour hits at 'cynical' pledge on self-defence", *The Independent* 27 April 2000,

45 HC Deb 4 March 2003 c206WH

> Although it is quite reasonable to ask for a proper approach by the police and the prosecuting authorities, many of the judgments in cases that are brought to court must be put in the hands of juries, which must play the role that they have traditionally played. We need to keep a careful balance between upholding an individual's right to self-defence and maintaining the general rule that people should not take the law into their own hands. It follows that changes to the existing law should not be made on the hoof as a response to a particular case. At this stage, we are not convinced that a change to the law on self-defence is required. [46]

2. The *Criminal Justice Act 2003*: restriction on civil claims

In response to protests at the prospect of burglar Brendan Fearon obtaining compensation from farmer Tony Martin, the Government agreed to bring forward an amendment to the *Criminal Justice Bill 2002-03* to ensure that those who commit offences affecting the lives and property of others should not be able to turn the tables and sue the victims of their offences.[47] The result was section 329 of the *Criminal Justice Act 2003*, which came into force in January 2004. The provisions of section 329 are considered in Part II B of this paper.

3. The *Criminal Justice (Justifiable Conduct) Bill 2003-04*

At the end of 2003, the BBC Today programme asked listeners to suggest a law that they would like to see put onto the statute books. There were 10,000 nominations and five were shortlisted. There were 26,000 votes, and listeners chose the proposal that homeowners should be able to use any means to defend their home from intruders.

The *Criminal Justice (Justifiable Conduct) Bill* sought to exempt from civil and criminal liability in specified circumstances persons acting in defence of persons or property. It was presented on 12 January 2004 and ordered to be read a second time on Friday 30 April.[48] Introducing the Second Reading Debate,[49] Roger Gale explained that although he believed that the BBC's exercise had been founded in good faith, it had been a mistake, and it was not the business of a public service broadcaster to engage in the drafting of legislation. Given that many people had voted in the belief that their view was going to be brought before Parliament, he and others had decided that they would –

> have a go at wiping a little of the egg off Auntie's face, and see whether we could achieve something in the direction of the change to the criminal justice law that was required. ..

He explained that his Bill had been drafted by former Parliamentary Counsel, Frances Bennion and that:

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46 *ibid*. c212WH

47 Home Office press release 037/2003*The Cases of Brendon Fearon and Tony Martin*, 29 July 2003,

48 Bill 36 of 2003-04, HC Deb 12 January 2004 c530 presented by Mr. Roger Gale, supported by Mr. Eric Forth, Mr. Peter Atkinson, Mr. Richard Bacon, Mr. Julian Brazier, Derek Conway, Mr. Gerald Howarth, Mrs. Eleanor Laing, Richard Ottaway, Mr. Andrew Turner, Ann Winterton and Sir Nicholas Winterton

49 HC Deb 30 April 2004 1146-80

> We are seeking to address the underlying perception that the criminal justice system has moved towards the criminal as the victim and away from the interests of the real victim of the crime—in this case, the householder, be that person tenant or house owner.

Under clause 1 of Roger Gale's Bill a person who was the occupier of a dwelling (or whose presence was licensed by the occupier) would not have been guilty of an offence by reason of any act done by him in relation to the person or property of a trespasser (or would-be trespasser) if he believed (whether reasonably or not) that he was acting:

- in self-defence, or
- in defence of another person, or
- to preserve or protect property, or
- to apprehend the trespasser or any other suspected wrongdoer, or
- otherwise in prevention of crime.

Mr Gale said:

> I am indebted to Mr. Andrew Hawkins of Communicate Research. Hon. Members may have seen the results of his poll, which were published at 1 o'clock this morning. Mr. Hawkins conducted a survey of 201 Members of Parliament—or almost a third, which is a fair sample. I take no particular satisfaction from the poll, because 56 per cent. of Members on both sides of the House believe that the law should stay as it is. A mere 4 per cent. believe that the law should be changed so that householders are permitted to use any means—as the Bill states—to defend their homes in the case of burglary. However, 40 per cent.—so a total of 44 per cent.—believe that the law should be changed so that householders are permitted to use greater force, but not any means whatsoever, to defend their homes in the case of burglary.
>
> The public, in radio and press polls, have made their view abundantly plain. The House has a clear duty to listen to that public voice, as well as to the honourably expressed views of hon. Members on both sides of the House. The balance at the moment is a fine one. A significant minority of hon. Members, without having heard the arguments that I have made today, believe that the prevailing circumstances warrant change.

Home Office Minister Fiona Mactaggart replied:

> Following the Martin case, there has been a cloud of confusion about the current state of the law, and some issues remain properly to be remedied.
>
> (…) The proposed Bill would give a person virtual immunity from prosecution for any act done by him if he believed, "whether reasonably or not", that he was acting in self-defence or that he was acting to preserve property, to apprehend a wrongdoer or to prevent a crime, and believed—again, "whether reasonably or not"—that the other person was a trespasser. That is certainly a step too far.(…) When there was a clearly disproportionate response to an incident, where someone was seriously injured or killed, no responsible person would want to find that the perpetrator did not have to answer for those actions before a jury.

> It is for a jury to decide whether someone is acting reasonably or unreasonably and whether their actions are proportionate and justifiable or not. To allow someone to use any means to defend themselves could include, for example, being able to use weapons to kill an intruder. That would clearly be a disproportionate and unreasonable response to an unarmed burglar.
>
> (…) I know that in some cases people feel that the law is not protecting them, and that is what has led to this proposal. We need to make sure that the law is operating as it should, but putting householders beyond its reach would not help the law to protect them. Rather, it would create an acceptance of lawlessness and a spiral of violence and retaliation that would make the situation worse. It would create a situation in which people felt that they had to go armed in order to protect themselves. That cannot be what we want to achieve.

That Bill made no further progress.

4. The Law Commission: partial defences to murder

In July 2003 the Law Commission announced that it was reviewing the operation of the partial defences to murder of provocation and diminished responsibility, and also whether there should be a new *partial* defence where a person kills in circumstances in which the current defence of self-defence is not available because the force used was excessive.[50] In a consultation paper published in October 2003,[51] the Commission quoted from an article which had appeared in the *Justice of the Peace*:

> In the particular context of a householder's right to defend his home and family, Dr Michael Watson has argued:
>
> > … a disarmed society depends on an efficient and effective criminal justice system. If the state cannot fulfil its side of the bargain, its courts should not be too hard on those who (in the heat of the moment) use more force than may later seem reasonable. A strong case can be made for establishing a presumption that force used in self-defence- and defence of the home- is reasonable and lawful.[52]

After summarising the law and developments in the UK and a number of other jurisdictions, the Commission sought views about partial defences, including a possible partial defence of excessive force in self-defence. In May 2004, it published provisional conclusions including a proposal that the provocation defence should be recast in a way which would include (subject to safeguards) excessive force in self-defence, so that a separate partial defence would not be proposed.[53] It also stated its intention of saying in its report that the law of homicide needed reviewing.

In its final report the Law Commission explained that the arguments in favour of a new partial defence had concentrated on two categories of defendant, one of which was:

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50 Law Commission press release 3 July 2003

51 *Partial Defences to Murder* Law Commission Consultation Paper No 173, 2003

52 "Self-defence and the Home" 167 *Justice of the Peace* 486 at p 488, 28 June 2003

53 *Partial Defences to Murder, Provisional Conclusions on Consultation Paper No 173* Law Commission, , http://www.lawcom.gov.uk/files/cp173-prov.pdf

> The householder who responds in fear of physical attack from an intruder and, whom it is said, the present law places in the exquisite dilemma of having to respond "reasonably" or not at all.

Some consultees had suggested that although the *Palmer* direction[54] was theoretically generous to the defendant, it did not always work justly where a weaker party uses a degree of force against a stronger opponent which is greater than would be proportionate as between people of equal strength. From consultees' responses, it appeared that not all judges give directions to juries about the need to carefully consider the disparity of strength and vulnerability between the defendant and the other party in cases where it is relevant on the facts.

The Commission summarised the substance of the concerns relating to the threatened householder:

> 4.19 … there is a strongly held view among many members of the public that the law is wrongly balanced as between householders and intruders. We think that much of that public anxiety is based on a misunderstanding of the present state of the law, contributed to by incomplete understanding of certain notorious cases. We accept, however, that the law should provide explicitly for a partial defence to a charge to murder where a person of ordinary tolerance and self-restraint acts in fear of serious physical violence to himself or another. We acknowledge that such a person, though genuinely acting in fear, might not always act "reasonably" so as to attract the full defence of self-defence. In such a case, we conclude, he or she should not be convicted of murder but should receive a conviction which reflects his or her lesser degree of culpability. The law of self-defence should not be a case of "all or nothing".[55]

5. Review of the law of murder

On 27 October 2004 a Home Office press release announced that there would be a review of murder law, following the Law Commission's recommendation that the law needed fundamental reform:

> The Home Secretary said that the law needed to be clear, comprehensive and fair to ensure public confidence in the criminal justice system. However, he said the Government remained committed to retaining the mandatory life sentence, and to the murder principles set out in the Criminal Justice Act 2003.[56]

On the following day, Mr Blunkett, who was then Home Secretary, explained that it had been had been his intention to address the issue of the homicide review during Third Reading of the *Domestic Violence, Crime and Victims Bill*—a debate that did not take place. He said that he proposed to establish a review, the terms of reference for which he would lay before the House shortly. [57]

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[54] *Palmer v The Queen* [1971] AC 814, see Part I above at p.8

[55] *Partial Defences to Murder* Law Com Report No 290, August 2004

[56] Home Office Press Release 332/2004 *Putting victims first: the Domestic Violence, Crime & Victims Bill*, 27 October 2004,

[57] HC Deb, 28 October 2004 c1578

The terms of reference of the review were laid before the House on 21 July 2005. On the same day the Home Secretary, Charles Clarke, made the following written ministerial statement:

> On 28 October 2004, my predecessor, David Blunkett, announced a review of murder. There has been a long-standing debate over many years about the need to review the laws on murder. The Law Commission has produced a report on partial defences to murder and this review will build on the analysis of the law set out in that work.
>
> The terms of reference for the review, to be led by the Home Office, have today been placed in the Libraries. There will be a full public consultation as part of the review and honourable Members will have the opportunity to comment at any stage.
>
> I am pleased to announce that the Law Commission have agreed to join the Home Office in this work. The review will be in two stages. The Law Commission will first conduct an analysis of the laws relating to murder, taking into account their earlier work on the partial defences but looking at them in this wider context. Following consultation, it will provide the Home Office with its conclusions which the Home Office will take into account in conducting a review of the wider public policy issues and producing recommendations, as appropriate, for new legislation.
>
> The review is expected to take between 18 months and two years. [58]

The terms of reference of the review are:

> To review the various elements of murder, including the defences and partial defences to it, and the relationship between the law of murder and the law relating to homicide (in particular manslaughter). The review will make recommendations that:
>
> - take account of the continuing existence of the mandatory life sentence for murder;
> - provide coherent and clear offences which protect individuals and society;
> - enable those convicted to be appropriately punished; and
> - be fair and non-discriminatory in accordance with ECHR and Human Rights Act
>
> The process used will be open, inclusive and evidence based:
>
> - a review structure that will look to include key stakeholders;
> - consultation with the public, criminal justice practitioners, academics, those who work with victims families, parliamentarians, faith groups;

[58] HL Deb 27 July 2005 cWS142

- looking at evidence from research and from the experiences of other countries in reforming their law.[59]

A footnote to the terms of reference says:

> The review will include consideration of areas such as culpability, intention, secondary participation etc inasmuch as they apply to murder. The review will only consider the areas of euthanasia and suicide inasmuch as they form part of the law of murder, not the more fundamental issues involved which would need separate debate. For the same reason abortion will not be part of the Review.

The Home Office minister, Fiona Mactaggart made the following comments about the review:

> Murder is the most serious crime and it is essential that the law reflects this. Whilst the Government remains committed to retaining the mandatory life sentences and the murder principles set out in the Criminal Justice Act 2003, the Review will look at the overall framework of murder to ensure that the Government provides coherent and clear offences which protect the public and enable those convicted to be appropriately punished.
>
> It is vital that the law on murder makes sense and people clearly understand it. The law needs to be clear, wide-ranging and fair so that people have confidence in the criminal justice system. We want to have an open and inclusive debate on the issues before we make firm recommendations on how the law should be reformed.
>
> The Government welcomes the Law Commission's role in using their legal expertise to provide a legal analysis. This will build on the research and analysis contained in their previous work on partial defences but look at things afresh in the context of the more wide ranging review, and it will inform and complement the work of the Review Team to provide a substantial and comprehensive review of the law of murder.[60]

The Law Commission will issue a consultation paper by the end of 2005. It aims to provide the Home Office with its provisional recommendations in early summer 2006 and to publish a final report in autumn 2006.

6. Press campaign

Following the fatal stabbing of Robert Symons, a schoolteacher, who disturbed a burglar at his family home in Chiswick on 20 October 2004, the *Sunday Telegraph* launched a campaign for the law to be changed to give householders the right to use whatever force is necessary against intruders. The leading article said:

> There is no more fundamental right than that of individuals to protect themselves, their families and their homes from criminals who break in and attempt to steal their property. It is the most basic one which government exists to protect - and when it fails to protect it, government neglects its most elementary duty.

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[59] DEP 05/976 at http://www.lawcom.gov.uk/docs/Terms_of_Reference.doc
[60] http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3187.html

> Successive governments have conspicuously failed to discharge that duty: more people than ever are being assaulted in their own homes, and having their property burgled. Worse, the laws that governments have passed have punished citizens when they have tried to make up for that failure by asserting that right for themselves….
>
> There is little doubt that had Mr Symonds taken a knife, and plunged it into his assailant's chest, it is he who would now be facing prosecution for murder. The law indeed states that a home-owner can use "reasonable force" to protect himself and his property from an intruder. But no one knows what "reasonable force" is.[61]

The newspaper also reported on support for its campaign from different sources:[62]

> David Davis, the shadow Home Secretary, said the law should be "rebalanced" to do more to protect householders from violent criminals… As pressure mounted on the Government to act, Mr Davis said: "The law needs considerably more clarification and should be rebalanced in favour of householders and against criminals."
>
> His comments represent a hardening of the Tory line following recent high-profile cases…
>
> David Burnside, the Ulster Unionist MP for South Antrim who has taken up the case of three elderly constituents who were attacked in their home, said: "People are afraid to defend themselves in their own homes. They think the law won't protect them, or that they will be sued if they harm the intruder. This is insane. The law needs to be changed.
>
> "Once a burglar enters someone's home with the intent of robbing them, raping them or hurting them they should lose their rights to protection from the law."
>
> … Even the Home Office is uncertain about householders' rights. A journalist from this newspaper contacted its public inquiries office, posing as a member of the public, to ask what was "reasonable force".
>
> After being placed on hold while the inquiry was passed from one stumped official to another, the reporter was offered the following: "There is no definition of what 'reasonable force' is. The law doesn't go into that level of detail. It is for the police to look into individual cases."
>
> A spokesman for Liberty, the human rights organisation, said: "This needs to be clarified. No one has a clue what reasonable force means."

On 28 November 2004 the *Sunday Telegraph* added a number of retired chief constables to its list of campaign supporters. William Wilson from central Scotland said that he could identify a trend for the law being tougher on the householders than it used to be. Sir Geoffrey Dear from the West Midlands thought that the CPS had been looking

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61 "The State's first duty", *Sunday Telegraph* 24 October 2004

62 "Let public fight back against the burglars" *ibid.*

at reasonable force in far too narrow a way, and had not tried to put themselves sensibly and properly in the place of the householder:

> If you chance upon somebody in the dark you have no idea what he has in his hand… I don't think you have time to weigh up what is proportionate and what isn't. I say that if you hit him and cause grave damage, then tough.

In early December 2004 Sir John Stevens, the former Metropolitan Police Commissioner told the *Telegraph* his view that those who defended their families and property should only face prosecution over injuries to intruders in extreme circumstances, where they could be shown to have used gratuitous violence. He said that the current test of reasonable force seemed to be weighted against the householders, and he suggested that there should be a presumption in law -

> …that the person using the force to defend themselves is acting within the law rather than the other way round.[63]

Tom Buchan, president of the Association of Scottish Police Superintendents, apparently agreed.[64]

C. The *Criminal Law (Amendment) (Householder Protection) Bill 2004-05*

1. Background

The debate on the issue of self-defence intensified after Patrick Mercer, who was Conservative spokesman for Homeland Security, came first in the ballot for Private Members' Bills in the 2004-05 Parliamentary session and announced that he would introduce a Bill, with the full support of the Conservative party, that would offer complete freedom from prosecution to homeowners who took action against intruders so long as their action was not "grossly disproportionate". He said that his Bill would not affect cases like that of Tony Martin, whose use of force had been grossly disproportionate, but would affect cases like Brett Osborn's:

> Osborn is serving a five-year sentence for manslaughter. One of the issues that led to the decision to prosecute him for murder was that he failed to "warn the intruder that he had a knife and might stab him with it if he did not desist".
>
> This is preposterous - but it is the kind of thing that happens under the present law. Cases such as Osborn's give the lie to the claim, made so often by government law officers, that "no one has been unjustly convicted" under the existing legislation. Many more people have had to endure the stress and strain of having a prosecution hanging over their heads for months - only for the judge to dismiss the case as "manifestly absurd" once it comes to court. Those people do not end up in prison but they do suffer the protracted torture of the legal process.

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63 "Time to let people kill burglars in their homes, says Met chief", *The Telegraph* 4 December 2004

64 "Top policeman backs 'right' to kill intruders", *Scotland on Sunday* 5 December 2004

> Under my Bill, no one will be prosecuted for taking the kind of action Osborn took. We will frame the Bill's language very carefully to ensure that result. To those who insist that the term "not grossly disproportionate" still leaves too much latitude to the Crown Prosecution Service (CPS), and that the CPS will inevitably twist the phrase so as to bring unjust or unfair prosecutions, I simply reply that there will be a clause in my Bill that will make the Attorney General personally responsible for any decision to prosecute an individual for using "grossly disproportionate force" in defence of his family and his property. That means the Attorney General will have to take the decision to prosecute himself. I have no doubt that this will act as a very effective disincentive to bring prosecutions in marginal or debatable cases.

Patrick Mercer said that he was seeking to rebalance the law in favour of the victim rather than the aggressor. He told *The Sunday Telegraph*:

> My Private Member's Bill will abolish the present statute's requirement that a home owner act with "reasonable force" when tackling an intruder. It will replace it with the requirement that the home owner's use of force be "not grossly disproportionate" to the circumstances in which he finds himself. Although it came top of the ballot for Parliamentary time, my Bill will almost certainly fail unless the Prime Minister explicitly supports it.
>
> There has already been media comment to the effect that my Bill will not provide the clarity in the law that home owners and others so desperately need: that "not grossly disproportionate" is no better than "reasonable force" as a definition of what you are allowed to do.
>
> Let me settle that issue now. The term "not grossly disproportionate" will allow home owners a much greater degree of latitude in tackling burglars. They will be able to do whatever they think is necessary to defend themselves when confronted by an intruder. What they will not be entitled to do is chase a burglar down the street and plunge a knife into his back once he is off their property. My Bill is not a licence to commit murder - it is not an English version of the Oklahoma law[65] that indemnifies home-owners from prosecution no matter what they do to an intruder.[66]

Mark Oaten, Liberal Democrat Shadow Home Secretary, said:

> We agree with the Conservatives that the law should back members of the public who use proportionate force in self-defence. The law does need to be clearer, but any changes to it must not create a climate where anything goes, as there is a danger that a nasty situation could turn into a fatal and tragic one.[67]

Sir John Stevens, who was then Metropolitan Police Commissioner, was said to be in total support of the plans:

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65 The law in Oklahoma is described in Part V of this paper.

66 "Even burglars admit it: my Bill will stop them ...but only if the Prime Minister is true to his word, says Patrick Mercer", *Sunday Telegraph* 12 December 2004,

67 Liberal Democrat press release *Public must be allowed to use proportionate force in self-defence – Oaten* 7 December 2005,

> A Metropolitan Police spokeswoman said [Michael Howard] had met Sir John and deputy commissioner Sir Ian Blair, who will be the force's next chief.
>
> > "They have not seen the private member's bill in full but do support the 'grossly disproportionate' threshold that Mr Howard suggests be used as the test for whether a householder should be prosecuted".[68]

Lord Falconer of Thoroton, the Lord Chancellor, agreed that it was important for people to know that they could use force to defend themselves but argued that no law change was required.[69]

Former editor, Andreas Whittam Smith, writing in *The Independent,* urged reflection before the momentum became overwhelming. He described his own experience as a juror in a case where a defendant pleaded self-defence and was acquitted, and went on:

> [Sir John Steven] is right in the sense that people have got it into their heads that they will inevitably be charged and found guilty of assault or murder if they strike first. And if householders are confused about their rights, then they may fatally hesitate when they should act promptly to save their property or their lives…. Let us accept that Sir John is right. There is confusion, - though I would be surprised to find that the 'reasonable force' test isn't working well in practice. Nonetheless the standard way of clarifying a misunderstood area of the law is for the Lord Chief Justice to make a statement that reminds people of what the law actually is… Failing this however, the wording of the relevant law should be tightened up but not going so far as the version likely to be proposed in Mr Mercer's Bill.

A different angle was suggested by Professor Patrick Atiyah who wrote to *The Independent*, saying that, like most lawyers, he had shared the view that there was no need for a change in the law:

> But reading many newspaper accounts of such cases in the past year or two has changed my mind, because it seems quite clear that when an intruder is injured or killed, police and prosecuting authorities now often take the view that it is not their job to decide whether the householder used reasonable force, but that the case should be laid before a jury. Even when the facts appear absolutely clear, and an acquittal by the jury is virtually certain, prosecutions are frequently brought; indeed judges have sometimes criticized cases that should never have been brought.
>
> Some may think that if an acquittal is a certainty, it does not matter if a prosecution is brought but this overlooks what a horrible experience it is for the householder – by definition the victim of an illegal intrusion into his house – to be questioned by the police as though he is the suspect, then arrested charged and fingerprinted and finally, after perhaps several months' delay, to be brought before a court before he is finally vindicated.[70]

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[68] "Law on intruders to be reviewed" *BBC News* 7 December 2004, http://news.bbc.co.uk/1/hi/uk_politics/4075411.stm

[69] *ibid*.

[70] "Burglary victims must be spared humiliating prosecutions", *The Independent* 7 December 2004,

2. The Government's view of the current state of the law

At Prime Minister's Questions on 8 December 2004, Tony Blair said:

> What we have said is that we will consult chief police officers, the Crown Prosecution Service and, indeed, the Attorney-General. I entirely understand the concern about this particular issue and I share the general view of the Metropolitan Police Commissioner. If we get the right response from those people, we will, of course, support a change in the law. As I understand it, the particular private Member's Bill has not yet been published. We will have to consider the best way to take it forward, but I entirely share and understand the concern and hope that we can reach agreement on it.

Lord Goldsmith, the Attorney-General, said in an interview for *The Observer* that criminals must also have the right to protection from violence:

> Goldsmith said he was obliged to carry out the review but remained unconvinced of the need for new legislation. He said the problem had been blown out of all proportion by publicity surrounding Tony Martin, the Norfolk farmer who was prosecuted for shooting a fleeing teenage burglar in the back.
>
> 'There are very few cases that have given rise to this problem. Besides Tony Martin, there's only one I know about,' said Goldsmith. 'Police and prosecutors have been very understanding of people who act to protect themselves and their property. The law says there's a limit to the force you can use, but it is judged by what you believe the position is, even if you turn out to be mistaken.'[71]

On the day of the Bill's introduction, the Home Secretary made a written statement explaining the Government's position:

> Concerns have been raised about the ability of householders to use reasonable force to defend themselves, their families, their homes and their property. The Prime Minister stated on 8 December that the Government appreciate that real public concern exists over these issues, and that they would be reviewed.
>
> Accordingly, the Government have considered, in consultation with the Association of Chief Police Officers (ACPO), the Crown Prosecution Service (CPS) and the Director of Public Prosecutions (DPP), how best this matter should be addressed.
>
> I have concluded that the current law is sound but needs to be better explained to all concerned, especially for householders.
>
> I very much welcome the new guidance on "Charging Standards for Prosecutors" published by the CPS in November, which I believe demonstrates clearly that the law is on the side of the victim and that householders are entitled to use reasonable force to defend themselves, their families and their property.
>
> Moreover I welcome the determination of ACPO to ensure that the new guidance clarifies the detail of this law for every police officer.

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[71] "Attorney General defends burglars' rights", *The Observer* 12 December 2004,

> I have come to the conclusion that this guidance and clarification will ensure that the current law is properly understood and implemented; and that therefore no change in the law is required.
>
> The Government in conjunction with the CPS and ACPO will shortly publish and promulgate information which makes it clear to the public that the current law ensures that appropriate steps to protect themselves, their family and their property will always be justified.[72]

The Director of Public Prosecutions issued press releases supporting the announcement and giving examples of cases where householders or other victims had *not* been prosecuted.[73] These were:

- Robbery at a newsagent's. One of the two robbers died after being stabbed by the newsagent. The CPS did not prosecute the newsagent but prosecuted the surviving robber who was jailed for six years (Greater Manchester);

- A householder returned home to find a burglar in his home. There was a struggle during which the burglar hit his head on the driveway and later died. No prosecution of householder who was clearly acting in self-defence (Derbyshire);

- Armed robbers threatened a pub landlord and barmaid with extreme violence. The barmaid escaped, fetched her employer's shotgun and shot at least one of the intruders. Barmaid not prosecuted (Hertfordshire);

- Two burglars entered a house armed with a knife and threatened a woman. Her husband overcame one of the burglars and stabbed him. The burglar died. There was no prosecution of the householder but the remaining burglar was convicted (Lincolnshire);

- A middle aged female took a baseball bat off a burglar and hit him over the head, fracturing his skull. The burglar made a complaint but the CPS refused to prosecute (Lancashire).

He said that the CPS routinely refused to prosecute those reacting in the heat of the moment to finding intruders within their homes:

> "On an informal trawl the CPS has only been able to find 11 cases in the last 15 years where people have been prosecuted for attacking intruders into houses, commercial premises or private land. Only 7 of these appear to have resulted from domestic household burglaries."

He gave the following three examples of prosecutions:

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[72] HC Deb 12 January 2005 c20WS

[73] CPS press notice 105/05, 106/05 *CPS statement: Self Defence* 12 January 2005: CPS press notice 106/05 *Homeowners and self defence - DPP issues further details of cases* 12 January 2005

> A man laid in wait for a burglar on commercial premises, caught him, tied him up, beat him, threw him into a pit and set fire to him (Cheshire);
>
> A number of people trespassed on private land to go night-time fishing. They were approached by a man with a shotgun who threatened to shoot them. They ran away but one of the men was shot in the back with a mass of 40 shotgun pellets (South Wales);
>
> A householder lay in wait for a burglar who tried to burgle his shed. The householder shot him in the back (South Yorkshire).

and added:

> These examples show that prosecutors take great care over their decisions and have done for many years. So long as a householder is not acting in retribution or revenge, the force used in self defence would have to be wholly excessive and out of proportion before a prosecution would be contemplated.

The *Sunday Telegraph* commented that the list provided brief details and did not include names: 5 of the 11 had been acquitted. The article went on to give some details of a number of cases which appeared to have been omitted from the list.[74] The Home Secretary then wrote to the newspaper welcoming its contribution to the debate. He said:

> My position on this issue is clear. I believe that an Englishman's home is his castle. It is the right of every British citizen to protect himself, his family and his home from intruders of any kind.
>
> Ken McDonald, the Director of Public Prosecutions, has made it clear that householders will only be prosecuted if they use very excessive force in defending their home against intruders. Homeowners not prosecuted include those who have shot and stabbed burglars. The Crown Prosecution Service's informal survey also demonstrates that the number of such cases brought before the courts is extremely low.
>
> I announced on January 12 that, following discussions with the Association of Chief Police Officers, the DPP and the CPS, I had concluded that the law was sound. The law is, as Tony Martin's defending barrister, Anthony Scrivener, put it last year, "simple and weighted overwhelmingly in favour of the householder".
>
> The key issue, now, is ensuring that householders understand the law. Next week the CPS and ACPO are launching their leaflet that sets out in plain language what householders' rights are, and the level of force that they can use when confronted by an intruder. The Government will be working with the CPS and ACPO to ensure that this reaches as many members of the public as possible. This process is vital to ensure there is public confidence in the law.[75]

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74 "The Government says there is no need to change the law on tackling burglars because a 'trawl' of its records found only 11 prosecutions of householders in 15 years It took us just one hour to find a further seven", 16 January 2005, *Sunday Telegraph*

75 "Clarke appreciates your views", 30 January 2005, *Sunday Telegraph*

On 1 February 2005 the leaflet referred to by the Home Secretary was published jointly by the Crown Prosecution Service (CPS) and the Association of Chief Police Officers (ACPO).[76] It is set out in the appendix to this paper.

3. The debate on the 2004-05 Bill

Patrick Mercer's two clause *Criminal Law (Amendment) (Householder Protection) Bill 2004-05* had its second reading in the House of Commons on 4 February 2005.[77] Library research paper 05/10 on the *Criminal Law (Amendment) (Householder Protection) Bill 2004-05* is available on the internet.[78]

In his speech during the debate on the Bill's second reading the Liberal Democrat spokesman David Heath said that Patrick Mercer had won the argument, in that by publishing the leaflet and seeking to clarify the law the Government had accepted that there was a lack of clarity not so much in what the law said, but in the way in which it had been implemented by the investigatory and prosecuting authorities. He felt that there were inevitable difficulties with the alternative formulation of the law in Patrick Mercer's Bill and was not convinced that the definition in the Bill would be more robust in providing a framework than the existing law.[79] He noted:

> The difficulty with the law as it stands is that there is clearly a misunderstanding as to what is reasonable force. That misunderstanding lies not solely with the householder but with jurors, police and prosecution authorities. The latter two are the most problematic.
>
> There is also the problem of what constitutes reasonable force in the circumstances—the test of the reasonable man. The Law Commission drew attention to that in its report of July 2003 on partial defences to murder, stating:
>
> "We acknowledge that such a person, though genuinely acting in fear, might not always act 'reasonably' so as to attract the full defence of self-defence."
>
> That acknowledges the fact that the householder whose home has been intruded upon and is in genuine fear for their own safety or that of their family may not act as a reasonable person who is devising a statute in this House or construing it in a court of law, because they are afraid and angry; they have a mixture of emotions that may cause them to act in a way that might appear unreasonable in the cold light of day but is entirely reasonable in the context of the circumstances in which they find themselves.
>
> There is a further difficulty that applies in many of our constituencies. I represent a very rural area. In many parts of my constituency, someone who disturbs an intruder in their house will not, with the best will in the world, get a police response for some time. They are very frightened about that. My constituents often say to me, "If they come to me, sir, I will have a shotgun ready." I reply, "I should be very careful about the way you use that shotgun, but I understand your fear." People fear that they no longer have the protection of a police force. That applies particularly in rural areas, but also, I am sure, in many urban areas. It is perfectly reasonable for someone to be unreasonable in those circumstances

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[76] http://www.cps.gov.uk/publications/prosecution/householders.html
[77] HC Deb 4 February 2005 Vol 430 c1075-1149
[78] http://www.parliament.uk/commons/lib/research/rp2005/rp05-010.pdf
[79] HC Deb 4 February 2005 Vol 430 c1086-1090

> because they are genuinely in fear of what will happen to them, and particularly to their loved ones. People in such circumstances sometimes act with a greater degree of force in protecting their loved ones than in protecting themselves; that is understandable. [80]

Having noted that the term "grossly disproportionate" use of force applied in the context of civil rather than criminal proceedings, the Labour MP Andrew Dismore suggested that there were reasons for viewing the criminal law differently from the civil law:

> First, civil cases are tried separately by a judge alone rather than a jury. More complex legal questions are more easily tackled in those circumstances. Secondly, the purpose of civil law is to allow an individual to bring a claim, on advice from private lawyers, who, through a conditional fee arrangement, may have an interest in the case. That might act as a deterrent to taking on the case. Criminal proceedings are brought by the state prosecution authorities—a very different set of circumstances.[81]

In his speech during the second reading debate on the Bill the Conservative home affairs spokesman David Davis made the following comments about the CPS/ACPO leaflet on the law concerning self-defence:

> Two things are notable about the debate that has been engendered by the leaflet. The first was that, in order to explain what was allowable under the law, the language used by the representatives of the Association of Chief Police Officers was not very "excessive and gratuitous force"—almost synonymous with not "grossly disproportionate" force. Indeed, spokesmen seemed to find a variety of ways of re-expressing precisely what my hon. Friend the Member for Newark has written into the Bill—ironic, given that the words in the Bill are the Government's own.
>
> A leaflet does not have the force of law, so the leaflet will not do. A range of views was expressed by the people who should know, particularly chief constables: Sir John Stevens believes that a clarification is necessary; and Sir Ian Blair voiced—how can I express this?—a range of views. Others, it is true, have said the opposite. Indeed, I saw on television three weeks ago a chief constable expressing a view of what a householder can do in far more robust terms than are laid out in this leaflet. So if chief constables do not know—indeed, Sir Ian Blair appeared not to on the programme the other morning—how on earth, even with a leaflet, can ordinary members of the public be expected to know?[82]

He continued:

> Leaders of our police forces are unclear because the law is unclear. The law is unclear because it involves a great deal of interpretation by the police, by the Crown Prosecution Service and, in the final analysis, by the jury—even those who throw out these cases in half an hour. The fact that interpretation is difficult and uncertain is demonstrated by the changing interpretation of "reasonable force" over the decades. There was even a case in 1924—the hon. Member for Ealing, North will like this—in which the court said that

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[80] *ibid*. c1088
[81] *ibid*. c1091
[82] *ibid*. c1125

> "in defence of a man's house the owner or his family may kill a trespasser who would forcibly dispossess him of it."
>
> That was considered reasonable force. Nobody would agree with such a stark definition today, but it demonstrates that over the years the interpretation has changed with changes in conventional wisdom and political correctness.
>
> There will always be in the law a margin for interpretation, as we discussed in the speech of the hon. Member for Somerton and Frome (Mr. Heath). That is why we have judges and juries. The Bill moves the point at which that interpretation is made in favour of the householder, including those who rent, and away from the criminal. It is as simple as that. All the confusing tactics deployed by Government Members will not drive that fact away. The public deserve better—an evocative phrase from the past—and they deserve clarity, consistency and protection against villains. The Government are not providing any of those.[83]

The Home Office minister, Paul Goggins, set out the Government's view of the law on self-defence in his speech during the second reading debate:

> Under the law as it stands, a person is entitled to use "reasonable force" in self-defence or to protect another person or their property. What constitutes that reasonable force will depend on the circumstances of each case, and Members on both sides of the House have speculated about those different circumstances. Faced with an intruder who is a grown man of 6 ft 4 in, the threat—perceived or real—will be different from the threat posed by an immature 12 year old. The circumstances in each case will lead to a judgment about what is reasonable. The nature of the threat and what it would take to counter the threat must be taken into account when judging what is reasonable in the circumstances.
>
> The law also takes account of the fact that a person under attack or being robbed may be frightened and confused. Woken by an intruder at 3 o'clock in the morning, a person cannot be expected to judge to a fine nicety the level of force that might be required to defend themselves against the threat posed. What the law asks is that the person act instinctively and honestly. So we must be clear: the law itself, and every part of the criminal justice system, must and does support the right to self-defence.
>
> As the Director of Public Prosecutions said on 12 January,
>
> "the law is on the side of householders".
>
> Many Members have made that comment this morning, not least my hon. Friend the Member for Ealing, North, and it bears repeating: the law is on the side of householders. Being burgled is a frightening experience and householders who react instinctively and attack intruders will be prosecuted only if they use very excessive force. Only in the most extreme circumstances are householders prosecuted for violence against burglars. The Director of Public Prosecutions made it clear on 12 January that only in those extreme circumstances would prosecution be considered.
>
> What the law does not permit is an act of retaliation. The punishment of criminals is rightly a matter for the courts; it is not for victims, vigilantes or anyone else to take the law into their own hands. People should support the police and the courts so that they can do their job effectively. People can defend themselves, but they should not seek to punish an offender for a crime or trespass committed

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[83] *ibid*. c1125-6

> against them. Prevention and self-defence are one thing, retaliation is quite another.
>
> The Government continue to judge that the law as it stands represents a fair balance between the need for householders to defend themselves and their property and the need for society at large to have confidence in the rule of law. The Director of Public Prosecutions said that prosecutors recognise that householders confronted by intruders are entitled to use violence to protect themselves and their families. He continued:
>
> "We routinely refuse to prosecute those reacting in the heat of the moment to finding intruders within their homes. So householders who have killed burglars in this situation have not been prosecuted. Householders who have shot burglars have not been prosecuted. Householders who have stabbed burglars have not been prosecuted. Householders who have struck burglars on the head, fracturing their skulls, have not been prosecuted."[84]

Mr Goggins said the CPS leaflet sought to make clear that householders facing a serious threat from an intruder could go to considerable lengths to defend themselves and their families. He added:

> There are three levels to the provision: first, we have the law, which the Government believe is perfectly adequate to allow householders to take whatever steps are necessary to defend themselves and their families from an intruder; secondly, the leaflet explains that law in simple, straightforward terms to the general public, so that they can have greater confidence about what they can and cannot do when someone enters their house and poses a threat; and, thirdly, we have the guidance against which the police and the CPS weigh each case. We therefore have appropriate provision in terms of the law, public understanding and professional judgment. In my view, that provision is adequate to ensure that everyone knows that the law is on the side of the householder who takes defensive action when someone breaks into their house.[85]

Mr Goggins went on to outline a number of anomalies and uncertainties which the Government thought Patrick Mercer's Bill would create:

> **[Paul Goggins:]**.....The Bill would create anomalies. Earlier, I was asked to comment on them. Although the measure is described as a householder protection measure, it is not limited to houses or homes but applies to any building. The person who uses the force does not need to be the owner or even a legitimate resident. He could even be a trespasser. Whether an assault takes place in a building and whether the person is a trespasser may be important and relevant factors.
>
> **Mr. Dismore:** My hon. Friend is making an important point. Someone who lives in a caravan may believe that that is their home and that the Bill protected them. However, a caravan is not a building and they would be confused if the Bill were passed.
>
> **Paul Goggins:** My hon. Friend gives one example and there are others.

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[84] *ibid* c1128-9
[85] *ibid*. c1132

Chris Bryant: Although the measure is called the Criminal Law (Amendment) (Householder Protection) Bill, it does not give any greater rights to a householder. It does not specify whether someone is a householder or a tenant. The measure simply refers to "a person".

Paul Goggins: My hon. Friend raises another anomaly, which could confuse the public rather than clarify the position.

The Bill would apply to a householder who woke in the night to find an intruder menacing his family. However, it would also apply to a security guard who found a potential thief attempting to enter a warehouse, a farmer who found a child in a barn eating his apples, or a squatter who attacked another squatter who was trying to steal some money from him. The Bill would cover all those examples. That would be its effect, although the hon. Member for Newark may not have intended that.

Tom Levitt: The hon. Member for Somerton and Frome (Mr. Heath), who is not in his place, talked about scrumping. Will the Minister confirm that scrumping would not be covered because it happens in an orchard, not a building?

Paul Goggins: Scrumping generally happens in an orchard rather than a building. The important point is that it could be any building, not necessarily someone's home. That is a genuine consideration.

Current law is based on what is reasonable in all the circumstances and allows the court to take them all into account. Moreover, the term "grossly disproportionate" does not clarify the law. To amend the law so that a person is not guilty of an offence unless

"the degree of force used was grossly disproportionate"

does not provide a clearer test than that of reasonable force. How are we to define disproportionate? How will the courts interpret it? "Reasonable" is often used in criminal law and the courts are used to interpreting it. Introducing a new test will also introduce uncertainty. Introducing a new test would introduce a new area of uncertainty, because a judgment would still be required, whichever measure was in the law. It has been suggested in this debate that a test of gross disproportionality would somehow be no test at all. Well, there is a test, and there is still a judgment to be made.

We have had a wide-ranging discussion, and I think that we all agree that there is more that we can do to make sure that the public understand the law and the measures that they may legitimately take to defend themselves, their family and their property. That is why the leaflet and the reassurance that it offers are very helpful. [86]

The Bill received a second reading and had completed its committee stage in the House of Commons before it was lost with the dissolution of Parliament before the General Election in May of this year.

IV Human rights issues

Private Members' Bills are not subject to the requirement of section 19 of the *Human Rights Act 1998* that the Minister in charge of a Bill should make a statement on its

[86] *ibid*. c1138-1139

compatibility with the European Convention on Human Rights before second reading. The Joint Committee on Human Rights has considered which of the articles of the European Convention on Human Rights was likely to be engaged by modification of the law of self-defence. It took the view that the provisions of the *Criminal Justice (Justifiable Conduct) Bill* 2003-04 would probably not have been compatible with the European Convention on Human Rights.[87] The Joint Committee considered that Patrick Mercer's *Criminal Law (Amendment) (Householder Protection) Bill 2004-05* would also be incompatible with the European Convention on Human Rights:

> 7.2 The Bill engages the right to life, protected by Article 2 ECHR, as well as the right to physical integrity protected by Article 8 ECHR. It may also engage the right to freedom from inhuman and degrading treatment, protected in Article 3. The right to life under Article 2 is subject to only very limited exceptions, allowing for force to intentionally deprive someone of life only where it is no more than is absolutely necessary in self-defence or in the defence of others from unlawful violence.[10] Rights under Article 3 are absolute rights, which are not subject to any exception.
>
> 7.3 Article 2 imposes on the state not only a negative obligation not to take life, but also a positive obligation to take reasonable steps to protect the lives of individuals, including by protecting against the actions of private individuals which threaten the lives of others. Equivalent positive obligations arise under Articles 3 and 8. The positive obligation to protect against loss of life includes an obligation to put in place an effective criminal law to deter offences against the person.[11] To the extent to which the provisions of this Bill allow for greater use of force against trespassers than is proportionate, as is currently permitted by the criminal law, it calls into question the state's discharge of this positive obligation. **In our view, for the criminal law to permit the use of disproportionate force, provided it falls short of being "grossly disproportionate" is incompatible with Articles 2, 3, and 8 ECHR, which require the use of force to be proportionate**.
>
> Given the obligation to interpret legislation in accordance with ECHR rights, under section 3 of the Human Rights Act 1998, the courts would be required to interpret the defence that force used was not "grossly disproportionate" in light of the State's positive obligations under Articles 2, 3 and 8. In our view, this would require a wider interpretation of the conduct considered to be grossly disproportionate in light of the absolute prohibition on inhuman and degrading treatment, and the terms of Article 2 which prohibit lethal force which is more than "absolutely necessary" in self defence or in defence of others. In particular, in order to be Convention compliant, the terms of the Bill would need to be interpreted and applied so that the permissibility of force solely in defence of property, or in the prevention of crime other than that involving violence against persons, would be very strictly confined. This would effectively involve the court deleting the word "grossly" from the Act. There is a risk that some courts would regard this as going beyond the scope of their power to "interpret" legislation. **We draw this to the attention of both Houses**.[88]

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[87] Joint Committee On Human Rights *Twenty-Third Report, 2003-04* , 29 November 2004, HL 210/HC 1282

[88] Joint Committee On Human Rights *Eighteenth Report 2004-05* 26 May 2005 HL 111/HC551

Anne McIntosh's *Criminal Law (Amendment)(Protection of Property) Bill 2005-06* is broadly similar to Patrick Mercer's Bill and it is therefore possible that the Joint Committee will take a similar view of its provisions.

V Other jurisdictions

While the current debate has focused on exactly when self-defence should amount to an absolute defence to criminal charges, there have also been moves to make partial defences available in cases which result in fatality. These defences could, for example, reduce the offence from murder to manslaughter in cases where a person has reacted with more than reasonable force. They would not affect cases where defendants, reacting with reasonable force, were entitled to be acquitted, but might be seen to produce a fairer result in some prosecutions which would result in murder convictions under the present law. The options are explored in detail in the Law Commission's consultation paper and report on *Partial Defences to Murder*.[89] The consultation paper includes commentary on the excessive use of force in self-defence, as a partial defence in other jurisdictions including Australia, Canada and Ireland.

There is wide variation between different countries in the extent to which a person who has killed or injured another will have a defence (to criminal charges) that he was acting in self-defence, or in defence of another person or of property. Many jurisdictions have criminal codes which set out more numerous categories of homicide and wounding than are recognised in English law, and the full or partial defences which may be available. Terminology also varies and straight comparisons are therefore difficult to make.

1. France

Article 122-5 of the French Criminal Code lays down the parameters of the "legitimate defence":

> A person who, faced with an unjustified attack against themselves or another, carries out at that time an act required by the necessity of the legitimate defence of themselves or another is not criminally liable, except if there is a disproportion between the means of defence used and the gravity of the attack.
>
> A person who, in order to prevent the commission of a serious or major offence against property, carries out an act of defence, other than voluntary homicide, when this act is strictly necessary for the goal sought is not criminally liable when the means used are proportionate to the gravity of the offence.[90]

2. New Zealand

In New Zealand, the ACT (Association of Consumers and Taxpayers) Party, which describes itself as a modern liberal party, and has nine Members of Parliament, has

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89 "Partial Defences to Murder", Law Commission Consultation Paper No 173, 2003, http://www.lawcom.gov.uk/files/cp173.pdf

90 Elliott *French Criminal Law*, 2001, p110

recently published a draft *Crime (Self-Defence) Amendment Bill*. The Party's campaign appears to follow from the trial of a farmer who shot a man he caught stealing, in 2002. In October 2004 Paul McIntyre was acquitted on a charge of recklessly injuring the man, but faced a possible retrial on a lesser charge, on which the jury had been unable to agree.[91] The Explanatory Note to the draft Bill outlines the existing law, and its result, as well as explaining the purpose of the Bill. It states:

> . Defenders who would previously have been commended are now routinely charged. Few defenders are found guilty, but their lives are irretrievably disrupted. Frequently the prosecution secure a consolation conviction for a lesser offence, perhaps under the Arms Act […]
> • The current law draws fine distinctions according to whether the intruder has entered a house, or is merely lurking by the back door, whether it is a home, or a garage, whether he is taking property, or merely vandalising it.
> • Defenders may use only what a court declares was no more than necessary or reasonable to avoid harm to the defender [….]
> Uncertainty about what is "reasonable" or "necessary" promotes wasteful and unsuccessful prosecutions. Few result in conviction, but uncertain and unfairly complex law gets translated to folklore about the law that puts defenders at a safety risk.
> • Defenders know that prosecutions involve huge delay, stress and the risk of revenge.
> • Defenders can be financially destroyed by legal costs, but will never recover their losses from the intruder […]
> • Defenders face wrongdoers who are encouraged into insolent trespass by their own folklore about the legal impotence of those they prey on.
> • Defenders are discouraged from their safest course – that is, letting the offender know unambiguously that his best course is to stop what he is doing immediately, and leave. The straightforward and intuitive way to achieve that is to threaten "unreasonable" force. That is precisely what is currently forbidden.[…]
> The Courts have made it more risky for defenders to use force than intruders. The law must be rebalanced so that it is oriented against aggressors.

The full text and other material are available electronically on ACT's website at: http://act.org.nz. The response of the Minister of Justice was that New Zealand's laws covering self-defence were clear, longstanding and shared by most other common law jurisdiction countries. He said:

> "In regard to self defence, the statutory defence permits the use of reasonable force to defend oneself – and that force may include deadly force in certain serious circumstances.
>
> "The force allowed by the law, however, must not be disproportionate or excessive to the threat faced.
>
> "For example, if someone was attacking me with a knife or a gun, I would likely be justified in using deadly force to repel the attack. But if I saw a thief walking out of my house carrying a television set, I would not be justified in shooting him in the back.

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[91] "Lawyer wants to avoid second trial" *One News* 27 October 2004,

> "Where there is doubt about the reasonableness of the force used, police can lay charges and send the matter to the Courts.
>
> "Overwhelmingly, juries in determining such cases have, in other than extreme cases, shown some sympathy for the position of the person protecting himself against criminal intruders.
>
> "This law in one form or another has been in place for around a century, and has been well tested.[92]

3. Canada

The Canadian Department of Justice reviewed the defences of provocation, self-defence and defence of property, which were frequently invoked in the context of crimes involving the use of force. Canada's law of self-defence is governed by the Criminal Code. The basic principle which underlies self-defence is that a person who is attacked or assaulted is not criminally responsible for using a reasonable or proportionate amount of force against the person assaulting them. An attempt or threat to apply force also constitutes an assault. A person can therefore use defensive force in response to an apprehension of immediate or impending danger. The law also allows a person to use force to defend someone under their protection. The law does not permit excessive or unreasonable force. The provisions distinguish various factual circumstances in which self-defence can arise, and provide specific defences tailored to those circumstances. The consultation paper *Reforming Criminal Code Defences* was published in 1998. The Executive Summary states: [93]

> Canada's laws for these defences have remained virtually unchanged for over a hundred years. Their application and meaning have been refined by decades of judicial interpretation, but the defences are still governed by the language of the Criminal Code. Many individuals and groups believe that these defences reflect archaic and outmoded values and principles and that they need to be reformulated to address modern concerns and realities, particularly in the domestic sphere…

There do not appear to have been any further developments.[94]

4. Australia

a. New South Wales

The *Crimes Amendment (Self Defence) Act 2001* codified the law with respect to self-defence. The defence of self-defence is available in the following circumstances:

> **418 Self-defence—when available**

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[92] "Self-defence laws are clear, says Goff" , at http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=21365 2 November 2004

[93] http://canada.justice.gc.ca/en/cons/rccd/summary.html

[94] A 2003 report on another issue recommended that the discussions on the 1998 document be reopened, see http://canada.justice.gc.ca/en/dept/pub/smir/ms_int_rel_report_concrec.html

> (1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
> (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:
> (a) to defend himself or herself or another person, or
> (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
> (c) to protect property from unlawful taking, destruction, damage or interference, or
> (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,
> and the conduct is a reasonable response in the circumstances as he or she perceives them

The other provisions are:

> Section 419 provides that the prosecution bears the burden of proof beyond a reasonable doubt that the person did not carry out the conduct in self-defence. Section 420 provides that self-defence is not available if the use of force involves the intentional or reckless infliction of death to protect property or prevent criminal trespass or remove a person committing criminal trespass.
>
> Section 421 relates to the situation where excessive force is used in self-defence which results in death. In such a case, if the defendant believed that his conduct was necessary even though it was excessive, the defendant is not criminally responsible for murder but is guilty of manslaughter. Section 422 relates to the application of self-defence when it is a response to lawful conduct.[95]

b. Victoria

The Victorian Law Reform Commission published a *Final Report on Defences to Homicide* in November 2004, making 56 recommendations for change.

Recommendations include the re-introduction of a partial defence of excessive force in self-defence and abolition of the partial defence of provocation, as well as codification of the rules for self-defence, adopting the New South Wales formulation under which:

> A person is not criminally responsible for the offence if the person believes the conduct is necessary:
> - to defend himself or herself or another person; or
> - to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person; and
>
> the conduct is a reasonable response in the circumstances as the person perceives them.
> …
> Self-defence should not be available if:
> the person is responding to lawful conduct; and

[95] NSW Public Defender's Office, *Crimes Amendment (Self Defence) Act 2001*, http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_crimesamendmentselfdefence

> at the time of the response, he or she knew that the conduct was lawful.
>
> However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.[96]

5. United States

Joyce Lee Malcolm, Professor of History at Bentley College Massachusetts, describes the American approach as follows:

> While American law on defence of the home differs somewhat from state to state, the millions of residents of the large, "liberal" states of California and New York, for example, can presume anyone who breaks into their homes means to do them harm and can act accordingly. A more explicit Oklahoma statute, passed in response to a spate of violent burglaries, allows householders to use force no matter how slight the perceived threat. Has this "vigilante" legislation resulted in "excess violence"? Just the opposite, the American burglary rate is less than half the English rate. And while 53% of English burglaries occur when someone is at home, only 13% do in America, where burglars admit to fearing armed homeowners more than the police. Violent crime in the US is at a thirty-year low.[97]

The Oklahoma statute, often referred to as the “Make My Day” law, was introduced in 1987 in response to public opinion following a case in which a householder shot an intruder. It provides:

> **Physical or deadly force against intruder**
> A. The Legislature hereby recognizes that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes and places of business.
> B. Any occupant of a dwelling is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made an unlawful entry into that dwelling, and when the occupant has a reasonable belief that such other person might use any physical force, no matter how slight, against any occupant of the dwelling.
> C. Any owner or employee of a place of business is justified in using any degree of physical force, including but not limited to deadly force, against another person who has made an entry into that place of business when the owner or employee has a reasonable belief that such other person might use any physical force, against the owner, employee, or any other person in that business.
> D. Any occupant of a dwelling or place of business using physical force, including but not limited to deadly force, pursuant to the provisions of subsections B and C of this section, shall have an affirmative defense in any criminal prosecution for an offense arising from the reasonable use of such force and shall be immune from any civil liability for injuries or death resulting from the reasonable use of such force.

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96 Victorian Law Reform Commission, *Defences to Homicide*, Final Report, October 2004, p84 et seq

97 Social Affairs Unit, *Bashing Burglars: Why the English common law right of self-defence should be restored*, 19 November 2004, http://www.socialaffairsunit.org.uk/blog/archives/000219.php

The *Sunday Telegraph* described the history and effect of the “Make My Day” law in an article in October 2004:[98]

> The law was pushed through by Sen Charles Ford, a Republican, the opposition party in the state. "The purpose of the law is to protect the victim of crime who defends his home and his family against unlawful intrusion from any criminal prosecution or civil action," Sen Ford said last week.
>
> "We considered it outrageous that someone who protects his home and family should suffer. Our law says you can use any force, including deadly force, to defend your home."
>
> It has been an unqualified success. Since the Make My Day Law came into force, burglary has declined by almost half in Oklahoma. In 1987, there were 58,333 cases; in 2000, just 31,661.
>
> While crime rates throughout America fell in the 1990s, Make My Day supporters point to a second statistic in Oklahoma they say proves the impact of the new law: while burglary rates plunged, other forms of theft stayed constant. In 1988, there were 96,418 cases, in 2000, 96,111.
>
> Similar anti-burglar laws have now been adopted in Colorado and Arizona. The reason, said Sen Ford, was simple: "The law works. We were in the grip of a violent burglary epidemic when Dr Sommer's home was invaded.
> …
>
> Prior to the Make My Day legislation, the law, as it remains in most American states, sanctioned force in self-defence and the defence of property, but only on the basis of "reasonable" response to the violence offered by the criminal. This allows a baseball bat against a baseball bat, a knife against a knife, and a gun against a gun - although in theory the householder should allow the burglar to shoot first.
>
> There have now been at least 11 cases where intruders have been shot dead in Oklahoma and the householders who pulled the trigger have escaped any sanction under the Make My Day law.

Earlier this month, the *Daily Oklahoman* reported a fatal incident where a homeowner was not to be prosecuted because of the “Make My Day” law.

> No charges will be filed against a homeowner who fatally shot a 16-year-old intruder Jan. 15, a prosecutor said Monday.
>
> “You have an absolute right to defend yourself in your home against an intruder,” said Steve Kunzweiler, a Tulsa County assistant district attorney. “His use of deadly force is authorized under Oklahoma law in this exact situation.”
>
> Police said Robert Spencer, 51, shot Billy Joe Hardridge on Jan. 15 after the teenager smashed his way into Spencer’s house in the 6700 block of E 26 Place,

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[98] “How the 'Make My Day' law cut epidemic of violent burglary”, *Sunday Telegraph* 31 October 2004,

police said. Hardridge was shot once in the face with a .22-caliber pistol while peering into Spencer's bedroom.[99]

[99] "Homeowner won't face charges", *Daily Oklahoman* 25 January 2005

Appendix: Householders and the Use of Force Against Intruders - Joint Public Statement from the Crown Prosecution Service and the Association of Chief Police Officers

What is the Purpose of this Statement?

It is a rare and frightening prospect to be confronted by an intruder in your own home. The Crown Prosecution Service (CPS) and Chief Constables are responding to public concern over the support offered by the law and confusion about householders defending themselves. We want a criminal justice system that reaches fair decisions, has the confidence of law-abiding citizens and encourages them actively to support the police and prosecutors in the fight against crime.
Wherever possible you should call the police. The following summarises the position when you are faced with an intruder in your home, and provides a brief overview of how the police and CPS will deal with any such events.

Does the law protect me? What is “reasonable force”?

Anyone can use reasonable force to protect themselves or others, or to carry out an arrest or to prevent crime. You are not expected to make fine judgements over the level of force you use in the heat of the moment. So long as you only do what you honestly and instinctively believe is necessary in the heat of the moment, that would be the strongest evidence of you acting lawfully and in selfdefence. This is still the case if you use something to hand as a weapon.
As a general rule, the more extreme the circumstances and the fear felt, the more force you can lawfully use in self-defence.

Do I have to wait to be attacked?

No, not if you are in your own home and in fear for yourself or others. In those circumstances the law does not require you to wait to be attacked before using defensive force yourself.

What if the intruder dies?

If you have acted in reasonable self-defence, as described above, and the intruder dies you will still have acted lawfully. Indeed, there are several such cases where the householder has not been prosecuted. However, if, for example:

- having knocked someone unconscious, you then decided to further hurt or kill them to punish them; or
- you knew of an intended intruder and set a trap to hurt or to kill them rather than involve the police,

you would be acting with very excessive and gratuitous force and could be prosecuted.

What if I chase them as they run off?

This situation is different as you are no longer acting in self-defence and so the same degree of force may not be reasonable. However, you are still allowed to use reasonable force to recover your property and make a citizen's arrest. You should consider your own safety and, for example, whether the police have been called. A rugby tackle or a single blow would probably be reasonable. Acting out of malice and revenge with the intent of inflicting punishment through injury or death would not.

Will you believe the intruder rather than me?

The police weigh all the facts when investigating an incident. This includes the fact that the intruder caused the situation to arise in the first place. We hope that everyone understands that the police have a duty to investigate incidents involving a death or injury. Things are not always as they seem. On occasions people pretend a burglary has taken place to cover up other crimes such as a fight between drug dealers.

How would the police and CPS handle the investigation and treat me?

In considering these cases Chief Constables and the Director of Public Prosecutions (Head of the CPS) are determined that they must be investigated and reviewed as swiftly and as sympathetically as possible. In some cases, for instance where the facts are very clear, or where less serious injuries are involved, the investigation will be concluded very quickly, without any need for arrest. In more complicated cases, such as where a death or serious injury occurs, more detailed enquiries will be necessary. The police may need to conduct a forensic examination and/or obtain your account of events.
To ensure such cases are dealt with as swiftly and sympathetically as possible, the police and CPS will take special measures namely:

- An experienced investigator will oversee the case; and
- If it goes as far as CPS considering the evidence, the case will be prioritised to ensure a senior lawyer makes a quick decision.

It is a fact that very few householders have ever been prosecuted for actions resulting from the use of force against intruders.