

Criminal Code (Defence of Dwellings and Other Premises - Castle Law) Amendment Bill 2024

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Submission on the Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024

I thank the Community Safety and Legal Affairs Committee for the opportunity to provide submissions on the Criminal Code (Defence of Dwellings and Other Premises—Castle Law) Amendment Bill 2024.

I oppose the Bill under consideration for the following reasons:

I. The current law on defence of dwellings is appropriate

Section 267 of the *Criminal Code* allows for the use of force against intruders to a dwelling if the accused person reasonably believes that the intruder is ‘attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling’ and the force used is ‘necessary’.¹

This defence allows homeowners to use force (including lethal force) to repel intruders. The fact that a defendant intended to kill or do grievous bodily harm in using force does not exclude the dwelling defence² and a homeowner ‘need not reasonably apprehend death or grievous bodily harm...to raise [the] defence...’.³

In the Explanatory Notes to the Bill, it is suggested that the current defence is inadequate and that: ‘A householder startled by an intruder in the night is not well-positioned to make an instantaneous yet measured evaluation regarding the intentions of, or the level of threat posed by an intruder and this Bill seeks to remove the requirement of an individual to do so.’

However, the current law imposes no such requirement. The test of whether the force used is ‘necessary’ is undertaken from the perspective of the homeowner (‘if the person using the force believes on reasonable grounds...it is necessary to use the force’)⁴ (emphasis added).⁵ The abrupt and startling effect of a home invasion on the householder is therefore already taken into account by the present test.

The law does not expect a person to make ‘an instantaneous yet measured evaluation regarding the intentions of, or the level of threat posed by an intruder’. This is reflected in the suggested jury instructions for the dwelling defence, which read in relevant part:

¹ *Criminal Code Act 1899* (Qld) sch 1 s 267 (‘*Criminal Code*’).

² *R v McMartin* [2013] QCA 339, [26].

³ *R v Cuskelly* [2009] QCA 375, [27].

⁴ *Criminal Code* (n 1) s 267.

⁵ See also *R v Dayney* [2020] QCA 264, [26]: ‘Unlike a case of self-defence, the force used by [the accused] did not have to be no more than was reasonably necessary to make an effectual defence against the appellant’s intrusion...Although the householder need not be acting in a way in which a hypothetical reasonable person would have acted, the householder must have acted in a way in which he or she reasonably believed was necessary in the circumstances.’ (emphasis added)

‘You should remember that a person defending himself/herself or his/her home cannot always weigh precisely the exact action which he/she should take in order to avoid the threat which he/she reasonably believes that he/she faces at the time... Take account of the situation in which the defendant found himself/herself. Bear in mind that unlike those of us in this courtroom, he/she would appear to have had little, if any, opportunity for calm deliberation or detached reflection...’⁶

The Bill eliminates the requirement that the homeowner have a ‘reasonable belief’ that the intruder was entering the dwelling with intent to commit an indictable offence. There is no reason to remove this requirement; many existing ‘castle doctrine’ laws require that the homeowner have a reasonable belief that the intruder intends to commit a criminal offence.⁷

II. ‘Castle doctrine’ laws are not effective at reducing burglary and violent crime

The Bill has been proposed as a means of reducing home invasions, which are said to be on the rise. In the Explanatory Notes, it is claimed that: ‘The amended section 267 sends a message to society that home invasions will not be tolerated and will act as a deterrence to potential home intruders.’

However, the introduction of ‘castle doctrine’ laws does not reduce burglaries or violent crime. A 2013 study into the effects of American castle doctrine legislation concluded that such laws ‘do not deter burglary, robbery, or aggravated assault’ and instead ‘lead to a statistically significant 8 percent net increase in the number of reported murders and non-negligent manslaughters.’⁸

III. The proposed law creates an unacceptable risk of death and serious injury

The Bill would allow an individual ‘to use force that is likely to cause death or grievous bodily harm against an intruder in circumstances where the intruder:

- enters or attempts to enter the dwelling or premises in the night; or
- uses or threatens actual violence; or
- is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or
- is in company with 1 or more persons; or
- damages, or threatens or attempts to damage, any property.

These circumstances are exceedingly broad. In allowing the use of lethal force in such wide circumstances, the Bill risks creating a ‘shoot first, ask questions later’ mindset.⁹ This is

⁶ Supreme Court of Queensland, *Supreme and District Courts Criminal Directions Benchbook: Defence of a Dwelling House (s 267)* < https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/86094/sd-bb-88-defence-of-dwelling-house-s267.pdf>

⁷ See, for e.g., Colo. Rev. Stat. § 18-1-705: ‘Any occupant of a dwelling is justified in using...physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry...’ (emphasis added); Minn. Stat. § 609.065: ‘The intentional taking of the life of another is not authorized by section 609.06, except when necessary in...preventing the commission of a felony in the actor's place of abode.’ (emphasis added).

⁸ Cheng Cheng and Mark Hoekstra, ‘Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine’ (2013) 48(3) *The Journal of Human Resources* 821.

⁹ G. Todd Butler, ‘Recipe for Disaster: Analyzing the Interplay between the Castle Doctrine and the Knock-and-Announce Rule after *Hudson v. Michigan*’ (2008) 27(2) *Mississippi College Law Review* 435.

especially dangerous if, for example, police attempt to search the residence of an armed homeowner, who may believe the officers to be intruders.

I would therefore suggest that the Bill not be passed. I again thank the Committee for inviting submissions on this matter.