

## **Criminal Justice (Justifiable Conduct) Bill**

### INTRODUCTION

This is a Ten-Minute Rule Bill introduced into the House of Commons by Roger Gale MP. The text of the Bill, which was conceived and drafted by Francis Bennion, is set out below, followed by Notes on Clauses also drafted by Francis Bennion. The second reading of the Bill is due to take place on Friday 30 April 2004.

The Bill arises out of public concern over the conviction of Tony Martin for killing a teenage burglar at his remote Norfolk farmhouse on 20 August 1999. In January 2004 Andrew Moffat won a BBC Radio Four Today programme competition to choose the Bill listeners would most like to see passed by Parliament. His winning choice was a Bill to protect householders who find themselves confronting burglars. The BBC consulted Francis Bennion about the drafting of this 'People's Bill' and he was interviewed by Dominic Arkwright in the Today programme broadcast on 10 January.

Later Roger Gale MP, who wished to introduce his own Bill on the subject, also consulted Francis Bennion, who conceived and drafted Mr Gale's Bill. In neither case did Mr Bennion receive any payment. He himself supports what Mr Gale's Bill seeks to do, and would like to see it enacted as law.

# **Criminal Justice (Justifiable Conduct) Bill**

A

## **BILL**

TO

Amend the law of England and Wales by making provision for exempting from civil and criminal liability in specified circumstances persons acting in defence of persons or property.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

### **1 Home defence (criminal liability)**

- (1) This section applies where a person (A) is in a dwelling and is either-
  - (a) the occupier of the dwelling, or
  - (b) present in the dwelling with the licence of the occupier.
- (2) Where this section applies, A is not guilty of an offence by reason of any act done by him in relation to the person or property of another person (B) who is in the dwelling, or is attempting to gain entry to the dwelling, if A believes (whether reasonably or not)-
  - (a) that A is acting-
    - (i) in self-defence, or
    - (ii) in defence of another person, or
    - (iii) to preserve or protect property, or
    - (iv) to apprehend B or any other suspected wrongdoer, or
    - (v) otherwise in prevention of crime, and
  - (b) that B is, or (if he gained entry) would be, a trespasser.

### **2 Home defence (restriction of prosecutions)**

Where-

- (a) section 1 applies to a person (A) in relation to a dwelling, and
  - (b) a Crown Prosecutor-
    - (i) is considering whether the public interest requires him to institute proceedings against A for an offence in relation to another person (B) who was in the dwelling, or was attempting to gain entry to the dwelling, and
    - (ii) believes that A may have a defence under section 1(2),
- the Crown Prosecutor shall take into account the fact that the public interest requires householders to be fully protected by the law against intruders in their home.

### **3 Home defence (civil liability)**

- (1) This section applies where a person (A) is in a dwelling and is either-
  - (a) the occupier of the dwelling, or
  - (b) present in the dwelling with the licence of the occupier.
- (2) Where this section applies A is not liable in tort by reason of any act done by him in relation to the person or property of another person (B) who is in the dwelling, or is attempting to gain entry to the dwelling, if A believes (whether reasonably or not)-
  - (a) that A is acting-

- (i) in self-defence, or
  - (ii) in defence of another person, or
  - (iii) to preserve or protect property, or
  - (iv) to apprehend B or any other suspected wrongdoer, or
  - (v) otherwise in prevention of crime, and
- (b) that B is, or (if he gained entry) would be, a trespasser.

#### **4 Interpretation, commencement and extent**

- (1) In this Act “dwelling” includes-
- (a) any building or part of a building which is occupied as a dwelling;
  - (b) any caravan, houseboat or structure which is occupied as a dwelling;
- and any yard, garden, garage or outhouse belonging to it and occupied with it.
- (2) Section 1(2) does not apply where A was convicted of the offence before the passing of this Act.
- (3) Section 3 does not apply where judgment was given against A before the passing of this Act.
- (4) This Act applies to England and Wales only.

#### **5 Short title**

This Act may be cited as the Criminal Justice (Justifiable Conduct) Act 2004.

[Overleaf]

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Amend the law of England and Wales by making provision for exempting from civil and criminal liability in specified circumstances persons acting in defence of persons or property.

*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*

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*Ordered, by The House of Commons*  
*to be Printed, 12<sup>th</sup> January 2004.*

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### Notes on Clauses by the draftsman (Francis Bennion)

The draft Bill is confined to dwellings because it is concentrating on the defence of the home. Article 8.1 of the European Convention on Human Rights (enforced by the Human Rights Act 1998) says that everyone has the right to respect for his or her home. This requires the state to give special protection to people in their home, additional to the protection given to individual citizens by the law generally. The sanctity of the home was long recognised by the common law. Justifying the strict laws against burglary (which was then designated by law as a crime committed by breaking and entering a dwelling during the hours of darkness) the famous English 18th century common lawyer Sir William Blackstone said in his *Commentaries on the Laws of England*: 'An Englishman's home is his castle. Burglary is done at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless'.

In relation to criminal offences the Bill operates by providing a special defence to the householder (clause 1) and by requiring Crown Prosecutors to pause and consider before they prosecute the householder (clause 2). In relation to civil liability, clause 3 repeats much of what is said in clause 1. As explained below, the reason for treating criminal and civil liability separately in this way concerns the differing standards of proof.

#### *Clause 1*

The headnote Home defence (criminal liability) indicates that the clause is concentrating, as indeed is the Bill as a whole, on the defence of the home.

*Subs. (1)* The person who is being protected by the clause is called A. The clause applies where A is in a 'dwelling', which is defined in subs. (3). A must either be the occupier of the dwelling or present with the licence of the occupier. This is usual statutory language. The occupier is the person currently in occupation, who may or may not be the owner. The word licence simply means permission, express or implied.

*Subs. (2)* Where the circumstances specified in subs. (1) exist A is given special protection against action he takes against an intruder in the dwelling (called B). A person qualifies as B if he is a trespasser in the dwelling. This again is a well-understand legal term, covering anyone who is in the dwelling without the consent (express or implied) of the occupier. So of course it includes a burglar or housebreaker. Subs. (2) also treats as B a person who is attempting to gain unlawful entry but has not yet succeeded in doing so.

Subs. (2) protects A if he acts against the person or property of B for one of five listed reasons and also believes B is (or would be) a trespasser. The five reasons are largely self-explanatory. The wording of the last of them, acting 'in prevention of crime', is taken from the Law Commission Consultation Paper No 173 'Partial defences to Murder' (see para 9.10). A must genuinely believe he is acting for one of these five reasons, but it does not matter if he is mistaken in his belief. As the Law Commission paper says, '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 the most potent evidence that only reasonable defensive action had been taken' (para 9.6).

The Law Commission paper goes on to say that a person should not be convicted where 'the acts in question were undertaken in self-defence and may have been an instinctive response to the perceived level of risk . . . it is hard to see why the law affords greater protection to those

who kill in response to insults [by virtue of the existing defence of provocation] than to those who do so while protecting their homes' (paras 9.7, 9.8).

Note that the criminal standard of proof (that is proof beyond reasonable doubt) applies to this clause. To defeat the special defence the prosecution would have to prove *beyond reasonable doubt* that A did not genuinely believe that he was acting as stated here.

### *Clause 2*

The headnote Home defence (restriction of prosecutions) indicates that the clause is meant to restrict the number of prosecutions of householders and others engaged in defence of the home.

A Crown Prosecutor only gets to the point of considering the public interest where the facts indicate that the evidence is there to give a strong prospect of obtaining a conviction. Even though that is the case, the prosecution must not be instituted unless the public interest requires it. The official Code for Crown Prosecutors says-

**4.1** There are two stages in the decision to prosecute. The first stage is **the evidential test**. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does pass the evidential test, Crown Prosecutors must decide if a prosecution is needed in the public interest.

Details of the public interest test are give by the Code as follows-

**6.1** In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since:

"It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)

**6.2** The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed.

The Code goes on to specify various public interest factors for and against prosecution. Clause 2 of the Bill adds a further factor, namely that the public interest requires householders to be fully protected by the law against intruders in their home.

### *Clause 3*

The headnote Home defence (civil liability) indicates that the clause is concentrating, as indeed is the draft Bill as a whole, on the defence of the home. This time it is directed to limiting civil liability for tort (negligence, damage to property etc). It repeats the language of clause 1 rather than referring back to it. This is needed because of the differing standards of proof. The civil standard, which is by implication applied by this clause, merely requires the court to be satisfied on a balance of probabilities that A's defence is made out.

*Clause 4*

*Subs. (1)* This is taken from the Family Law Act 1996 s 63(1). It covers not only a house or flat but also a caravan, houseboat etc. It also brings in any yard, garden, garage etc.

*Subs (2) and (3)* These are the usual transitional provisions ensuring that the Bill does not disturb past convictions or judgments.

2004.002

Bill 36 of 2004 (House of Commons)

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