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A Householder's Right to Kill or Injure an Intruder under the Crime and Courts Act 2013: An Australian Comparison

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A Householder's Right to Kill or Injure an Intruder

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Abstract Section 43 of the Crime and Courts Act 2013 has amended s. 76 of the Criminal Justice and Immigration Act 2008 such that a person may be acquitted in a case of self-defence in his or her own home where he or she uses disproportionate, but not grossly disproportionate, force against an intruder. This extends to circumstances where a householder intentionally kills such an intruder. This amendment, a result of Conservative Party policy, appears to be based on populist appeal and a response to certain high-profile cases. By comparison, Australian home invasion legislation imposes limitations on the rights of a householder to kill in circumstances such as a home invasion. In addition, a number of Australian jurisdictions provide for a partial defence of excessive self-defence. Section 43 provides only that the disproportionate force used by a householder be reasonable in the circumstances as the householder believed them to be. Further to this, the amendments are vague, ambiguous and likely to create significant uncertainty.

Keywords Home invasion; Self-defence; Castle doctrine; Disproportionate force; Partial defence

On 10 May 2012, the Crime and Courts Bill 2012 was introduced to the House of Lords, and subsequently read for the first time in the House of Commons on 19 December 2012. The Bill received Royal Assent on 25 April 2013, and subsequently became the Crime and Courts Act 2013. The Bill had numerous objectives, relating to the administration of courts, reform of immigration laws, dealing with proceeds of crime, and so on. One objective, however, which is the topic of this article, is to reform the law of self-defence in the case of a home owner in his or her own home acting against an intruder. Clause 30 of the Bill proposed to achieve this via the amendment of s. 76 of the Criminal Justice and Immigration Act 2008 (hereafter 'the 2008 Act').¹

In discussing what was cl. 30, the Justice Secretary, Chris Grayling, stated that the purpose of this Bill was to give more legal protection to those householders who used force when confronted by burglars in their residences.² Where such force was necessary and reasonable then the existing law entitled the householder to an acquittal.

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What was lacking, according to Grayling, was further protection to those householders who used disproportionate force in such circumstances.

Grayling made it clear that grossly disproportionate force would still lead to a conviction which could be murder in circumstances of an intention to kill or inflict grievous bodily harm. However, householders who used disproportionate force, but less than grossly disproportionate force, could still be deemed to have used reasonable force in accordance with s. 76.

As it stands, s. 76 still preserves the common law defence of self-defence³ and provides statutory guidance on the methodology to be applied when determining whether a defendant's use of force in a purported situation of self-defence was reasonable. For example, the section provides that a defendant is entitled to rely upon a genuine but mistaken belief as regards the existence of any circumstance,⁴ unless the mistake was caused by intoxication,⁵ and if a person honestly and instinctively believes his or her actions were necessary for a legitimate purpose,⁶ then that is 'strong evidence that only reasonable action was taken by that person'.⁷ Prior to the amendment, however, the section did not differentiate between cases of self-defence that occur in one's home or elsewhere, such as on the street. It applied equally to any situation where self-defence was raised.

In 2012, s. 76 was amended by s. 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.⁸ This amendment added the common law defence of defence of property to the list of defences⁹ covered by s. 76 as well inserting a new provision under subs. (6A), which states that:

In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.¹⁰

The effect of subs. (6A) is significant in that it appears to abolish a duty to retreat.¹¹ Whether there has been any form of retreat is now only a factor, along with others, to be considered as part of 'the circumstances as D believed them to be ...'.¹²

In order to appreciate the operation of s. 76 and the impact of the 2012 amendments, regard must be had to two subsections. First, s. 76(7), which states that:

In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

- (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
- (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

Secondly, s. 76(6), which states that:

... the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

This subsection affords a defendant some latitude insofar as a trier of fact may assess the reasonableness of the defendant's actions as he or she reasonably perceived them to be, not as they actually may have been. Nonetheless, it ultimately imposes an objective limitation and says that the degree of force must not have been disproportionate in those circumstances.¹³

This is now altered through the introduction of s. 76(5A) to the 2008 Act, which reads:

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In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

Section 76(6) is also amended by inserting at the beginning 'In a case other than a householder case'.¹⁴ A 'householder case' is defined in the new s. 76(8A)–(8C) and broadly means a situation where the victim was a trespasser in the defendant's dwelling.

Now, in those cases where a person defends himself in his own residence, the defendant cannot rely on self-defence where the degree of force used was objectively grossly disproportionate, but is entitled to rely on force which is disproportionate, if such disproportionate force was reasonable in the circumstances as the defendant believed them to be. As such, there appears to be no apparent obstacle therefore to this leading to an acquittal in cases of both murder and manslaughter where a defendant, acting in self-defence, kills using disproportionate force in a householder case if it was reasonable in the circumstances as the householder believed existed. This places a householder case in stark comparison with every other case of self-defence under s. 76(6) of the 2008 Act, where defendants must fail if their use of force was disproportionate. To understand the amendments better, Part 1 of this article will discuss the background to the Crime and Courts Act 2013 further as well as some additional consideration of the provisions.

Part 2 will present the legislative provisions enacted in various Australian states which deal with householder cases, as well as display, through seminal cases, their application. Part 3 of the article will consider the differences between s. 76 of the 2008 Act, as amended by s. 43 of the Crime and Courts Act 2013, and those Australian provisions, and will argue that there is a case for the inclusion of specific home invasion legislation, but there is a need to achieve an appropriate balance.

1. Background

Section 43 of the Crime and Courts Act 2013 was the result of the Conservative Party's pledge to amend the law regarding the reasonable force test for householder's who kill or injure intruders. This pledge was part of the Party's 2010 election manifesto but it reflects Conservative Party policy that goes back much farther than this.

The appropriate starting point is the case of *R v Martin*.¹⁵ The facts of this case are well known and only briefly outlined here. Martin had been the victim of a number of burglaries. One evening in 1999 he saw three persons prowling outside his property. He then hid, but armed himself with a loaded shotgun. When the prowlers had approached within close range he shot at them, killing one and wounding another. Martin was charged with murder and wounding and in 2000 was convicted at trial. At trial his defence of self-defence was rejected by the jury. On appeal his conviction for murder was reduced to manslaughter based on 'fresh evidence' of diminished responsibility.

Two years after *Martin*, and in response to the continuing debate around a householder's rights against burglars, UK Conservative MP Roger Gale pushed his Criminal Justice (Justifiable Conduct) Bill in April 2004 to the Second Reading stage in the House of Commons. This Bill would have permitted a householder 'to use any force if he (subjectively) believed that another person was a trespasser and he was acting in self-defence'.¹⁶ The Bill did not proceed any further, but the then Parliamentary Under-Secretary of State, Fiona Mactaggart, commented that it would have created a 'spiral of violence and retaliation'.¹⁷ The Bill, however, was a result of a media campaign in response to the *Martin* case which described his conviction as a travesty. As noted in the *Guardian* in 2001:

By the time Tony Martin made his first court appearance charged with the murder of teenage burglar Fred Barras, his case had become a cause célèbre.

Neighbours and strangers alike held a demonstration outside King's Lynn magistrates court demanding his release and some sections of the media were already lionising him.

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He was depicted as the ordinary man who, plagued by burglars and let down by the police, had struck back but was now being persecuted for his actions.

Over the coming months, politicians, commentators and public opinion turned the Norfolk farmer into something approaching a folk hero.¹⁸

While Gale's Bill was rejected, the Conservative Opposition reignited the debate in late 2004 with Conservative MP Patrick Mercer introducing the Criminal Law (Amendment) (Householder Protection) Bill 2004.¹⁹ The similarities with cl. 30 of the Crimes and Court Bill are obvious, Mercer's Bill stating that a householder should only be guilty of an offence of homicide or assault where the force used was 'grossly disproportionate'. Significantly, Mercer noted that his Bill would bring the criminal law in line with the civil law which had been amended following *Martin*. This resulted from the action taken by the wounded burglar who sought to sue Martin for damages. As the law then stood, he would have had to prove that Martin had used 'unreasonable force'.²⁰ This was amended by the then Labour government so as to raise this to 'grossly disproportionate' force.²¹ At the time there was also apparent support from the Labour government for a change to the criminal law, but no action was taken.²²

The debate would appear to have largely disappeared until the *Hussain* case in 2008.²³ In *Hussain*, the second defendant, Munir Hussain, was tied up along with his family by a group of burglars. Munir's son managed to get free and ran to the house of his uncle Tokeer (the first defendant). Both defendants then chased one of the burglars out of the house and down the street. Having caught him, they attacked the victim with a variety of weapons including a cricket bat. As a result the victim suffered a fractured skull and serious permanent brain damage as well as other injuries. His brain damage had actually rendered him unfit to plead at his trial for the various burglary and related offences. Both defendants were found guilty at trial of causing grievous bodily harm with intent and sentenced to 39 and 30 months' imprisonment respectively.²⁴ Significantly, neither brother raised self-defence at their trials, but argued instead that they did not carry out the assault. This did not seem to matter for the press, particularly the *Telegraph*, or the Conservative Party; Chris Grayling announcing that a Conservative government would legislate to protect the rights of the victim.²⁵

The Hussains subsequently appealed against their convictions, but these were dismissed as the need for self-defence had long passed, the Court of Appeal stating:

Even allowing for all the provocation, Munir Hussain and Tokeer Hussain were rightly prosecuted. The verdict of the jury must be respected. This level of violence was unlawful. However, the principle that concerned the judge that nobody can take the law into their own hands and administer revenge punishment has been vindicated.²⁶

Given the exceptional circumstances of the case, however, and perhaps in response to community sympathy and media attention, the Court of Appeal felt that this was a case where there was a strong argument for mercy, particularly in Munir's case. As a result it reduced the sentence of Tokeer to 24 months' imprisonment and Munir to 12 months, suspended for two years.

In announcing the Crimes and Court Bill in 2012, the Justice Secretary further noted that householders also needed to be protected from the stress of potential prosecution where they had acted excessively. Such persons should be seen as victims not suspects, and police investigations of potential charges should proceed on this basis. There are no provisions in s. 43 as to how this is to be achieved but the Ministry of Justice Circular, *Use of Force in Self Defence at Place of Residence*, states that s. 43 should be considered with the revisions to the Police and Criminal Evidence Act 1984, Code G (Arrest) which came into force on 12 November 2012.²⁷

This not only reflects earlier Conservative policy, but also appears to be a response to certain cases. In 2009 Omari Roberts stabbed two intruders in his mother's house. One was fatally wounded, but the other survived. As a result Roberts was charged with murder and wounding with intent. One year later, and just before the trial was due to

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begin, the Crown Prosecution Service (CPS) dropped all charges against Roberts on the basis of new evidence from the surviving intruder.

The most recent case is that of Andy and Tracey Ferrie who were arrested in September 2012 on suspicion of causing grievous bodily harm for shooting and wounding two intruders on their property. They were held in custody for two days before being released on bail. One day later, the CPS announced that the Ferris would not face any charges, the two wounded intruders being charged with burglary.²⁸

While there may well be further amendments which seek to limit police investigations and charges in householder cases, the focus in this article is on the amendments to the law on self-defence. As reported, Grayling stated that 'grossly disproportionate' force will still be against the law in England and Wales, but the bar will be higher than the current 'proportionate' force test.²⁹ While there was considerable opposition to the Bill, which is discussed later, s. 43 of the Crime and Courts Bill 2013 does reflect legal developments in countries such as Australia giving the occupant of a home the right to kill someone who has entered or remained in it without the occupant's consent:

This form of trespass differs from others insofar as a home—and what it signifies psychologically to the occupant in terms of personal space, physical safety and security—is involved. The word 'invasion' captures this and, indeed, the term 'home invasion' has become commonplace in countries like Australia, the United Kingdom and the United States ...³⁰

2. An Australian comparison

In Australia, the doctrine of defence of the person and defence of property is now governed by a variety of statutory provisions. The legislation in each jurisdiction, however, is far from consistent. Tasmania, South Australia (SA), Western Australia (WA) and Queensland have specific home invasion provisions. There is no specific home invasion legislation in NSW, Victoria, the Australian Capital Territory (ACT), Northern Territory (NT) or the Commonwealth. There is provision for excessive self-defence in NSW, Victoria WA and SA, but not in the ACT, Tasmania, Queensland, the NT, nor federally. While this is clearly unsatisfactory and there is an obvious need to seek a more common approach, this is beyond the scope of this article. The purpose here is to consider, by way of comparison to the current UK amendments, a selection of those states which have specific provisions covering defence of the person and defence of property in home invasion circumstances. The jurisdictions selected are SA, Queensland and WA. NSW is also considered due to its early adoption of home invasion legislation which, however, has now been repealed. To an extent, therefore, NSW may present as a comparative example in support of the retention of the current UK legislation and the rejection of specific householder provisions. Having said this, however, NSW has adopted the partial defence to murder of excessive self-defence. It is noted that both UK and Australian law also makes provision for preventing a crime and affecting a citizens' arrest, but this is not considered here, the focus being on the use of deadly force in circumstances of home invasion, burglary or associated situations which give rise to a claim of defence of the person as well as property defence.

New South Wales

The law of self-defence in New South Wales is currently stated in Part 11 of the Crimes Act 1900 (NSW). Introduced in 2001, the amendment followed a somewhat anomalous situation whereby the law on self-defence was generally covered by the common law and two Acts, the Home Invasion (Occupants Protection) Act 1998 (NSW) and the Workplace (Occupants Protection) Act 2001 (NSW) which stated the law of self-defence for situations of home and workplace invasion.³¹

The test for self-defence is now set out in s. 418, this being judicially considered by Howie J in *R v Katarzynski* and structured as a two part test, the 'first issue is determined from a completely subjective point of view ... The second issue is determined by an entirely objective assessment of the proportionality of the accused's response to the situation the accused subjectively believed he or she faced'.³²

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Section 420 removes self-defence in cases concerning only protection of property or prevention of criminal trespass where the defendant intentionally or recklessly caused death. A major amendment was s. 421 which reintroduced excessive self-defence, but only in circumstances of defence of the person or to prevent the unlawful deprivation of liberty, not in cases of defence of property or against trespass alone.

While decided before the 2002 amendments to the Crimes Act 1900 (NSW),³³ *R v Munro*³⁴ is a significant NSW case in terms of the complexities surrounding self-defence and defence of property and the application of the then Home Invasion (Occupants Protection) Act 1998 (NSW). In *Munro*, M attacked and killed the victim who lived next door. The victim and his brother had entered M's yard armed with a cricket bat. M had disarmed the victim and struck him with at least one blow. The victim attempted to run away, but M continued to strike him, causing the victim to collapse. Nonetheless, M carried on the assault as well as fending off the other brother each time he tried to intervene. The blows resulted in a skull fracture and an underlying subdural and subarachnoid haemorrhage. The victim died approximately 24 hours after the attack.

M was charged with murder. Badgery-Parker AJ, sitting without a jury, concluded that the prosecution had not been able to prove a 'murderous intention' beyond reasonable doubt and according M was not guilty of murder. His Honour then noted that:

The act or acts which caused the death of Ben Prior were clearly dangerous acts in the sense in which the law uses that term—namely that, whether the accused himself realised it or not, they were acts which any reasonable person would realise exposed Ben Prior to a significant risk of serious injury. If in addition those acts were unlawful, then the accused is guilty of manslaughter. The acts were unlawful unless done in lawful self-defence.³⁵

In this regard, the Home Invasion (Occupants Protection) Act 1998 (NSW) was applicable. In his consideration of a defence under the Act, Badgery-Parker AJ noted that:

Its principal provisions relate to the right of an occupant of a dwelling house 'to act in self defence against an intruder' (s 6) or to 'act in defence of any other person in the dwelling house against an intruder' (s 7) or to 'act in defence of any property of or within the dwelling house against an intruder' (s 8) but only 'if the occupant believes on reasonable grounds that it is necessary to do so'.³⁶

While he found that the deceased was an intruder for the purposes of the Act, he concluded that the Crown had proven that the attack had ceased and M's continued attack on the deceased had gone not only beyond a defence under the Home Invasion (Occupants Protection) Act 1998 (NSW), but also self-defence at common law. In dismissing M's appeal, the NSW Court of Criminal Appeal also agreed with the following reasons of Badgery-Parker AJ in his rejection of the defence's argument as to how to define the belief of the occupant:

The significance of the words in s 9, 'having regard to the belief of the occupant' is to emphasise that the determination which has to be made 'whether the grounds are reasonable grounds for the purposes of s 6' is a determination about the grounds upon which the occupant himself (the actual person, not some hypothetical person in the same position as the occupant) held the relevant belief.³⁷

South Australia

South Australia (SA) has unique provisions with respect to self-defence and defence of property. These are set out in ss 15, 15A, 15B and 15C of the Criminal Law Consolidation Act 1935 (SA). Section 15 sets out the provisions regarding self-defence with s. 15(2) covering excessive self-defence. This is extended to defence of property, prevention of criminal trespass and making or assisting in a lawful arrest under s. 15A(2), noting, however, that the defendant must not intend to cause death (s. 15A(2) (b)). Section 15B states that there is a requirement of reasonable proportionality for all provisions in that Division of the Act.

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Significantly, s. 15C states that reasonable proportionality does not apply in circumstances of an innocent defence against home invasion. Home invasion is defined as 'a serious criminal trespass committed in a place of residence'. The section says that if the defendant would have had a full defence available, but for the use of excessive force, then in the case of a home invasion, and where the defendant genuinely believed the victim to be committing, or have just committed, home invasion; and the defendant was not engaged in criminal misconduct; and where the defendant was not intoxicated; and the intruder is not a police officer, then the defendant is entitled to the full defence. The burden, however, is on the defendant to prove the matters mentioned above on the balance of probabilities.

While not a case involving killing, the SA Court of Criminal Appeal in *Roberts v R*³⁸ is significant. In *Roberts*, the victim and a number of other people, including the accused's girlfriend had been drinking over a lengthy period at a pub and the accused's residence. Roberts, who was not part of this drinking, returned home and locked the front door, the side gate and the garage door. When the group returned with more alcohol, Roberts refused to let them in. After considerable yelling, Roberts let his girlfriend back in. In response, the victim threw a garbage bin at the house smashing a window. There was subsequently an altercation between Roberts and the victim. Roberts, however, had armed himself with a Samurai sword, and the victim was holding a bottle in his hand. During the altercation, the victim received a serious wound to his arm. At trial, Roberts was convicted of aggravated causing serious harm with intent to cause serious harm.³⁹ The jury were directed as to self-defence and defence of another under s. 15, but not home invasion under s. 15C.

In allowing his appeal and ordering a retrial, the Court of Criminal Appeal held that a direction under s. 15C should have been given and that a failure to do so was an error of law. All the judges referred to difficulties and confusion in terms of a direction under s. 15C, however. White J stated:

The inter-relationship between s 15, on the one hand, and s 15C appears therefore to be as follows. It is for the prosecution to exclude as a reasonable possibility that the defendant had a genuine belief that the conduct to which the charge relates was necessary and reasonable for a defensive purpose. If the prosecution does not exclude that possibility then, in a case in which the victim is not a police officer acting in the course of his or her duties, it is for the defendant to establish the circumstances giving rise to the home invasion defence under s 15C(2). If the defendant establishes those matters, then he or she will have a complete defence, ie, the prosecution will not have shown that the conduct was unlawful. However, if the defendant does not satisfy the trier of fact on the balance of probabilities of the home invasion defence, it will then be for the prosecution to exclude as a reasonable possibility that the defendant's conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat which the defendant genuinely believed to exist (at [104]).⁴⁰

So even where the defendant has not satisfied the jury on the balance of probabilities of his belief that the victim was committing a home invasion, they must only convict when satisfied beyond reasonable doubt that the defendant's conduct, in the circumstances as he believed existed, was not proportionate to the threat.⁴¹ Where murder is the offence charged, however, a defendant could also seek to rely on excessive self-defence under s. 15(2).

Queensland

The Criminal Code Act 1899 (Qld) makes provision for self-defence under a number of provisions. Under s. 31 a person is not criminally responsible for an act that is 'reasonably necessary in order to resist actual and unlawful violence threatened to the person'⁴² or where the act is done to save himself or property and the act is reasonably proportionate to the harm or detriment threatened.⁴³ The provision does not apply, however, 'to an act or omission which would constitute the crime of murder' or an offence involving an intent to cause grievous bodily harm.⁴⁴ Section 271(1) allows a person to use such force which is reasonably necessary to repel an unprovoked assault.

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The limitation on this defence is that 'the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm'. Section 271(2) states, however, that if:

the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

In terms of defence of property, s. 267 makes it lawful:

to use force to prevent or repel another person from unlawfully entering or remaining in the dwelling, if the person using the force believes on reasonable grounds that;

- (a) the other person is attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling; and
- (b) it is necessary to use that force.

In this regard, the use of deadly force will not be allowed in the defence of property only. If, however, the accused believed it reasonably necessary to defend himself against serious violence, as well as his property, then his conduct may be deemed lawful. In these circumstances, he may seek to rely on ss 267 and 271(2).

Sections 274–278 set out further provisions with regard to defence of property or trespass. The condition for all these provisions is that such force must be reasonably necessary and must not do grievous bodily harm to the other person. Where death or grievous bodily harm does result, it is apparent that reliance cannot be placed on these provisions.

In *R v Cuskelly*,⁴⁵ C argued with the victim who had been yelling abuse from the street. C then heard the victim coming up the stairs to his apartment, continuing to make threats. He obtained two knives and stepped outside the apartment and into the stairwell, where he confronted the victim and stabbed him to death. C was tried and convicted for murder, the trial court judge only directing the jury on the basis of self-defence under ss 271 and 272, but not s. 267 (defence of a dwelling). In allowing the appeal and ordering a retrial on the basis that s. 267 was relevant, Keane JA described s. 267 as giving 'effect to a policy of the law which recognises the legitimate use of force to defend hearth and home and to prevent the commission of offences by others in one's home'.⁴⁶ At his retrial for murder, the jury found C not guilty of murder, but guilty of manslaughter. The trial judge, Mullins J, noted, however, that it had been a gross over-reaction by C:

'All you had to do was close your front door,' she said.

However, Justice Mullins noted that Cuskelly had got a medical kit and tried to help Carr who was bleeding profusely.

She said she accepted the jury would have convicted Cuskelly on the basis he deliberately stabbed Carr but at the time Cuskelly was too intoxicated to form the necessary intent to cause death or grievous bodily harm.⁴⁷

Western Australia

The law relating to self-defence in Western Australia (WA) is set out in s. 248 of the Criminal Code (WA).⁴⁸ This is similar to the Queensland provisions, but the WA Code makes provisions for a partial defence to murder of excessive self-defence.⁴⁹ In addition, s. 244 sets out a specific and detailed defence against home invasion. This allows an occupant to 'use any force or do anything else that the occupant believes, on reasonable grounds, to be

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necessary' to defend against a home invader entering the dwelling or an *associated place* or defend against violence used by a home invader. The term *associated place* is defined to mean 'any place that is used exclusively in connection with, or for purposes ancillary to, the occupation of the dwelling' and any common areas between two or more dwellings in a building or group of buildings.

Section s. 244(1A) removes the availability of the defence where the occupant uses force intended or likely to cause death unless the occupant believes the home invader is or is likely to use violence.

Like Queensland, the WA Code also sets out various provisions regarding the defence of property (ss 251–256). The proviso is 'that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm to the person in possession'.

While there have been a few cases where there was a very tenuous claim of a defence under s. 244,⁵⁰ there are no reported cases of where a householder has killed or injured an intruder found in the home during a burglary or as part of an actual home invasion. As such there are no WA cases which shed any light on the application of these provisions.

3. Getting the balance right

The law has long recognised that householders should be entitled special protection. Lambeth suggests such recognition dates back to a passage of Moses in the *Book of Exodus*.⁵¹ Both Blackstone⁵² and Hale⁵³ recognised the special case of a person being attacked in his or her home, the former being at 'pains to specify that the situation of a person in his home was unlike that of a person assaulted in a public place'.⁵⁴ As a New York judge once said, '[f]light is for sanctuary and shelter, and shelter if not sanctuary, is in the home'.⁵⁵

The authors do not doubt that householders are entitled to certain protections at law when defending against an intruder. The questions to be considered below are what should be the appropriate legislative response to recognise that entitlement and whether the amendments contained in s. 43 of the Crime and Courts Act 2013 are an example of an appropriate legislative response.

Those who opposed the 2012 Bill stated at the time that the existing provisions of s. 76 of the Criminal Justice and Immigration Act 2008 were sufficient to protect the householder who acted excessively. Not surprisingly, the Shadow Justice Minister, Lord Beecham, stated that the proposed amendment would only confuse the present law, there being no clarity in the difference between disproportionate force and grossly disproportionate force.⁵⁶ Both the Bar and Law Society also stated that the then existing s. 76 was working well, a sentiment also echoed by the Lord Chief Justice.⁵⁷ Such opposition has been consistent ever since the policy appeared in the Conservative Party's election manifesto. In 2010, the chairman of the Criminal Bar Association, Paul Mendelle QC, stated that the law as it currently stood was working 'perfectly well and was well understood by juries'. In his view the proposed changes would promote vigilantism and sanction 'extrajudicial execution'. He also noted 'that the change could also make householders less safe' because burglars may well arm themselves in response to knowing that a householder could use deadly force against them.⁵⁸

While prior to the drafting of Bill, an Editorial in the *Criminal Law Review* made comments regarding the *Hussain* case and the then Conservative Party Opposition's proposals:

A great virtue of the reasonableness standard is that it can be applied flexibly and appropriately in different contexts. It is not at all apparent that a 'grossly disproportionate' standard would be appropriate for all these contexts, even assuming that a case could be made for its application to domestic burglary. Different laws of self-defence for different social settings would then present nightmares of definition, to say nothing of the acute policy issues that would be raised. The present law works and is fair. It should be left alone.⁵⁹

Others opposing the Bill also pointed to two Crown Prosecution Service publications: *Householders and the Use of*

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Force against Intruders; Legal Guidance: Self-defence and the Prevention of Crime.⁶⁰ Both of these publications set out the rights and responsibilities of those who are confronted by an intruder in their home under s. 76.

An alternative verdict of manslaughter is also available where a householder intentionally kills an intruder using excessive force. Under s. 54 of the Coroners and Justice Act 2009 murder may be reduced to manslaughter by way of a loss of self-control triggered by a fear of serious violence.⁶¹ To an extent this reflects the partial defence of excessive self-defence.

Australia and England have, however, often been divided in their recognition of a rule of excessive self-defence. As noted above, a number of Australia jurisdictions now make statutory provision for this partial defence. In addition to this partial defence, SA and WA also have specific home invasion provisions. The UK, on the other hand, has steadfastly rejected excessive self-defence. In an appeal from the Jamaican Supreme Court, the Privy Council in *R v Palmer*⁶² rejected the principle of excessive self-defence, saying a person who acts in excessive self-defence has no defence and is guilty of murder unless there it could not be proven that the accused intended to kill or inflict grievous bodily harm or, if there were such evidence, that there was provocation. In the same year, *Palmer* was approved and followed by the UK Court of Appeal in *R v McInnes*.⁶³

This was reflected in *Martin*, where the Court of Appeal stated:

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 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 be the law then the change would have to be made by Parliament. It was not even suggested on this appeal that it would be open to this court by judicial decision to bring about such a change.⁶⁴

There has been no such proposal for legislative change in the UK, and in 2004, the Law Commission in its Final Report on Partial Defences to Murder⁶⁵ rejected excessive self-defence in favour of their reformulated provocation defence.⁶⁶

While there is an obvious relationship between circumstances of excessive self-defence and householder cases, a full consideration of the arguments for and against the adoption of this partial defence would significantly extend the scope of this article. As such, this must await subsequent analysis. Having said this it is of some interest to note again the case of *Martin*. Had this case occurred today, Martin could have raised a partial defence under s. 54 of the Coroners and Justice Act 2009 by way of a loss of self-control triggered by a fear of serious violence.⁶⁷ If there were no apparent loss of control, however, then this defence would fail.⁶⁸ If the provisions of s. 76 of the 2008 Act, as amended by s. 43 of the Crime and Courts Act 2013, had governed Martin, the outcome could have been significantly different with the possibility of an acquittal.

There may be some who would support this outcome, but at trial Martin's defence of self-defence was rejected by the jury. On appeal his conviction for murder was only reduced to manslaughter based on 'fresh evidence' of diminished responsibility. The possibility that the amendments to the 2008 Act could now potentially lead to an acquittal of someone killing in circumstances similar to those in *Martin* would, however, be abhorrent to most. To what extent was Martin's conduct only disproportionate or grossly disproportionate? Under s. 76 of the 2008 Act, as amended, disproportionate force in a householder case will now be reasonable in the circumstances as the householder believes them to be and will only be unreasonable if grossly disproportionate. In this sense, s. 76, as amended by s. 43 of the 2013 Act, is ill-conceived and vague to the extent that the previous s. 76 is to be preferred. But there is an argument for reform. In commenting on the previous s. 76, *Smith and Hogan's Criminal Law* saw it as a very strange provision, 'merely partially restating the common law'.⁶⁹

By way of comparison with the previous s. 76, Yeo has called for changes to be made to Canadian criminal defence

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law in circumstances where an occupant kills a home invader. In his view the relevant current provisions of the Canadian Criminal Code and their interpretation by the courts are too narrow.⁷⁰ The current law, he stated, as with existing law reform proposals, differentiated between allowing an occupant either a defence of the person, where an intention to kill was conditionally allowed, or a defence of property where evidence of such an intention would preclude any such defence.⁷¹ What was necessary was an approach which recognised a combination of the two due to the special circumstances of home invasion. Yeo recommended that Canada look to overseas legal examples such as s. 244 of the Criminal Code (WA).

According to Yeo, changes to the current Canadian Criminal Code along the lines of s. 244 of the Criminal Code (WA) would be modest, but were attractive because they struck a balance between two extremes:

of permitting a defence only when the home occupant was threatened with death or grievous bodily harm by the trespasser (which appears to be our present law) and of permitting the defence where there was no threat of bodily harm whatsoever (which is the law in some foreign countries).⁷²

The other characteristic of s. 244, as well as other Australian home invasion provisions, is the protection they attempt to build into the legislation so as to guard against killing just in defence of property or where there is minimal threat to the person. Having said this, they also acknowledge the extreme nature of a home invasion situation and the ability of the resident to make judgements in such circumstances.

Under s. 15C of the Criminal Law Consolidation Act 1935 (SA), noted above, the requirement of reasonable proportionality is waived in cases of home invasion, but only where the resident establishes, on the balance of probabilities, that he or she 'genuinely believed the victim to be committing, or to have just committed, home invasion'.⁷³

In his Second Reading speech to the enactment of this new provision in 2003, the Attorney-General for South Australia explained the home invasion amendments as follows:

The Government believes that the law of self-defence should be changed to provide that, in a case where an innocent occupier genuinely believes that he or she is defending himself or herself from the commission of an offence of aggravated serious criminal trespass in a residential building occupied by them, then, as a general rule, he or she may use such force in defence of his or her person or property as he or she genuinely believe to be proportionate to the threat that they genuinely believe that they face.⁷⁴

As detailed earlier, s. 267 of the Queensland Criminal Code, allows a resident to use force where he or she believes it is necessary, on reasonable grounds to prevent a person from 'attempting to enter or to remain in the dwelling with intent to commit an indictable offence in the dwelling'.⁷⁵ Deadly force, that is force which intended, or is likely, to cause death or grievous bodily harm, can only be used, however, where:

the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm ...⁷⁶

This is similar to s. 244(1A) of the Criminal Code (WA) which prohibits the use of deadly force unless the occupant believes, on reasonable grounds, that the home invader is or is likely to use violence against a person in the home. This subsection was inserted in 2008⁷⁷ in response to a 2007 report into the law of homicide by the Law Reform Commission of Western Australia.⁷⁸ In this report, the Law Reform Commission of Western Australia highlighted a number of potential dangers with the then existing s. 244. The Commission noted, for example, that:

Thus, it is possible for a person to rely upon the defence against home invasion in circumstances where the occupant believes on reasonable grounds that a person (who may actually be outside the boundaries of the property) intends to steal a car from the driveway. If the occupant believes on reasonable grounds that it was

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necessary to use lethal force to prevent the home invader from entering the property then the occupant may be acquitted. It is not necessary under s244 for the actual force used to be objectively reasonable.⁷⁹

Further protection is also provided under s. 244(2) which states that the occupant must also have reasonable grounds for believing that the victim is a home invader. These include a belief that the person (a) intends to commit an offence; or (b) is committing or has committed an offence, in the dwelling or on or in an associated place.⁸⁰

Conclusion

Section 76 of the Criminal Justice and Immigration Act 2008, as amended by s. 43 of the Crimes and Court Act 2013, seeks to provide legal protection to householders who use force against intruders in their own home. It is the product of significant policy-driven lobbying and several high-profile cases where householders have been prosecuted after using force against a home invader.

In the Australian context, such legislation is not novel or unique, with a majority of states having some legislation directed towards householder cases. A majority of jurisdictions also provide for a partial defence of excessive self-defence. The form and nature of that legislation differs between states, and we have presented four of those states above.

Apart from those statutory examples of householder recognition, the common law has also recognised the sanctity of a person's home, and made certain allowances in such cases, such as the non-requirement to demonstrate retreat before resorting to self-defence. Unlike those provisions in Australia, however, which provide a partial defence to murder, or legislate generally to provide a defence of excessive self-defence, the amendments under discussion provide a complete defence to a charge of murder in cases of disproportionate, but not grossly disproportionate force. That kind of amendment is both unprecedented in the UK and Australia and presents an unpredictable, vague and potentially dangerous legal test for parties and juries.

The amendments are not only vague in terms of disproportionate force, but also in terms of the circumstances of a so-called 'householder case'. To date this appears to have escaped specific criticism by those opposed to the amendments, the focus being on the distinction between disproportionate and grossly disproportionate force. The only apparent requirement for a case to be deemed a 'householder case' is that it must occur in or partly in a building, or part of a building, that is a dwelling, the householder is not himself or herself a trespasser in that dwelling at the time the force is used, and at that time the householder believed the victim to be in, or entering, the building or part as a trespasser.⁸¹ As such, there appears to be no apparent requirement that the householder be attacked or threatened with violence.

The explanatory Circular released by the Ministry of Justice on 26 April 2013⁸² provides little if any guidance with regard to the interpretation of the new provisions. It notes the reasons and need for change which the authors support, but the key consideration of the distinction between disproportionate and grossly disproportionate force is lacking. There appears to be some attempt to explain how s. 43 will operate by reference to a hypothetical, the facts of which are cause for concern. What is described is a case involving a householder who gets into a fight with an intruder armed with a knife. The householder gets the upper hand and the intruder drops his weapon and attempts to flee. The householder, however, continues to strike the intruder who is rendered unconscious. Section 76, as amended, it is said would now mean that the householder would not be guilty of assault. With due respect, the householder would not have been liable under the previous provisions of s. 76. The cases that have been the impetus for the amendments have not been about knocking an intruder unconscious, but have involved death and grievous bodily harm. Reference is made to the future publication of guidelines by the Crown Prosecution Service, but the overriding feeling in relation to s. 76 is that it is fundamentally flawed.

¹ Clause 30 of the Bill became s. 43 of the Crime and Courts Act 2013.

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- ² O. Bowcott, 'Plan to allow "disproportionate force" against burglars included in crime bill', *Guardian*, 25 November 2012, available at <http://www.guardian.co.uk/law/2012/nov/25/disproportionate-force-burglars-crime-bill>, accessed 9 December 2013.
- ³ Criminal Justice and Immigration Act 2008, s. 76(2)(a).
- ⁴ Criminal Justice and Immigration Act 2008, s. 76(4).
- ⁵ Criminal Justice and Immigration Act 2008, s. 76(5).
- ⁶ Defined to mean the common law purpose of self-defence or for effecting a lawful arrest: Criminal Justice and Immigration Act 2008, s. 76(10).
- ⁷ Criminal Justice and Immigration Act 2008, s. 76(7).
- ⁸ By the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 8) Order 2013 made 11 May 2013; s. 148 came into force on 14 May 2013.
- ⁹ As such, the defences now covered under s.76 are self-defence (s. 76(2)(a)), defence of property (s. 76(2)(aa)), prevention of crime, and effecting or assisting in a lawful arrest (s. 76(2)(b)). A 'householder case' only arises, however, where the defence is self-defence (s. 76(8A)).
- ¹⁰ Criminal Justice and Immigration Act 2008, s. 76(6A).
- ¹¹ The duty to retreat is explained in Part 2 below and was a prerequisite in the UK to pleading self-defence (*R v Julien* [1969] 1 WLR 839; *R v McInnes* [1971] 1 WLR 1600) until *R v Bird* [1985] 1 WLR 816 where it was held that whether a person retreated is a factor to be taken into account, but failure to retreat does not absolutely prohibit reliance on self-defence.
- ¹² Criminal Justice and Immigration Act 2008, s. 76(3).
- ¹³ Reed and Bohlander describe this as requiring a defendant's actions be 'objectively proportionate': A. Reed and M. Bohlander, *Loss of Control and Diminished Responsibility: Domestic Comparative and International Perspectives* (Ashgate Publishing: Farnham, 2013) 94. See also R. Heaton and C. de Than, *Criminal Law* (Oxford University Press: Oxford, 2010) 273.
- ¹⁴ Crime and Courts Act 2013, s. 43(3).
- ¹⁵ *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1.
- ¹⁶ R. Thompson, 'Break In, Make My Criminal Justice Policy' (2005) 148 *Criminal Lawyer* 6.
- ¹⁷ HC Deb, 30 April 2004, vol. 404, col. 1180.
- ¹⁸ S. Morris, 'The killer who won a nation's sympathy', *Guardian*, 30 October 2001, available at <http://www.guardian.co.uk/uk/2001/oct/30/tonymartin.ukcrime2>, accessed 9 December 2013.
- ¹⁹ See S. Broadbridge, *Criminal Law (Amendment) (Householder Protection) Bill*, Research Paper 05/10 (House of Commons Library, 2005).
- ²⁰ This action, together with a counterclaim by Martin, were dropped in 2003: S. Morris, 'Martin expected to end legal dispute with burglar', *Guardian*, 22 September 2003, available at <http://www.guardian.co.uk/uk/2003/sep/22/tonymartin.ukcrime>, accessed 9 December 2013.
- ²¹ Criminal Justice Act 2003, s. 329(4)(b).
- ²² Thompson, above n. 16 at 7.
- ²³ *R v Hussain (Tokeer)* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60.
- ²⁴ Offences Against the Person Act 1861, s. 18. The equivalent provision in the Australian state of New South Wales is the Crimes Act 1900 (NSW), s. 33.

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- ²⁵ C. Grayling, 'A Tory government would seek to protect the rights of the victim', *Telegraph*, 19 December 2009, available at <http://www.telegraph.co.uk/news/uknews/law-and-order/6844244/Chris-Grayling-A-Tory-government-would-seek-to-protect-the-rights-of-the-victim.html> , accessed 9 December 2013.
- ²⁶ *R v Hussain (Tokeer)* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60 at [43].
- ²⁷ Ministry of Justice, *Use of Force in Self Defence at Place of Residence*, Circular No. 2013/02 (26 April 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192945/self-defence-circular.pdf , accessed 9 December 2013.
- ²⁸ 'Welby farm shooting: Couple will not face charges', *BBC News*, 5 September 2012, available at <http://www.bbc.co.uk/news/uk-england-leicestershire-19496531> , accessed 9 December 2013.
- ²⁹ 'Conservative conference: Force against burglars to be allowed', *BBC News*, 9 October 2012, available at <http://www.bbc.co.uk/news/uk-politics-19879314> , accessed 9 December 2013.
- ³⁰ S. Yeo, 'Killing a Home Invader' (2011) 57 *Criminal Law Quarterly* 181.
- ³¹ Crimes Amendment (Self Defence) Act 2001 (NSW).
- ³² *R v Katarzynski* [2002] NSWSC 613 at [23].
- ³³ Crimes Amendment (Self-defence) Act 2001 (NSW).
- ³⁴ [2000] NSWSC 1168.
- ³⁵ *Ibid.* at [26].
- ³⁶ Above n. 34 at [29].
- ³⁷ *Ibid.* at [46]–[47].
- ³⁸ [2011] SASCFC 117.
- ³⁹ Criminal Law Consolidation Act 1935 (SA), s. 23.
- ⁴⁰ *Roberts v R* [2011] SASCFC 117 at [104].
- ⁴¹ *Ibid.* at [35].
- ⁴² Criminal Code (Qld), s. 31(1)(c).
- ⁴³ Criminal Code (Qld), s. 31(1)(d).
- ⁴⁴ Criminal Code (Qld), s. 31(2).
- ⁴⁵ [2009] QCA 375.
- ⁴⁶ *Ibid.* at [30].
- ⁴⁷ M. Oberhardt, 'Jail for stabbing man in heart', *Courier-Mail*, 29 November 2012, available at <http://www.couriermail.com.au/news/jail-for-stabbing-man-in-heart/story-e6freon6-1225962659197> , accessed 9 December 2013.
- ⁴⁸ Criminal Code Compilation Act 1913 (WA), Sched. 1.
- ⁴⁹ Criminal Code (WA), s. 248(3).
- ⁵⁰ All reported cases, however, took place before 2008 and were based on the earlier version of s. 244.
- ⁵¹ K. Lambeth, 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82.
- ⁵² Sir W. Blackstone, *Commentaries on the Laws of England*, 5th edn (J. Exshawl: 1773) 223.
- ⁵³ M. Hale, *The History of the Pleas of the Crown*, vol. 1 (T. Payne: 1778) 486.

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- ⁵⁴ J. Suk, 'The True Woman: Scenes from the Law of Self-Defense' (2008) 31 *Harvard Journal of Law & Gender* 237 at 242. See also B. Levin, 'A Defensible Doctrine?: Reexamining Castle Doctrine Statutes' (2010) 7 *Harvard Journal on Legislation* 523 at 530: 'The home is therefore distinguished from the public space, creating a dichotomy between the public and private spheres and the law that applies in each'.
- ⁵⁵ *People v Tomlins*, 107 NE 494 at 497 (NY, 1914).
- ⁵⁶ S. Lipscombe, *Householders and the Criminal Law of Self Defence*, Standard Note SN/HA/2959 (House of Commons Library, 2013) 13.
- ⁵⁷ O. Bowcott, 'Chris Grayling's self-defence plans greeted with dismay by lawyers', *Guardian*, 9 October 2012, available at <http://www.guardian.co.uk/politics/2012/oct/09/chris-grayling-self-defence-lawyers> , accessed 9 December 2013.
- ⁵⁸ Lipscombe, above n. 56 at 10.
- ⁵⁹ Editor, 'Defending Self-defence' [2010] *Crim LR* 167 at 168.
- ⁶⁰ Crown Prosecution Service, *Householders and the Use of Force against Intruders*, available <http://www.cps.gov.uk/publications/prosecution/householders.html> , accessed 9 December 2013; and Crown Prosecution Service, *Legal Guidance: Self-defence and the Prevention of Crime* http://www.cps.gov.uk/legal/s_to_u/self_defence/index.html , accessed 9 December 2013.
- ⁶¹ Coroners and Justice Act 2009, s. 55(1) and (2)(i).
- ⁶² [1971] AC 814.
- ⁶³ [1971] 1 WLR 1600.
- ⁶⁴ *R v Martin* [2001] EWCA Crim 2245, [2003] QB 1 at [9].
- ⁶⁵ Law Commission, *Partial Defences to Murder*, Final Report (2004) 80.
- ⁶⁶ As now reflected in Coroners and Justice Act 2009, ss 54, 55.
- ⁶⁷ See Coroners and Justice Act 2009, s. 55(1) and (2)(i).
- ⁶⁸ *R v Clegg* [1995] 1 AC 482.
- ⁶⁹ D. Ormerod, Smith and Hogan's Criminal Law, 11th edn (Oxford University Press: Oxford, 2011) 395.
- ⁷⁰ S. Yeo, 'Killing a Home Invader' (2011) 57 *Criminal Law Quarterly* 181.
- ⁷¹ *Ibid.* at 192.
- ⁷² *Ibid.* at 196.
- ⁷³ Criminal Law Consolidation Act 1935 (SA), s. 15C(2)(a).
- ⁷⁴ South Australia, Parliamentary Debates, House of Assembly, 31 March 2003, 2613 (M Atkinson, Attorney-General).
- ⁷⁵ Criminal Code (Qld), s. 267.
- ⁷⁶ Criminal Code (Qld), s. 271.
- ⁷⁷ By the Criminal Law Amendment (Homicide) Act 2008 (WA).
- ⁷⁸ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 175.
- ⁷⁹ Above n. 78 at 174.
- ⁸⁰ Criminal Code (WA), s. 244(2).
- ⁸¹ Crimes and Court Act 2013, s. 43(4).
- ⁸² Ministry of Justice, above n. 27.

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