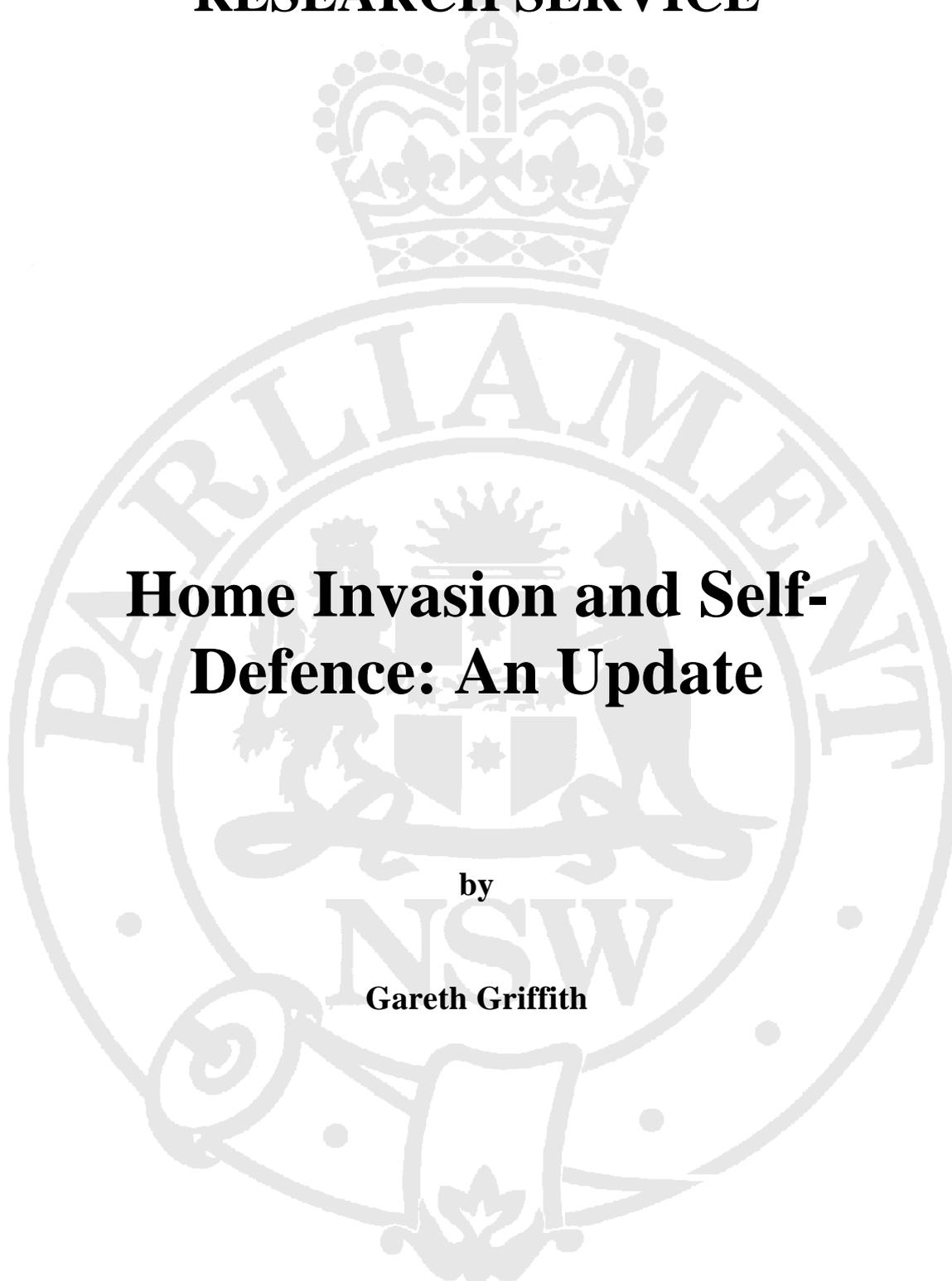


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**Home Invasion and Self-  
Defence: An Update**

by

**Gareth Griffith**

**Briefing Paper No 17/98**

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- **Commentary on the Home Invasion (Occupants Protection) Bill 1995 by Gareth Griffith and Vicki Mullen, Briefing Paper No 41/95**

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### APPENDIX A: Home Invasion (Occupants Protection) Bill 1998

## EXECUTIVE SUMMARY

This paper, which updates Briefing Paper No 42/1995, *Commentary on the Home Invasion (Occupants Protection) Bill 1995*, sets out the statistical figures for home invasions in NSW in recent years before summarising the law of self-defence, the defence of others and the defence of property as it operates in NSW. The paper then outlines the relevant developments in South Australia and under the Model Criminal Code, and afterwards presents a commentary on the main elements of the Home Invasion (Occupants Protection) Bills of 1995, 1997 and 1998.

The paper's main findings (pages 18-19) in relation to the Home Invasion (Occupants Protection) Bill 1998 are that:

- where the defence of *self-defence* and the *defence of others* are concerned, it codifies the common law and removes whatever confusions and uncertainties that have attended the *Zecevic* decision;
- where the defence of the *defence of property* is concerned, on the other hand, the 1998 Bill would appear to alter the common law. This alteration in the law would assist the defendant (the occupant) who has raised the defence of the defence of property by introducing a subjective element into the test of the reasonableness of his or her conduct; and
- the 1998 Bill does not attempt to bind the courts or to determine the outcome in particular cases, preferring instead to leave it to the courts to apply a test which is stated in general terms.

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## 1. INTRODUCTION

On 8 September 1998 the Premier of NSW announced the Government's intention to 'make the law of self-defence in the home clear and simple'. The Premier went on to say:

The Government will introduce amendments to the Bill [the Home Invasion (Occupant's Protection) Bill 1995], with the support of the Hon JS Tingle, who has been negotiating with the Attorney General, that will result in a simple test of self-defence being applied in these cases. If the test is satisfied, there can be no finding of criminality on the part of a victim of home invasion. Put simply, a victim of home invasion who reasonably believes he is in danger can defend himself...Let us be clear on this point: the Government is not giving people the right to act as vigilantes. The Government's amendments locate the law of self-defence firmly in the home and define the actions clearly.<sup>1</sup>

Adding detail to the proposed changes, the Premier said that, together with codifying the law in this area and confirming the right of the individual to defend himself in his own home, the amendments would:

- establish a simple test that no finding of law will be possible against a person who reasonably believes in the circumstances that he or his family is in danger, *provided the level of force used is not excessive*; and
- prevent a person who is protecting himself, his family or his home from a home invader from being sued if the perpetrator is injured. This would confer immunity from civil liability on a householder who acts within the proposed law's definition of self-defence against an intruder.<sup>2</sup>

A further feature of these proposed amendments, as reported in the media, is that in cases where a householder is charged with murder or manslaughter as a result of defending his or her home against an intruder, the burden of proving that the defensive action was not reasonable would now fall on the prosecution.<sup>3</sup> It should be noted, however, that this is in fact the current state of the law: if an issue is genuinely raised, it is always up to the prosecution to disprove it beyond reasonable doubt. This is reflected in the Home Invasion (Occupants Protection) Bill 1998.

Predictably, initial comment in response to these proposals, which were not presented in a legislative form, was mixed. For *The Daily Telegraph*, 'Legislation to provide immunity to

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<sup>1</sup> NSW Hansard (Proof, Legislative Assembly), 8 September 1998, p 13.

<sup>2</sup> Ibid. See also - Premier of NSW, 'NSW Government supports Home Invasion Bill - Statutory Right to protect own family from home invaders', *Media Release*, 8 September 1998.

<sup>3</sup> Editorial, 'Self-defence in the home', *The Sydney Morning Herald*, 10 September 1998.

NSW householders in the event of a home invasion is commonsense and long overdue'.<sup>4</sup> *The Sydney Morning Herald*, while supporting key elements of the Government's announcement, doubted that such reforms would render the law 'clear and simple', with the editorial comment stating that 'both the Government and Mr Tingle are likely to be disappointed if they believe the new law will break with the complexities of judge-made law...the new law will still be interpreted by judges in the context of the common law it largely seeks to codify'.<sup>5</sup> The political dimension to the proposals were acknowledged generally, with one comment in *The Australian* saying that they reflect 'the dominance of the law-and-order issue just seven months out from the next State election'.<sup>6</sup> For Tim Anderson, Secretary of the NSW Council for Civil Liberties, the proposed changes were 'a disturbing and dangerous development', adding that the Council deplored 'law making on the run, in a "law and order" climate, with cheap political motives, where the prospects of denying rights are substantial'.<sup>7</sup>

A recurring theme in the debate was the fear that the proposed shift in the law would be an encouragement for people to keep loaded guns by their beds. On this issue, *The Sydney Morning Herald* commented that 'there should be no such misapprehension. The law's requirement for the safe storage of guns must still apply and should be enforced'.<sup>8</sup>

This paper, which updates Briefing Paper No 42/1995, *Commentary on the Home Invasion (Occupants Protection) Bill 1995*, sets out the statistical figures for home invasions in NSW in recent years before summarising the law of self-defence, the defence of others and the defence of property as it operates in NSW. The paper then outlines the relevant developments in South Australia and under the Model Criminal Code, and afterwards presents a commentary on the main elements of the Home Invasion (Occupants Protection) Bills of 1995, 1997 and 1998.

## 2. THE INCIDENCE OF HOME INVASION IN NEW SOUTH WALES

Of the reforms announced by the Premier on 8 September 1998 *The Daily Telegraph* editorial comment stated: 'It is tough legislation, necessary in the face of statistics that show there is an armed home invasion virtually each day in NSW'.<sup>9</sup> According to the NSW Bureau of Crime Statistics and Research, using figures from the NSW Police database, COPS, the 1995-1997 figures for home invasion, defined as '*armed robbery in the home*',

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<sup>4</sup> Editorial, 'Invasion of the vote snatchers', *The Daily Telegraph*, 10 September 1998.

<sup>5</sup> Editorial, 'Self-defence in the home', *The Sydney Morning Herald*, 10 September 1998.

<sup>6</sup> T Sutherland and A McGilvray, 'Home invaders face victims' wrath', *The Australian*, 9 September 1998.

<sup>7</sup> T Anderson, 'No defence for political law-making', *The Australian*, 10 September 1998.

<sup>8</sup> Editorial, 'Self-defence in the home', *The Sydney Morning Herald*, 10 September 1998.

<sup>9</sup> Editorial, 'Invasion of the vote snatchers', *The Daily Telegraph*, 10 September 1998.

for NSW and Sydney are as follows:

NSW	1995	158	Sydney	1995	127
	1996	174		1996	139
	1997	164		1997	116

Statistically, this shows a relatively stable picture, with the variations from one year to another probably being too small in the overall context to be significant. The 127 incidents of armed robbery in the home in the Sydney Statistical Division represented a rate of 0.3 incidents per 10,000 resident population. Local Government Areas in the Sydney Statistical Division which recorded the highest rates of armed robbery in the home in 1995 were: Sydney (2.7 incidents per 10,000 resident population); South Sydney (1.1 incidents per 10,000 resident population); Blacktown (0.9 incidents per 10,000 resident population); and Fairfield (0.7 incidents per 10,000 resident population). These regions, according to the NSW Bureau of Crime Statistics and Research, had rates about two times or more the average for the Sydney Statistical Division. However, the Bureau also states that the number of incidents was 'very small' in all areas, noting that in the Sydney Local Government Area the police recorded 'just two incidents of armed robbery in the home...in 1995'.<sup>10</sup> A perspective on the incidence of home invasion relative to the *break and enter of dwellings* is gained from the following figures for the latter offence, again supplied by the NSW Bureau of Crime Statistics and Research:

NSW	1995	61336	Sydney	1995	43481
	1996	74546		1996	53192
	1997	79388		1997	56456

There are always different perspectives on crime figures. From one standpoint, the above figures may suggest that home invasions, while obviously regrettable, are not a major problem when viewed in the context of the overall crime scene. A different reading of the figures may emphasise that, because home invasions are relatively rare compared to break and enter offences, to take one example, this does not mean that they are in any way insignificant. From this perspective, home invasions may not be so great in number compared to many other crimes, but the nature of home invasion, the nightmarish prospect of an armed intruder in the home, may be such as to raise intense fears in the community, fears which have their own subjective legitimacy. Also, the fact that 164 home invasions occurred in NSW in 1997 may suggest something about the community we live in.<sup>11</sup>

<sup>10</sup> P Salmelainen, "Home Invasions" and Robberies', *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, August 1996, p 6 and p 9.

<sup>11</sup> It would be interesting to compare these figures with those for, say, twenty years ago, but unfortunately it seems that comparable statistics are not available.

### 3. SUMMARY OF THE LAW OF SELF-DEFENCE, THE DEFENCE OF OTHERS AND THE DEFENCE OF PROPERTY

**Self-defence at common law:** The Home Invasion (Occupants Protection) Bill 1995 raised the question of whether the common law provides adequately at present for the defence of self-defence where the use of deadly force by a home occupant is at issue. Amended versions of the Bill in 1997 and 1998 have also raised important questions relating to the law of self-defence. The main findings concerning self-defence at common law can be summarised as follows:

- self-defence operates to excuse from liability a person who has been proven to have committed an assault or murder.<sup>12</sup> In other words, where the doctrine of self-defence is found to apply, it results in the acquittal of the defendant;
- when a defendant intends to plead self-defence, the defendant must point to evidence that genuinely raises that issue. Once the defendant has done so, the obligation is then on the prosecution to disprove the defence beyond reasonable doubt. On the other hand, having raised the issue of self-defence, the defendant need prove nothing;<sup>13</sup>
- at present the common law recognises the rights of victims of home invasions (to take one example) to use ‘reasonable force’ in self-defence where the occupant believed on reasonable grounds that it was necessary to do what he or she did;
- the leading case is *Zecevic v DPP (Victoria)* (1987) 162 CLR 645 in which the High Court held that both subjective and objective reasonableness were relevant to the defence of self-defence in all cases, including murder;
- the decision in *Zecevic* brought about a number of important changes in the common law. In particular, the partial defence of ‘excessive self-defence’, previously available in murder cases, was abolished. Further, there is no longer a separate requirement that the attack to which the defendant responded must have been unlawful;<sup>14</sup>
- another innovative aspect of the *Zecevic* decision is that proportionality is no longer a separate element of self-defence. Traditionally, where self-defence has been at

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<sup>12</sup> P Gillies, *Criminal Law*, 4th ed, LBC Information Services 1997, p 311. Gillies discusses the doctrine of self-defence in chapter 15.

<sup>13</sup> P Gillies, *Criminal Law*, 4th ed, LBC Information Services 1997, p 316.

<sup>14</sup> Justices Wilson, Dawson and Toohy stated: ‘Whilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so’ (at 663). For example, self-defence is available against an attack by a person who, by reason of insanity, is incapable of forming the necessary intent to commit a crime. These were acknowledged to be unusual circumstances.

issue the defendant's use of force had two components: the decision to resort to force, which had to satisfy the test of necessity; and the decision as to the amount of force to use in the circumstances, where the question of proportionality was at issue. Viewed in this way, the test for self-defence contained two parts: (a) was the use of force (including deadly force) necessary?; (b) was the amount of force actually used (including deadly force) a reasonable response to the danger which the defendant believed he or she faced?;

- *Zecevic*, on the other hand, formulated one general test for the defence of self-defence as follows: 'It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did';<sup>15</sup>
- this single test removes the need for a rigid two-stage inquiry which, it has been said, will often be 'highly artificial' and ill-suited to assessing the culpability of the defendant's conduct which, in all likelihood, will have been undertaken in a situation where there was little time for a separate assessment of the threat involved and the nature of the response to it.<sup>16</sup>
- nonetheless, proportionality remains a relevant consideration under *Zecevic*, but only as a matter of evidence and not as a rule of law or separate requirement. In this context, the degree of force used by the defendant is to be viewed as one part of the entire circumstances which are to be considered in the case. As Justices Wilson, Dawson and Toohey stated: 'it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part';<sup>17</sup>
- as noted, in *Zecevic* it was decided that both subjective and objective reasonableness were relevant to the defence of self-defence in all cases, including murder. Thus, the defendant would have to demonstrate that he or she behaved reasonably on both an objective and a subjective view; otherwise the defence of self-defence would fail. This means that the defendant must believe (subjectively) that the resort to force is necessary and it must (objectively) be necessary in fact;
- to explain how this may operate in practice, it can be contrasted, first, with the purely '*subjective*' approach apparently adopted by the English Court of Criminal Appeal in *R v Gladstone*<sup>18</sup>. There the question was whether the defendant 'genuinely believed' that the use of force was necessary and reasonable. Whether the use of

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<sup>15</sup> (1987) 162 CLR 645 at 661.

<sup>16</sup> R Murugason and L McNamara, *Outline of Criminal Law*, Butterworths 1997, p 233.

<sup>17</sup> (1987) 162 CLR 645 at 662.

<sup>18</sup> (1984) 78 Cr App R 276.

force was in fact, on objective grounds, necessary and reasonable did not arise.

This purely subjective approach can, in turn, be contrasted with the Privy Council's approach in *Beckford*<sup>19</sup> (as well as that adopted under the Tasmanian Criminal Code)<sup>20</sup> where, in the test as to proportionality at least, a *mix of objective and subjective elements* are involved. Here the force used must be objectively reasonable, but judged on the circumstances as the defendant honestly believed them to be. Gillies has said of the *Beckford* decision, 'it would appear from the judgment that the quantum of force employed by the accused must still be objectively reasonable, granted the initial premise that the facts were as he or she (unreasonably and mistakenly, but honestly) apprehended them to be';<sup>21</sup>

- both the above can then be contrasted with an alternative *objective/subjective approach* which, in the past at least, has been associated with the *Zecevic* decision itself.<sup>22</sup> This holds that the use of force must be necessary and reasonable both on subjective grounds (on the circumstances as the defendant genuinely believed them to be) and on objective grounds (on the circumstances as a hypothetical reasonable person in the position of the defendant would have believed them to be). Under this scenario, the defence of self-defence would fail for a person whose use of force was based on an honest but unreasonable and mistaken view of the facts. The Law Reform Commission of Victoria considered that *Zecevic* left unresolved the problems: first of the defendant charged with murder who believes, unreasonably, that it is necessary to kill an assailant; and, second, of the defendant who uses more force than is necessary to respond to a less serious threat.<sup>23</sup> At the extreme, with the abandonment of the partial defence of excessive self-defence, this third approach could mean that a person would be guilty of murder where he or she honestly, but mistakenly and unreasonably, believed that deadly force was necessary and proportionate;
- the question, then, is whether this third approach is an accurate reflection of the *Zecevic* rules, as these have been interpreted subsequently by the courts? Apparently, it is not. The interpretation which appears to have gained approval is that associated with the NSW Court of Criminal Appeal, where Chief Justice Hunt has maintained that the defendant's personal characteristics can be taken into

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<sup>19</sup> [1988] 1 Ac 130.

<sup>20</sup> Section 46 of the Tasmanian Criminal Code provides: 'A person is justified in using in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use'.

<sup>21</sup> P Gillies, *Criminal Law*, 4th ed, p 322.

<sup>22</sup> P Gillies, *Criminal Law*, 3rd ed, p 310; this interpretation was followed in G Griffith and V Mullen, *Commentary on the Home Invasion (Occupants Protection) Bill 1995*, NSW Parliamentary Library Briefing Paper No 42/1995.

<sup>23</sup> L Waller and CR Williams, *Criminal Law: Text and Cases*, 8th ed, Butterworths 1997, p 200.

account, not just in relation to the subjective test in self-defence, but also in determining whether the defendant had acted reasonably (the objective test). Following a line of interpretation which started in *Conlon*,<sup>24</sup> in *R v Hawes*<sup>25</sup> it was stated: ‘The test posed is certainly not a completely objective one...It is the belief of the accused, *based upon circumstances as the accused perceived them to be, which has to be reasonable*, and not that of the hypothetical reasonable person in the position of the accused’.<sup>26</sup> In other words, the common law approach in *Zecevic* is closer to the mix of subjective and objective elements found in the second approach (the *Beckford* approach discussed above), only the *Zecevic* rules do not require the question of proportionality to be considered as a separate element of the defence of self-defence;

- thus, the *Zecevic* test can be reformulated in this way: ‘It is whether the accused believed on reasonable grounds (based upon circumstances as the accused perceived them to be) that it was necessary in self-defence to do what he did’;
- under *Zecevic*, allowance would be made for the fact that the occupant’s decision was made under stress;<sup>27</sup>
- defensive action can be taken to forestall a threatened attack, but only where the threat is imminent or immediate, as well as to repel an attack which has already started;<sup>28</sup> and
- in *Zecevic* it was held that ‘A killing which is done in self-defence is done with justification or excuse and is not unlawful, though it be done with intent to kill or do grievous bodily harm’;<sup>29</sup> that is, where murder is concerned it is clear that reasonable force may encompass deadly force.

**Defence of others at common law:** In brief, at common law force may be lawfully used to defend not only oneself but also other persons. The issue was not dealt with in *Zecevic* but it seems the same test would apply where force is used in defence of another person as in

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<sup>24</sup> (1993) 69 A Crim R 92; *Kurtic* (1996) 85 A Crim R 57. In these cases Hunt CJ at CL ruled that the jury had to take into account the defendant’s intoxicated condition and paranoid psychosis respectively. The law on intoxication has since been changed in NSW, with the insertion in 1996 of section 428F into the *Crimes Act 1900*. Now intoxication cannot be taken as a relevant personal characteristic of the defendant when determining the reasonableness of his or her belief.

<sup>25</sup> (1994) 35 NSWLR 294 at 305.

<sup>26</sup> Emphasis added.

<sup>27</sup> (1987) 162 CLR 645 at 662-663.

<sup>28</sup> P Gillies, *Criminal Law*, 4th ed, p 319.

<sup>29</sup> (1987) 162 CLR 645 at 662.

self-defence.<sup>30</sup>

**Defence of property at common law:** Again, the issue was not dealt with in *Zecevic* but presumably the test for the defence of property would be formulated in terms similar (although not necessarily identical) to that for self-defence. The cases in this area are relatively old and there may be some room for doubt as to their interpretation. In essence, however, the rule is that a person is justified in using reasonable force in defence of his or her property, but that no more force may be used than is necessary for the purpose.<sup>31</sup> Presumably, and this would be in contrast to the common law rule in *Zecevic*, where the defence of property is at issue the test as to reasonableness would be objective in nature: that is, it would refer to the circumstances as a hypothetical reasonable person in the position of the defendant would have believed them to be (it would not, therefore, refer to the circumstances as the defendant genuinely believed or perceived them to be). On this objective view of the defence of property, the question would be *whether the defendant believed on reasonable grounds (on the circumstances as a hypothetical reasonable person in the position of the defendant would have believed them to be) that it was necessary in the defence of property to do what was done.*

As one commentator has suggested, ‘The reasonableness of the action would be left for the jury to assess in relation to its necessity, assisted by a specific direction that the force used should be proportionate in cases where proportionateness is a live issue’.<sup>32</sup> Bearing in mind the *Zecevic* test that ordinarily, in order for fatal force to be justified the threat or attack must be such as to cause a reasonable apprehension of death or serious harm, Murugason and McNamara comment: ‘It is unlikely (and undesirable) that the defence of property, unless accompanied by an attack on a person, would justify the use of lethal force’.<sup>33</sup>

**Self-defence, excessive self-defence and the defence of property in South Australia:** Under the common law self-defence is a complete defence to all forms of murder and intentional manslaughter. On the other hand, the situation in South Australia is that self-defence is a complete defence in all cases except where the charge is murder and where excessive force was used by the defendant. Only in South Australia does this *partial defence of excessive self-defence* apply. That partial defence, which was re-formulated by the *Criminal Law Consolidation (Self Defence) Amendment Act 1997*, operates to alleviate the potential hardship of a murder conviction in circumstances where the defendant genuinely believed (although unreasonably) that his or her response was proportionate to the threatened harm. The partial defence can be raised where a positive answer can be given to the following questions: did the defendant use excessive force (that is, more force than could

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<sup>30</sup> *Saler v Klingbiel* [1945] SASR 171; RN Howie and PA Johnson, *Criminal Practice and Procedure NSW*, Vol 1, Butterworths 1989, [8241.5].

<sup>31</sup> *Ibid* at [8241.6].

<sup>32</sup> E Colvin, ‘Defence of persons and property’, *The Laws of Australia*, The Law Book Co Ltd 1993, [9.3].

<sup>33</sup> R Murugason and L McNamara, *Outline of Criminal Law*, p 230.

reasonably be believed by the defendant to be necessary)? if so, did the defendant honestly believe that the force used was reasonably necessary?<sup>34</sup> Where the partial defence applies, a charge of murder is reduced to the offence of manslaughter. The relevant provisions provide:

Section 15. (1) It is a defence to a charge of an offence if -

- (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and
- (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if -

- (a) the defendant genuinely believed the conduct to which the charge relates to be necessary for a defensive purpose; but
- (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(3) For the purposes of this section, a person acts for a defensive purpose if the person acts -

- (a) in self defence or in defence of another; or
- (b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

Before the reforms of 1997, the test for *self-defence* under section 15(1) was entirely subjective in nature, in that the defendant had to show that he or she genuinely believed that the use of force was necessary and reasonable. Whether or not it was necessary and reasonable on objective grounds did not arise, unless that is under section 15(2) the use of force was ‘grossly unreasonable’, but this was to be judged on the subjective test by reference to ‘the circumstances as he or she genuinely believed them to be’.

As revised in 1997, section 15 (1) of the South Australian law seems to involve the following two-stage test: first, was the use of force necessary and reasonable for a defensive purpose, which requires a subjective test by reference to what the defendant ‘genuinely believed’; and, secondly, was the use of force a reasonably proportionate response to the circumstances the defendant genuinely believed to exist. In this way, the test as to necessity would appear to be subjective, but the test as to proportionality is a mix of subjective and objective elements (as in the *Beckford* case which was discussed earlier in this paper). For an acquittal, the amount of force used in self-defence must be objectively reasonable (‘reasonably proportionate’) on the facts, but again by reference to the subjective test of the ‘threat that the defendant genuinely believed to exist’. Section 15 (1) bears some comparison with the *Zecevic* approach, as this has been interpreted by the NSW Court of Criminal Appeal. The key difference would seem to be that the common law has abandoned the two-stage test, opting instead for a single test of necessity.

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<sup>34</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code - Chapter 5: Fatal Offences Against the Person*, Discussion Paper June 1998, p 109.

On the issue of the burden of proof in self-defence, Gillies comments that, in conformity with the common law, in South Australia the defendant has an evidential onus to raise the defence 'and the prosecution would then have to negative the defence beyond reasonable doubt'.<sup>35</sup>

Another feature of the South Australian law is that it extends beyond self defence and relates to *defence of property* and lawful arrest. Section 15A provides:

- (1) It is a defence to a charge of an offence if -
  - (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable -
    - (i) to protect property from unlawful appropriation, destruction, damage or interference; or
    - (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
    - (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
  - (b) if the conduct resulted in death - the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and
  - (c) the conduct was, in the circumstances, as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.
- (2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if -
  - (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable -
    - (i) to protect property from unlawful appropriation, destruction, damage or interference; or
    - (ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
    - (iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and
  - (b) the defendant did not intend to cause the death; but
  - (c) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

This is in similar but not identical terms to the defence of self-defence under section 15. In both sections 15 and 15A the force used must be objectively reasonable, but judged on the circumstances as the defendant honestly believed them to be. A key difference is that, under 15A(1), where the defendant's conduct caused death, the defence will not apply where he or she intended to cause death (the use of deadly force). In other words, a certain mental state will prevent the defendant from relying on the defence of property defence. Presumably, where a person did intend to kill in the defence of property the common law would apply. To summarise, in relation to murder, the defence of property in South Australia is:

- a complete defence if the defendant did not intend to cause death and did not act recklessly realising that the conduct could result in death;

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<sup>35</sup> *Ibid*, p 340.

- a partial defence of murder (reducing murder to manslaughter) if the accused did not intend to cause death but did act recklessly realising that the conduct could result in death.<sup>36</sup>

The interest of the defence of property in the context of this paper stems from its relevance to the home invasion issue, with section 15A contemplating the use of force, even the reckless use of force resulting in death (but not deadly force), for the protection of property. It is worth noting that the original codification of these defences in 1991 in South Australia occurred in direct response to public concern about home invasion.<sup>37</sup> Experience since then has tended to confirm the observation made at the time that ‘It is difficult to draft into law reasonable protections for people who seek to protect themselves, their property and others’.<sup>38</sup> The re-formulation of the law in 1997 did not attempt to distinguish between ‘home invasion’ situations and others because, as the Second Reading Speech explained, ‘Any attempt to define in a principled and comprehensive manner, what constitutes a “home” and what constitutes “invasion” for these purposes is doomed to fail’.<sup>39</sup>

**Self-defence, excessive self-defence and the Model Criminal Code:** It was also said in the Second Reading Speech for the 1997 South Australian Act that its reforms were consistent with the recommendations of the Model Criminal Code Officers Committee, a body reporting to the Standing Committee of Attorneys General on, among other things, the general principles of the criminal law).<sup>40</sup> The recommended provisions of that Committee, which in 1995 were enacted under the Commonwealth *Criminal Code Act*, are worth setting out on the ground that they are an important and influential reference point in the current debate on the codification of the law of self-defence. In fact, these provisions were themselves used as the model for the *Home-owners Defence Bill 1996*, a Private Member’s Bill which was introduced by Mr CP Hartcher MP into the NSW Legislative Assembly on 26 September 1996. The Commonwealth *Criminal Code Act 1995* provides:

Self-defence

- 10.4 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
- (a) to defend himself or herself or another person; or
  - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

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<sup>36</sup> ‘Defences - self defence’ (1997) 21 *Criminal Law Journal* 337.

<sup>37</sup> G Griffith and V Mullen, *Commentary on the Home Invasion (Occupants Protection) Bill 1995*, NSW Parliamentary Library Briefing Paper No 41/1995, p 15.

<sup>38</sup> SAPD(Legislative Council), 10 September 1991 (Hon KT Griffin MLC); the South Australian Court of Criminal Appeal said in *Gillman* (1994) 62 SASR 460 that the original section 15(2), relating to excessive self defence, was ‘completely unworkable’.

<sup>39</sup> SAPD (House of Assembly), 27 February 1997, p 1090.

<sup>40</sup> *Ibid*, p 1089.

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- (c) to protect property from unlawful appropriation, destruction, damage or interference; or
  - (d) to prevent criminal trespass to any land or premise; or
  - (e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
  - (a) to protect property; or
  - (b) to prevent criminal trespass; or
  - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
  - (a) the person is responding to lawful conduct; and
  - (b) 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.

As in the revised South Australian law, a two-stage inquiry is involved: the test as to necessity is subjective, but the test as to proportion is a mix of subjective and objective elements, which requires 'the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced'.<sup>41</sup> The defence is not restricted to self defence of the person, but extends to the defence of property. It would not allow the intentional infliction of deadly force or, indeed, the infliction of 'really serious injury' in the protection of property or in the prevention of criminal trespass. Moreover, the use of force in self-defence would not apply where the defendant was responding to force which was in fact lawful and which the defendant knew to be lawful (an attempted arrest by a police officer, for example). The defence would apply, however, against a 'deadly attack by a child or insane person, even though the attacker is not criminally responsible'.<sup>42</sup>

In its discussion paper of June 1998 entitled, *Fatal Offences Against the Person*, the Model Criminal Code Officers Committee considered the arguments for and against the partial defence of excessive self-defence. It was noted that, at common law, the partial defence was abandoned in the *Zecevic* case, and that now it is only in South Australia that a version of excessive self-defence operates. It was said, too, that a number of law reform bodies had recommended the re-introduction of excessive self-defence, notably the House of Lords *Report of the Select Committee on Murder and Life Imprisonment* and the English Criminal Law Revision Committee. For its part, the Model Criminal Code Officers Committee concluded that, on balance, it did not favour re-introducing excessive self-defence, stating

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<sup>41</sup> Criminal Law Officers of the Standing Committee of Attorneys-General, *Model Criminal Code - Chapter 2: General Principles of Criminal Responsibility*, Final Report December 1992, p 69.

<sup>42</sup> *Ibid.*

that ‘As a concept, excessive self-defence is inherently vague’.<sup>43</sup>

#### 4. SUMMARY OF 1995 AND 1997 HOME INVASION (OCCUPANTS PROTECTION) BILLS

**The Home Invasion (Occupants Protection) Bill 1995:** The Home Invasion (Occupants Protection) Bill 1995 (the 1995 Bill) was introduced in the Legislative Council on 16 November 1995. Under the 1995 Bill, it was declared that it is public policy of this State that its citizens have a right to enjoy absolute safety from attack within their home from intruders. To this end, in certain circumstances, immunity from criminal liability would be granted to an occupant who used physical force, or even deadly physical force, in defence of that right. In particular, the following features of the 1995 Bill can be noted:

- clause 5 defined ‘Deadly physical force’ to mean ‘force that the actor uses with the purpose of causing, or that the actor knows will create a substantial risk of causing, death or serious bodily harm’. Deadly physical force is thus defined in terms of the mental state of the defendant, in terms of the intent to cause death or serious harm or the knowledge that such a consequence is likely to follow from his or her actions;
- clause 7 of the 1995 Bill (Use of force) justified the use of ‘any degree of physical force’ against an intruder ‘if the occupant *reasonably believes in the circumstances as the occupant perceives them* that the intruder is using or might use physical force against any person in the dwelling-house’(emphasis added). This would have combined objective and subjective tests of the reasonableness of the defendant’s actions, at least as this related to the quantum of the force used. Again, this is similar to the common law position, in particular as the *Zecevic* test has been interpreted by the NSW Court of Criminal Appeal.<sup>44</sup> One difference is that the *Zecevic* test does not separate out the issue of the amount of force used in this way. Moreover, clause 7 would specifically enable a home occupant to respond to the threat of physical force (not specifically deadly physical force) with deadly physical force;
- clause 7 is subject to clauses 8 and 9 which set out the circumstances where it is and is not necessary to give a warning of the intention to use force respectively;
- clause 7 is also subject to clause 10(b) of the 1995 Bill (Limitations on use of deadly physical force) which provides that deadly physical force against an intruder is not justified if the occupant reasonably believes that the intruder ‘has ceased to threaten the use of physical force, or to cause damage, or is fleeing or retreating from the dwelling-house’. Alternatively, the use of deadly physical force would not be justified if it was ‘not a reasonable response in the circumstances as the occupant perceives them’. This would suggest that excessive self-defence would not be

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<sup>43</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code - Chapter 5: Fatal Offences Against the Person*, Discussion Paper June 1998, p 113.

<sup>44</sup> This was discussed at page 6.

justified, judged on the basis of what is objectively reasonable in the circumstances as the accused honestly believed them to be;

- clause 11 extended the occupant's right to use force to any force to the 'grounds surrounding the dwelling-house and to land a reasonable distance' from it if, for example, the intruder is armed with an offensive weapon; and
- clause 12 of the 1995 Bill (Immunity from criminal liability) may have re-ordered the chronology of the criminal trial in a way that could place greater evidential burdens on the defence of the occupant. It would have done this by placing a positive evidential burden on the occupant in establishing a justification of his or her conduct on the balance of probabilities.

With regard to the issue of the *occupier's civil liability* to an intruder, at common law, in relation to the criminal trespasser, the courts would be reluctant to impose any burden on the occupier whose fault was regarded as one of omission. However, the situation may be less clear cut where the occupier's fault was regarded as one of commission, as in the case of *Hackshaw v Shaw* (1984) 155 CLR 614.

The 1995 Bill went some way towards codifying the law as regards an occupier's immunity from civil liability to a criminal trespasser. The Bill's treatment of the issue had four components: (i) under clause 14 absolute immunity was given to the occupier of a dwelling house who does not use any level of force against an intruder who has unlawfully entered the premises for the purpose of committing a crime therein; (ii) also under clause 14 qualified immunity, depending on the existence of certain aggravating circumstances, was given on the same basis where the intruder has unlawfully entered onto the 'grounds and land' of the dwelling house to commit a crime; (iii) under clause 13(1) conditional immunity was given where the occupier does use physical force or deadly physical force, as long as its use was justified under the proposed Act, which means that no criminal liability attaches to the occupant; and (iv) under clause 13(2) in any civil proceedings a positive evidential burden is placed on the occupant to justify his or her conduct on the balance of probabilities. This would have reversed the present position where the criminal trespasser would bear the onus in any civil proceedings of proving breach of duty and a causal connection between the breach and the injury.

**The Home Invasion (Occupants Protection) Bill 1997:** The 1995 Bill was opposed by the Government and substantial amendments were made to it before it passed through the Legislative Council on 27 May 1997. Most of these amendments were moved by the Hon JS Tingle MLC, the proposer of the Bill, at least one other by the Leader of the Opposition, Hon JP Hannaford MLC. A second print of the Bill, incorporating these amendments, was issued on 26 May 1997. This 1997 version of the Bill contained the following elements:

- clause 5 ('Safety within homes') again declares the public policy of this State that its citizens have a right to enjoy absolute safety from attack within their home from intruders;
- all references to 'deadly physical force' were omitted;

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- the 'Use of force' (now clause 6) was reformulated so that 'any degree' of physical force against an intruder could be used: (a) if the *occupant believes* that the intruder is using physical force; or (b) if the *occupant believes on reasonable grounds* that the intruder might use physical force. The effect of this would seem to be that, where an intruder *has used* physical force, then a completely subjective test would apply based entirely on the occupant's belief in the necessity of using force, either in self-defence or in the defence of another person in the dwelling-house. However, where force *might be used* by the intruder then the common law position would seem to apply where the objective test of reasonableness must be satisfied. Note that the 'reasonable grounds' are not in the circumstances as the occupier perceives them to be;
  - clause 6 is subject to clauses 7 and 8 which stipulate where it is and is not necessary to give a warning of the intention to use force respectively;
  - clause 6 is also subject to clause 9 'Limitation on use of physical force' which provides that the use of physical force is not justified if the intruder 'has ceased to threaten the use of physical force, or to cause damage, or is fleeing or retreating from the dwelling-house'.
  - clause 10 makes it clear that, in criminal proceedings, once the defence is raised, the obligation is then on the prosecution to disprove the defence beyond reasonable doubt.
  - the formulation of an occupier's civil liability is confined to clause 11 which establishes two propositions: first, that an occupier who uses physical force that would be justified under the Act is immune from all civil liability; secondly, it is the plaintiff (the intruder) who must prove on the balance of probabilities that the occupant's conduct was not justified.

## 5. HOME INVASION (OCCUPANTS PROTECTION) BILL 1998

**The 1998 Bill - self-defence and the defence of others:** The Home Invasion (Occupants Protection) Bill 1998, the full text of which is set out at Appendix A, was introduced into the Legislative Assembly on 24 September 1998. In the Second Reading Speech, the Hon PF Whelan MP, said:

This Bill ensures a simple test of self-defence applies to the home. If the test is satisfied, there can be no finding of criminality on the part of a victim of home invasion. Put simply, a victim of home invasion who reasonably believes that she or he is in danger, can defend himself or herself. It does not allow people to act as vigilantes.<sup>45</sup>

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<sup>45</sup> NSW Hansard (Proof, Legislative Assembly), 24 September 1998, p 88.

In essence, at least where self-defence and the defence of others is concerned, the Bill would appear to codify the common law position as this has been interpreted by the NSW Court of Criminal Appeal. Under that interpretation the common law test of the *Zecevic* case is as follows: 'It is whether the accused believed on reasonable grounds (based upon circumstances as the accused perceived them to be) that it was necessary in self-defence to do what he did.' Under the 1998 Bill the use of force in self-defence (clause 6), the defence of other persons (clause 7) and the defence of property (clause 8) must be objectively reasonable but the test is subjective to the extent that the reasonableness of the force used is judged on the circumstances as the occupant perceived them to be. Clauses 6, 7 and 8 are in similar terms, with clause 6, for instance, stating:

An occupant of a dwelling-house may act in self-defence against an intruder if the occupant believes on reasonable grounds that it is necessary to do so.

This must be read in combination with clause 9 which states that, where self-defence, the defence of others and the defence of property are concerned, the question whether there were reasonable grounds for the occupant's action, '*is to be determined having regard to the belief of the occupant, based on the circumstances as the occupant perceived them to be*' (emphasis added). As stated in the Second Reading Speech:

The person asserting self-defence [or the defence of others or the defence of property] must honestly believe on reasonable grounds that it was necessary to do what she or he did in self-defence. This definition is balanced in two ways. First, the person asserting self-defence must have actually believed that the degree of force used was necessary. Second, that belief must have been based on reasonable grounds. These two elements build into the law in this area the crucial concept of proportionality...Clause 9 codifies the interpretation which has been placed on the element of reasonable grounds. It states that the reasonable grounds requirement should be interpreted with reference to the position and perception of the accused, and not with regard to some completely objective analysis.<sup>46</sup>

It can be explained that, although proportionality is a relevant factor under the 1998 Bill, its relevance is in terms which are consistent with the common law; that is, neither the 1998 Bill nor the common law require the question of proportionality to be considered as a separate element of the defence of self-defence. Instead, the amount of force used by the occupant is to be viewed as one part of the entire circumstances which are to be considered in the case.

Not only is the 1998 Bill substantively consistent with the common law on self-defence and the defence of others, it also adopts the common law's preference for general formulae, avoiding any attempt to be overly prescriptive by seeking to pre-empt or second guess the kind of details which might arise in any number of possible situations. In other words, like the common law, as this has been enunciated in recent years by the High Court, the Bill

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<sup>46</sup>

Ibid.

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presents us with a general statement of principle, the application of which is left to be decided on a case by case basis.

**The 1998 Bill - the defence of property:** Where the 1998 Bill may depart from the common law is in respect to the defence of property. It is said in the Second Reading Speech that ‘The common law in this area has been rather unclear’.<sup>47</sup> As it discussed earlier in this paper, the key issue is whether the test for reasonableness in relation to the defence of property is an objective one. In contrast to *Zecevic* and the common law rules for self-defence and the defence of others, the defence of property at common law does not appear to refer to the circumstances as the defendant genuinely believed or perceived them to be. On the objective view of the defence of property, the question would be *whether the defendant believed on reasonable grounds (on the circumstances as a hypothetical reasonable person in the position of the defendant would have believed them to be) that it was necessary in the defence of property to do what was done*. If this ‘objective’ interpretation of the common law defence of the defence of property is correct, the effect of the 1998 Bill, which determines the reasonableness of the occupant’s action ‘*having regard to the belief of the occupant, based on the circumstances as the occupant perceived them to be,*’ would be to assist the defendant who has raised the defence by introducing a subjective element into the test of the reasonableness of his or her conduct. The Bill would, in short, make the defence of property consistent with the common law defences of self-defence and the defence of others.

**The 1998 Bill compared with the 1995 and 1997 Bills:** One key difference between the 1995 and 1997 Home Invasion (Occupants Protection) Bills, on one side, and the 1998 Bill, on the other, is that the last extends its ambit to include the defence of property. As noted, this is a feature of the South Australian law and of the Model Criminal Code. Clause 8 of the 1998 Bill provides:

An occupant of a dwelling-house may act in defence of any property of, or within, the dwelling-house against an intruder if the occupant believes on reasonable grounds that it is necessary to do so.

Unlike the 1995 Bill, the 1998 version makes no reference to the use of deadly physical force. Instead, consistent with the common law, the present Bill would not set any limits on the degree of force used provided it was necessary and that it satisfied the test of reasonableness under clause 9.

Further points of continuity (and discontinuity) with either the 1995 or 1997 Bills are as follows:

- clause 5 (‘Safety within homes’) reflects the public policy statement found in the earlier Bills, in that it declares that the public policy of the State of NSW is that its citizens have a right to enjoy absolute safety from attack within their home from intruders;

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<sup>47</sup>

ibid.

- certain definitions are substantially the same as in one or either of the earlier Bills. For example, the definition of '*confrontation with an intruder*', a term which is only used in clause 11 ('Immunity from criminal liability'), has remained unchanged; the definition of '*dwelling house*' is the same as in the 1997 Bill, except that the 1998 Bill does not make specific reference to boats or vehicles which are used as a place of residence; clause 4 ('*Who is an intruder?*') is in identical terms to its equivalent in the 1997 Bill;
- clause 10 codifies the common law position in respect to the onus of proof in criminal proceedings, whereby, once the defence of self-defence (or defence of others or the defence of property) have been raised, the prosecution will bear the onus of disproving the defence beyond reasonable doubt. Unlike the 1997 Bill, the 1998 version makes no reference to the onus of proof question where civil proceedings are concerned;
- clause 11 deals with immunity from criminal liability for an occupant who has acted in accordance with the Bill's self-defence, defence of others or defence of property provisions and, as in the 1997 Bill, the occupant must be brought before the court within nine months. In the words of the Second Reading Speech, this is to ensure that 'the matter is dealt with promptly';<sup>48</sup> and
- clause 12 deals with civil liability in similar terms. However, unlike the 1997 Bill there is no requirement to bring the occupant before the court within nine months after the proceedings are commenced.

## 6. CONCLUSIONS

It has been suggested that, despite many of the comments about the current Bill and its predecessors, in the final analysis the key characteristic of the Home Invasion (Occupants Protection) Bill 1998 is that it codifies the common law and that, in doing so, it clarifies the mix of subjective and objective elements for the test of the reasonableness of the defendant's action where the defence of self-defence and the defence of others is raised. In essence, the self-defence and the defence of others provisions reflect the common law position, in particular as the *Zecevic* test has been interpreted by the NSW Court of Criminal Appeal. As noted, in *Conlon* and later cases the NSW Court of Criminal Appeal interpreted the *Zecevic* objective test as being not wholly an objective one, with Chief Justice Hunt stating that 'it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable'.<sup>49</sup> The question therefore was not what a reasonable person would have believed, but rather 'what the accused himself might reasonably have believed in all the circumstances in which he found himself'.<sup>50</sup> This, in essence, is the test formulated in the present Bill, only here it is shorn of whatever

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<sup>48</sup> Ibid.

<sup>49</sup> (1993) 69 A Crim R 92 at 98.

<sup>50</sup> Ibid.

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confusions and uncertainties that have attended the *Zecevic* decision. It should be added that the 1998 Bill does not attempt to bind the courts or to determine the outcome in particular cases, preferring instead to leave it to the courts to apply a test which is stated in general and abstract terms.

It would seem that, in formulating one test to cover self-defence, the defence of others *and the defence of property*, the 1998 Bill would alter the common law position in relation to the latter, the defence of property. In effect, this alteration in the law would assist the defendant (the occupant) who has raised the defence of the defence of property by introducing a subjective element into the test of the reasonableness of his or her conduct. In this way, the Bill would make the defence of property consistent with the common law defences of self-defence and the defence of others. A change of this kind raises the following questions of public policy: (1) should public policy maintain the apparent common law distinction, under which the defence of property has an 'objective 'test of reasonableness?; or (2) should the same test apply to the defence of persons (either oneself or others) and to the defence of property, leaving it to the courts to decide in what circumstances (if any) the actual application of the test might differ? As discussed, in South Australia the defence of property is dealt with separately. On the other hand, the Model Criminal Code reflects the 1998 Bill in applying one test to all these defences. The difference is that the Model Criminal Code makes it clear that a use of force that 'involves the intentional infliction of death or really serious injury' is not justified: to protect property; to prevent criminal trespass; or to remove a person who is committing criminal trespass. There are sure to be good arguments on both sides.