

 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
SUBMISSION NUMBER	4
DATE AUTH'D FOR PUBLICATION	04/04/12 Bl-

ACT BAR ASSOCIATION

LIMITING THE RIGHT TO SELF-DEFENCE

WHEN ARRESTED BY POLICE



The ACT Bar Association opposes the limitations on self-defence proposed in Parts 2 and 4 of the *Crimes Legislation Amendment Bill 2011*.

The Bill proposes that self-defence cannot be raised if a person is being arrested by a police officer – irrespective of whether the arrest is lawful or unlawful if the police officer holds an honest belief that the arrest could be made.

The limitation was proposed in the Police Powers Paper No. 2. Neither the Police Powers Paper, the Explanatory Memorandum nor the Attorney-General's presentation speech provide convincing justification for what will be the effective abolition of the defence. To the extent that they have endeavoured to do so, they do not present the matter in a balanced way.

Crimes identify that conduct which ought to be suppressed and which, where it occurs, merits punishment. Self-defence is not a "defence" which is given to defendants who are otherwise guilty of assault. If the self-defence or the defence of another is reasonable, there is no assault. If self-defence is reasonably open, it is fundamental that the prosecution must exclude it for there to be an assault. If it does not do so, the criminal law does not view conduct as *meriting punishment*.

If any other member of the community attempted or was thought to be attempting to unlawfully detain a person, a person who acted in self-defence or defence of another would not merit punishment. The proponents of the Bill do not explain why identical conduct merits punishment if it occurs with respect to police.

Rule of Law

The Police Power Paper does not set the argument out fairly. It does not set out a fundamental premise underlying our system of law - the "rule of law" – and it does not explain why an exception to this principle is warranted.

The principle of the rule of law is that governments and government officials including the police *are bound by the law*. A government official (including a member of the police) cannot interfere with citizens' liberty or property unless that interference is authorised by law.

Law constrains public and private actions alike.¹ No special entitlement to interfere with citizens exists merely because a person is an employee of the state. The person's authority stems from the law, not the office.

The Bill proposes special entitlements. If enacted, police alone may act contrary to law and people who defend themselves in the face of that illegal action, will be punished.

Our Constitutional History

The paper and the Explanatory Memorandum allege that the right of self-defence in the face of unlawful arrest can trace its origins back to the 17th century.

Self-defence has a much older pedigree and this is not its weakness – it is its strength. Our citizens are not given liberty by their government which may be taken away if a government does not think some aspect of it is justified. Liberty is our citizens' birthright. It is fundamental principle that absent legal authority, a person is *entitled to maintain* his liberty.

Our most fundamental constitutional documents protect citizens from arbitrary arrest by state officers. Arbitrary arrest is unlawful and a free person is entitled to resist unlawful intrusions upon his person.

Magna Carta

The Magna Carta was signed in 1215. It was enacted into statute in 1297, the following part of which remains on the statute books of the ACT today. "No freeman shall be taken or imprisoned, or disseised of his freehold, liberties or free customs...but by the lawful judgment of his equals, or by the law of the land."

Petition of Right

This statement was reiterated in the Petition of Right to Charles 1 in 1628. It stated, "that no man of what estate or condition he be, should be put out of his land or tenements, not taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by due process of law."

Bill of Rights 1689

The Bill of Rights 1689 after the Glorious Revolution adapted this idea to include restrictions on regal power, stating, "that the pretended power of suspending the laws or the execution of

¹ To the extent that there was a presumption that the Crown in right of the ACT was not bound by statutes, section 121 of the *Legislation Act 2001* now provides "An Act binds everyone, including people who are not Australian citizens and all governments."

laws by regal authority without consent of Parliament is illegal; [and] that the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.”

Recent Australian Authority

The right to personal liberty, of which resistance to unlawful arrest is a part, has been described by Fullagar J as ‘the most elementary and important of all common law rights’: *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

In *Williams v R* (1986) 161 CLR 278 at 292 Mason and Brennan JJ quoted the extract of Fullagar J’s judgment above with approval and went on to say:

“Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England “without sufficient cause”: *Commentaries of the Laws of England* (Oxford) 1765, Bk 1, pp. 120-121, 130-131. He warned

‘Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper...there would soon be an end of all other rights and immunities.’

“That warning has been recently echoed. In *Cleland v The Queen*², Deane J said:

‘It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.’”

In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-9 Deane J (then on the High Court) stated:

“The common law of Australia knows no *lettre de cachet* or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the *prima facie* right of every citizen and alien in this land. They represent a bulwark against tyranny.”

Despite this long and clear jurisprudence asserting the importance of personal liberty, the need for lawful authority for any deprivation of liberty, the absence of any special legal

² (1982) 151 CLR 1, 26

authority deriving from government office, this material from *our* legal system is not mentioned in the discussion paper, the Explanatory Memorandum or the Attorney's presentation speech.

Instead, the Discussion Paper has selected cases out of context and relied upon American cases from Wisconsin, Alaska and California.

The American Cases

This Police Powers Paper (No 2) relies upon selected quotes from three American cases. Even this does not fairly portray the state of US law.

The right to resist unlawful arrest is still valid at the US federal level,³ None of the statute or case law in states which have restricted the right of self-defence has been tested before the US Supreme Court.

The Police Powers Paper (No 2) relies first upon the case of *Wisconsin v Hobson*. This case arose from the unarmed but vigorous resistance of a mother to an attempt by police to enter her house and apprehend her five-year-old son. The police wanted to bring the boy down to the station to question him about the alleged theft of a bicycle. The mother denied them entry to her home and then flailed about when being arrested for obstruction of justice. The majority of the Wisconsin State Supreme Court, recognised the existence of the right to resist at common law but stated that it should be curtailed prospectively, thus allowing them to dismiss the charges against Hobson while achieving their public policy goals.

The strongest criticism of Hobson comes from within the opinion itself. Chief Justice Abrahamson concurred that the charges ought to be dismissed but disagreed that the right needed to be prospectively curtailed. Hobson was resisting the assault done to her by the officers in the course of their unlawful arrest in a measured way in order to protect her son. Chief Justice Abrahamson stated (citing authority which was not mentioned in the ACT discussion paper⁴) that there were many states in the United States and the British Commonwealth of Nations which had continued to recognise the right to resist unlawful arrest.

The second case cited in support of this amendment, *Miller v Alaska*, is at the opposite factual extreme from Hobson. It concerned the armed, violent resistance to a traffic stop in

³ *John Bad Elk v. U.S.*, 177 U.S. 529 case still the only directly on-point USSC case on right to resist unlawful arrest, and that case, despite being decided over 100 years ago, has not been overturned. *United States v Di Re* 332 Us 581 (1948). Both of these cases were mentioned in *Hobson v Wisconsin*.

⁴ Paragraph 68

circumstances that were clearly escalated by the accused. While curtailing the right to resist, the majority opinion of the Supreme Court of Alaska said "[I]t should be noted that the rule we formulate today has no application when the arrestee apprehends bodily injury, or when an unlawful arrest is attempted by one not known to be a peace officer. Quite different problems are then presented."

The conclusions in *Miller v Alaska* was doubted by the Supreme Court of Maryland in *State v. Wiegmann*, 350 Md. 585 where the majority stated: "We cannot say... that the right to resist is unsound or unsuitable to a modern society. Were we to abrogate the common law rule, the only remaining remedies for an unlawful arrest would be release followed by a civil or criminal action, such as an action for false imprisonment. We have said that such remedies often may be inadequate."

The final American case to feature in the Police Powers Paper is the California case of *People v Curtis*. That case concerned the arrest without explanation, and subsequent unsuccessful resistance, of Curtis on suspicion of burglary. Curtis was acquitted of the burglary charge but convicted of the assault of a police officer in the course of their duties at first instance. The California Supreme Court overturned the charge of assaulting a police officer, since an unlawful arrest was outside the officer's duty, but upheld the law removing the right to resist unlawful arrest, stating that police weaponry and technology was so advanced that escape from any arrest, lawful or otherwise, was highly unlikely.

Hemmens and Levin point out the most disturbing aspect of the opinion: "In effect, Curtis ratified the legislature's deprivation of an individual's right to resist unlawful arrest on the grounds that such a right no longer exists in modern America because we have no place to hide from the police and no hope of overpowering them. In other words, resisting arrest is not so much normatively wrong as it is simply impossible; resistance is futile." This does not appear to be a convincing reason for the imposition of punishment.

Justification

The documents also suggest that the justification for the defence is because people might be provoked to defend themselves and because in the 17th century people might languish a long time in a gaol. By seeking a justification for self-defence and then determining whether the justification has contemporary relevance, the proponents approach the question from the wrong angle.

The availability of bail does not overcome the effect of arrest and it does not take account of the different perspectives people of different cultures make take to arrest. Would the availability of bail really comfort a Syrian in Australia who was facing arrest? The very fact that the arrest may be *illegal* is likely to heighten apprehensions.

In *Donaldson v Donaldson* (1982) 60 FLR 124, 1226 Deane J said:

“Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny.”

The question ultimately is not one of bail or even futility as mentioned in *People v Curtis*. It is whether a person who is illegally arrested by police or has reasonable grounds for believing that he is being illegally arrested should be punished.

Human Rights Act 2004

The Explanatory Memorandum addresses the compliance of the Bill with the *Human Rights Act 2004*.

Section 18 applies.

“18 Right to liberty and security of person

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.”

Despite the assertion in the Explanatory Memorandum that the Bill “may” limit the right to liberty, it is difficult to see how legislation which makes it a criminal offence to assert the “right to liberty and security of the person” in the face of arbitrary arrest or detention could possibly *not* offend this provision.

The real question of whether the proposals in the Bill are inconsistent with the *Human Rights Act* lies in the application of section 28. Regrettably the analysis of this provision confines itself to subsection 28(2) thereby omitting the principal subsection – 28(1).

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

It may be immediately seen that the real test is that the true test which legislation which otherwise is inconsistent with rights given in the Act must demonstrate is that the right has been subject to “reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.”

The critical reference “demonstrably justified in a free and democratic society”, sets the bar. It has been omitted from the analysis. As a result the conclusions drawn are at best questionable.

One might hope that there are not so many unlawful arrests in the ACT that defendants are being acquitted of assaulting police on a regular basis. Absent that, it is difficult to see how there could be a demonstrated justification. Absent demonstrable justification, the Parts 2 and 4 of the Bill should go no further.

Alternatives

The claim that defendants are escaping conviction because of technicalities is not accepted. If however the Committee takes a different view there are two alternatives before fundamental rights are changed:

- a) if the “technicality” is not justified, change the law to remove the technicality; and
- b) if police officers are not observing the limits of their powers, train the police.

If there is a training problem, the Bill could have quite perverse consequences. The more poorly trained police are the more likely they are to have an “honest and reasonable belief” that the arrest they are making is lawful.

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4 April 2012