**Notes of a presentation to the Law and Order Select Committee, on the Arms Amendment (No 3) Bill**

Wednesday 1 June 2005

I am genuinely grateful to the committee for the invitation to explain the amendments in SOP 345.

These notes

· outline why I am passionate about this issue

· summarise concerns that the existing law is being discredited

· explain the questions I have been most frequently asked about the proposals

· suggest issues on which the committee might seek advice from officials.

**Why is a commercial lawyer involved in a criminal law issue?**

I have been interested in this issue for more than 10 years since I was asked by criminal defence lawyer Michael Bungay for help in a case. I was then chairman of the board of Chapman Tripp and I had not been in a court room for nearly 20 years. Mr Bungay was very upset about a case he had just lost in the High Court. As I recall it involved a 17-year-old boy who shot an intruder armed with an iron bar. The intruder had broken through the front door, bashed the boy's sister, and was advancing across the boy's family living room.

The intruder was a neighbour, known to the police and the boy's family as a serious habitual criminal. The intruder and his family had terrorised law abiding neighbours for some time.The boy's problem was that he had fired twice. Apparently the jury felt they had to conclude that the second shot was unnecessary. Bungay's appeal was on the grounds that the guilty verdict looked as if it had been secured from the jury by intimidation. The dead intruder's family had rioted in court and threatened the jury when they mistakenly thought the foreman was about to deliver a verdict of not guilty.

Mr Bungay confided that the appeal required a depth of technical legal research that was not his forte. He got us to donate one of our "brilliant young sparks"to work with him on the appeal. I kept myself informed on the work.The boy lost. I believe he served much of his short sentence in the cells of Wellington area police stations. When he was released he joined his family who had moved to Australia for their own protection. The the sense of wrongness of that case has never

left me. Justice was not served. The goodies lost. Every decent person in the neighbourhood was outraged. The police were depressed about being obliged to prosecute, and hated the outcome.

**Undermining respect for law, and the Police**

The current law is a classic instance of unintended consequences from well-meaning "reforms", and the inability of the legal establishment to admit mistakes and undo them. The trouble started in 1980 when provocation was reduced from a defence to assault charges, to become merely a factor a judge should take into account in sentencing. The problem compounded when the Arms Act was changed to discourage recourse to firearms for self defence. What should have been discouragement became a prohibition.Until 1980, provocation was a defence to assault. When that was repealed, a link (in section 56(2)) was lost between ‘defence of land or building’ and general ‘self-defence against unprovoked assault’. If a trespasser outside a home resisted removal, or being denied entry, he was deemed to commit an assault without justification or provocation.

The peaceable defender was then justified in repelling force by force. Accordingly, a side-effect of the repeal of provocation as a defence was a restriction on the right of defence in relation to land and buildings (other than dwelling houses). These changes were not based on research, or shrewd and practical experience of how people and communities actually work. Instead they reflected high-minded hopes about about how society should work. The promoters shared unrealistic expectations of the capacity of the police and kindly courts to maintain a climate of compliance with the law, without recognising how much of our mutual trust and security was inherited social capital from generations of tough policing and tough law.The result is:

- law that no longer fits the expectations of ordinary law abiding people· law that juries and judges circumvent or in effect refuse to apply· law that has ridiculous anomalies
- law that rewards false evidence and creates dangerous folklore· law that can destroy the assets and livelihoods of morally innocent people whether or not they are acquitted
- law that assures criminals they have the initiative when they confront victims in the course of a crime· law that encourages victims to feel helpless when it is in the public interest for criminals to feel they are at more risk than victims.
- law that reduces confidence in the fairness and effectiveness of the law itself, and ultimately drives people to underhand "self-help".

Paradoxically a law that some support to prevent individuals "taking the law into their own hands" is forcing law abiding people to prepare to act outside the law. Similar problems are resulting in rethinks and reforms in many jurisdictions. For example:· A violent crime wave has left English homeowners at greater risk of burglary and violent intrusion than the US. In shock, British newspapers are now calling for reform (see www.act.org.nz/selfdefence).

· Recent law changes in NSW, Australia, have gone much further. Sections 418 to 423 of their Crimes Act in effect assure most defenders of immunity from civil and criminal liability if they defend themselves against attack. If they are charged after fending off an attack, the onus of proof is reversed. The prosecution must prove that they did not believe, in their own minds, that they had to take whatever action they did to defend themselves. The common law doctrines of retreat and proportionate force no longer apply. See
http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082.txt

**Frequently asked questions, for officials.**

I have been recording the frequently asked questions on the topic, plus my answers. I urge the committee to now get official answers.

***Why do Police now routinely prosecute people who've forcefully defended themselves or their property against criminal intruders?***
They believe that the Arms Act is intended to say it is never justified to use a firearm for self-defence, despite the Crimes Act authority to use whatever force is necessary.. Unhappy police tell me that it is "Government policy" to "let the courts decide what is reasonable" even where the police know a prosecution will not succeed. Many of these prosecution decisions are made in Wellington, by the Attorney General's officials in the Crown Law Office – not by the police. This leaves the police to carry the unpopularity burden created by politicians and the legal establishment.
*What are the rules governing the prosecution discretion? Who is exercising it? What is the truth here?*

***What is the result of these prosecutions?***
Thankfully, juries apply their commonsense and the prosecutions usually fail – at least on serious charges like murder and manslaughter. The prosecutions of Northland farmer Paul McIntyre, Waitara policeman Keith Abbott, and Matthew Oates largely failed, though in my opinion on the law as it as written the first two should have succeeded. My crude newspaper review of cases reported over recent years, suggested the conviction rate is less *than 10 percent.*
*What is the actual success rate?*

***Isn't our system supposed to operate on precedent? Why don't the prosecutors get the message – that the law will not hold defenders against criminals culpable? Why do the police persist in initiating prosecutions they must know will have an unjust outcome whatever the result?***
They know they are putting farmers through years of agony. If they weren't already well aware, the Waitara case against a police officer would have reminded them. Far less compelling cases can bankrupt civilians with none of the back-up and trial resources available to the police. It seems they are content to discourage self-help by leaving successful defenders with the costs of a prosecution. In other words they seem to see the prosecution as the punishment.
*Is this true?*

***Why do they want to punish the use of weapons in self defence?***
Allegedly because of a fear that self-help might turn into “lynch justice” or “vigilantism”. Sometimes it is justified on the grounds that farmers must be discouraged from self-help in their own interests because it is dangerous for them to challenge criminals.
*What research supports fears that self defence rights could morph in to ‘vigilantism”? Is it not equally or more likely that a loss of confidence in the fairness and effectiveness of policing will do that?*

***Is there any evidence to support that fear?***
Nothing in our history. It is unfashionable in politically correct circles to acknowledge that our countryside and cities were safest when every able citizen was expected to help stop criminals.
*When did the police first start discouraging use of citizens arrest and other citizen enforcement powers and the Crimes Act?*
*What is the evidence? Does it show that the risks of self defence outweig the benefit of widespread citizen involvement in upholding the law/*

***Wouldn’t this dramatically change our law to allow ordinary people to do what the Armed Offenders Squad does?***
No. It would restore the balance lost only 30 years ago. A basic principle of Sir Robert Peel, the founder of policing, was that police should have no more powers than the ordinary citizen. A constable was just doing full-time what any citizen should do part-time. Instead we have, for example, strong official discouragement for anyone who wants to use the powers of citizen’s arrest expressly guaranteed in the Crimes Act 1961.
*What special powers do police now have that ordinary citizens are denied? Should we formally record the abandonment of Sir Robert Peel's principle?*

***But why do the police want people to wait for them when the crime will be done before they arrive?***
It is part of the move toward a victim culture, in which people are expected to be passive. Hostility to risk-taking and self-reliance is reflected in the police focus on prosecuting carelessness. They argue that lives lost on the road in accidents, and lives lost to deliberate evil, are equally valuable, and should get equal police effort. I consider that to be slogan thinking. Most of us see a big difference in the .
*How are police priorities assigned when compelling causes compete?*

***How does the SOP guard against vigilantism?***
It requires the courts to recognise the reasonableness of normal instinctive reactions to unlawful intruders, without ending the requirement that a response be proportionate to the risk or threat. A British Court said it “degrees of force are not to be weighed in ‘jewellers scales’”. A weighbridge should be enough. It is not a “make my day” law. Those laws effectively excuse any violence if the intruder is committing crime. The SOP does not excuse the shooting of a

trespasser fleeing empty-handed.
*Is the SOP reform too soft to achieve its purpose? What if the courts make the concept of "disproportionality" just as uncertain as "reasonableness"? What is wrong with the New South Wales reforms or British proposals?*

***Won't the acquitted farmer get a legal costs award or compensation when he succeeds?***
He'll get nothing from the State. His neighbours might help. It is only in the rarest of circumstances that an acquitted defender can get a contribution toward costs, and there will never be official compensation for the lost time and emotional stress.
*What would it cost if the State did undertake to reimburse for acquittals? If the fear is the adverse precedent, why could a direction to meet the defence costs not be confined to cases where the defence is that the purpose was to uphold the law against criminal intruders?*

***What do the police think the law of self-defence should be?***
They made that clear in the sensible decision not to prosecute their Waitara colleague who shot a marauder instead of backing off. A fundamental feature of our law has been that the police are under the same law of self-defence as every other citizen. On current official theory, instead of hurting someone they too are supposed to run away if they can without letting the crime continue. Still, they tenaciously supported the Waitara policeman's defence against private prosecution. The police were publicly pained by the financial, emotional and other costs to that unfortunate officer, and their service as a whole.
*What do front-line police think now, after the Keith Abbott case, and the lack of success in prosecutions? What steps have police taken to canvass front-line police opinion? Are the stories true, of pragmatic "informal" advice by police to frightened communities to ignore the law, or to manufacture evidence to satisfy the reasonableness test?*

***Why is this a problem now when it seems not to have been a problem 20 or 30 years ago?***
The law, as written, hasn't changed much in a hundred years. The biggest change has been in the Justice establishment's opinion of what is reasonable. The official doctrine now is against encouraging courage. People are urged not to defend themselves. It almost passes without notice when the police applaud the courage of successful defenders, but add that they were foolish.
*What is the research evidence on whether it is more risky to defend or to try to use a weapon in defence?*

***Why not copy the New South Wales changes?***
We could, though our law has evolved in a different direction. The SOP has been drafted to steer courts as to what is reasonable, instead of a revolutionary change. The result should be similar to the Australian test of necessity – which will still leave room for judges to apply their views of what the defender should have done.

***Why not bring in something simpler that applies the same test to every circumstance?***
Two reasons: first, if it is too open, those who fear self-help will paint a picture of trigger-happy

slayings of door-to-door salespeople. That is remote that is from the long experience of New Zealand and other countries. Secondly, the simple formulations leave a lot to the judges. For example, the common law could be simplified as follows:
*"Everyone is justified in using such force as, in the circumstances as he believes them to be, it is reasonable to use for the purposes of:*

- *self-defence; or*
- *defence of another; or*
- *defence of property; or*
- *prevention of crime; or*
- *lawful arrest."*

The problem is that unsympathetic courts might still need more direction to decide that any threats and force were reasonable. They might hold that it is always reasonable to run away, and that no property risk is worth injury to an intruder.

***But why should a risk to property justify hurting someone? It's only property and can always be replaced.***
The key thing is to ensure that criminals do not risk a confrontation in the first place. There is clear evidence that young criminals progress from violating the property of others to personal violence. A habit of trespass and petty theft becomes a pattern of contempt for the lives of others. In time, law and order will break down because some victims will not tolerate being treated as cringing mugs.
The success of the policing policy pioneered in New York, called "broken windows", showed how important it is in preventing serious crime to create a climate in which petty crime becomes less conceivable. A climate of respect for others and their property, that does not tempt young offenders into confronting their neighbours, is likely – in the long run – to be safer for them, as well as for the law-abiding.
*What will Police offer as tangible assurance that the rule of law will prevail in rural New Zealand, given the Federated Farmer advice that confidence has been lost?. What survey or other evidence is there of changes in;*
*· Public confidence in the ability of the law to protect them?*
*· Public willingness to work with the police in ‘partnership’?,*
*· Public cooperation with the police of the loss of the Peel model of the Police as simply doing full time what ordinary citizens can do part-time?*

***Why shouldn't people have to wait for the police?***
Because, in many circumstances, there is no realistic prospect that the police will be able to do anything effective. Rural offenders often have to be caught red-handed to be caught at all. That means on the spot locals will have to take responsibility for it.
Instead, under present law – provided they don’t forcibly enter the house – criminals can check

out a prospect, or search sheds for items to steal, without much risk.
*What are the realistic times for people to expect Police 'assistance' as defined practically in the proposed section 71B(d)(i)?*

***Why would effective self-defence reduce overall crime?***
There is clear research evidence that property crimes are responsive to risk/return calculations. When the prospects of being caught, convicted, sentenced and then having to complete a sentence, are all low, the expected cost of a rural burglary in probability terms may be less than a day in prison. That makes rural crime pay. The possibility that a panicked householder may use a weapon changes that calculation substantially.

***Isn't it dangerous to confront criminals alone?***
What is the alternative? Hiding in a safe place could be a guarantee that they'll be back. It may be less dangerous to show forcibly that the invitation is withdrawn. Otherwise they are effectively invited to prowl a property assuming that they have the occupiers cowed.

***Won't meeting force with force just escalate violence?***
It is a truism that the best form of defence is overwhelming capacity, so it never has to be used. An aggressor should conclude that it is not even worth considering the risk. The current law is, possibly, the worst of all possible strategies – assuring an aggressor that the defender will dither, carefully trying to calibrate the response to an intrusion, according to the initiatives of the intruder. Intruders are encouraged to think their prey is legally impotent, and that they can control any escalation. Instead, they should have to expect to be met with "unreasonable" force. The law must come to recognise that it is reasonable to at least threaten "unreasonable" force.

***In summary – what does the SOP do?***
The courts have made it more risky for defenders to use force than intruders. The law will be re-balanced to lie the other way, against aggressors, but without saying "anything goes".

***Why not leave this change to the courts to develop?***
It could take too long. The isolation of living in the country must not be allowed to discourage rural people. They should know that, when they defend their property and livelihood, their fellow citizens support them, through the laws of Parliament.

**Indicative questions by committee MPs.**
**The following are not verbatim. They are my recollection of what was said.**

**Marc Alexander** *What about the risk that more burglars and other criminals will arm themselves if they expect more forceful resistance?*

**Franks** - That is a common concern but I'm not aware of any research evidence to support fears of an "arms race". We had no arms race when we had none of our current arms law and most

rural households had firearms sitting around like knives, as tools in daily use. The research on criminal behaviour tends to go the other way. Criminals seek out weak targets and avoid confrontations where they might come off second best.

**Ann Hartley** *I'm willing to look at this and to consider New South Wales law but what if it encourages more people to have firearms, given the risk they pose to women in domestic incidents?*

**Franks** - I don't think the existing law does much about the risks of domestic violence. My changes are focused on the risks from intruders, and women in most homes are pretty united about how they should be dealt with. Perhaps we could seek evidence on whether the brutes who would be willing to use a firearm in a domestic dispute can't get them already, or would not use a knife or other lethal force in any event.

**Brian Connell** *I'm sympathetic but I'm concerned about the possibility that people would leave firearms more accessible for self-defence and increase the likelihood of access by children who would hurt themselves or others. What is your comment?*

**Franks** - We could ask for evidence to establish whether the existing storage rules had actually reduced child misuse accidents. The increased accessibility fear might be overblown. The proposed subsection 71A (7) would allow a defence against charges for breaching storage rules but only to the extent necessary to enable self-defence. For example it would protect the householder who takes a shot gun to investigate suspicious midnight noises in the garage from charges that he had taken it out of storage before necessary for its duck shooting purposes. I suspect that most people store their firearms lawfully but so that the bolt and ammunition are convenient though separated from the gun cabinet. The time taken to put them together would be measured in seconds not minutes.

**Ron Mark** *What is the overseas evidence on the effect on crime against householders of their lawful use of whatever force is necessary, including firearms?*

**Franks** - Harvard Professor John Lott has written a book analysing figures from various States in the US. Some have tight restrictions and there is a range up to those with "make my day" laws. He offers pretty strong evidence that violence is lower, not higher where the law-abiding people own firearms and use is lawful. Of course these conclusions are much disliked by the knee-jerk anti-gun people.

**Ron Mark** *What about burglaries?*

**Franks** - There has been accessible recent discussion of this in British papers. They were shocked by an international comparison that showed Britons are now more at risk of violence and burglaries than average US citizens. Worse, so-called "hot" burglaries are much more

prevalent in Britain than in the US. Hot burglaries are those where the householders are at home during the burglary. It seems in Britain they prefer that because it means the burglar alarms are switched off. They are less afraid of the householders. In the US it seems they do not want to run the risk that the householder might react forcefully. According to the Police we don't keep statistics on the rates of hot burglary in New Zealand.

Stephen FranksWellington 1 June 2005