

# Regulatory Impact Statement: Arrest and defence of property amendments

## Coversheet

Purpose of Document	
Decision sought:	Cabinet decision to develop an amendment bill that will amend arrest and defence of property provisions in the Crimes Act 1961
Advising agencies:	Ministry of Justice
Proposing Ministers:	Hon Paul Goldsmith, Minister of Justice Hon Nicole McKee, Associate Minister of Justice
Date finalised:	11 December 2024
Problem Definition	
<p>Reported retail crime has risen over the past several years, and there is a perception that this has contributed to a sense of impunity held by offenders. Retailers, the security industry, and the wider public are uncertain about the degree to which they can intervene to stop retail offending as it occurs and the degree of force that can be used when doing so. The amendments seek to clarify the law so that people are more certain of their rights under the Crimes Act 1961 to defend their property and stop offending.</p>	
Executive Summary	
<p><i>The Ministerial Advisory Group for the victims of retail crime</i></p> <p>In July 2024, the Government announced the establishment of a Ministerial Advisory Group for the victims of retail crime (<b>the MAG</b>), as part of its plan to restore law and order. The MAG was tasked with engaging directly with victims, workers, business owners, retail experts and advocacy groups to provide the Government specific proposals to address urgent challenges in retail crime.</p> <p>Cabinet agreed that the MAG would provide advice on legislative changes to empower security guards to deal with retail offenders, and allow retail business owners to deal with shoplifters. The MAG’s initial focus has been on the defence of property, including powers to detain offenders, with retail theft offending being at the core of this work.</p> <p><i>Reported retail theft offending has been increasing</i></p> <p>Reported retail theft offending has been increasing in New Zealand over the past several years. The number of reported victimisations for theft from retail premises increased by 205% (from 29,278 to 89,287 per year) between September 2019 and September 2024. Police proceedings for theft from retail premises decreased by 33% (from 7,239 to 4,851 per year) between January 2019 and January 2023. However, since then proceedings have increased by 43%, to 6,956 per year as at September 2024.</p> <p>Part of this increase in reported victimisations for theft from retail premises can be attributed to Auror, a theft from retail premises reporting platform. As of April 2023, around 70% of all theft from retail premises was reported through the Auror platform.</p>	

### *The proposed amendments to the Crimes Act 1961*

The MAG consulted with a range of retail and security industry, and other, stakeholders when developing its policy proposals. The Ministry of Justice has received a summary of this feedback, as well as several written submissions to the MAG. This provided useful insight into the perceptions of how the law currently operates and what contributes to the hesitancy around when a person can intervene to stop retail offending.

The MAG recommended changes to five sections of the Crimes Act 1961 (**the Act**), to amend the immunities for arrests (at sections 35 and 36) and various defence of property provisions (sections 52, 54, and 56). The Ministry of Justice refined the MAG's proposals to make them simpler, and to reduce the scope for unintended consequences.

The recommended option put forward by the Ministry of Justice:

- expands the scenarios under which a justified (section 35) arrest can be effected to include theft offending (of any value of property); and
- removes the restriction, in the relevant defence of property provisions, that prevents striking or doing bodily harm.

The Ministers' preferred approach is to:

- expands the scenarios under which a justified (section 35) arrest can be effected to any Crimes Act offence;
- specify that restraints can be used when effecting an arrest, where reasonable;
- set out conditions that Police must be contacted as soon as practicable when effecting arrests, and that subsequent Police instructions are followed; and
- remove the restriction, in the relevant defence of property provisions, that prevents striking or doing bodily harm.

### *The intended effect of the proposals*

The statutory provisions, currently, prevent justified arrests for property valued \$1,000 or less. This legislative gap contributes to the perception that retailers are not able to protect their property effectively, within the bounds of the law. Alongside the lack of clarity in relation to the defence of property provisions, the law creates some hesitancy in relation to intervening to stop offending.

These proposals are intended to eliminate the gap that means low-level retail offending is not within the scope of the justified arrest provisions, simplify the defence of property provisions to focus more on reasonable force, and introduce a process and conditions for effecting arrests. Providing more certainty may result in greater by-stander intervention, increase confidence for retailers, and is intended to help bring about more certainty of consequence for retail offenders.

However, submissions to the MAG have revealed that the causes of hesitancy to intervene largely exist outside of the Crimes Act. These are perceptions of Police resourcing (and the view that Police may not be able to respond to all lower-level offending in a timely manner), health and safety laws (employers are risk averse when exposing staff to such risks), and a lack of professionalisation in the New Zealand security industry.

### **Limitations and Constraints on Analysis**

The analysis in this regulatory impact statement has been constrained by:

- **Time constraints** - the Minister of Justice and the Associate Minister of Justice intend to take a paper to Cabinet before the end of this year in relation to the policy

problem identified by the MAG. The Ministry received a first draft of the MAG's policy proposals on 7 October, followed by a final version on 19 November. On 11 November Ministers agreed for the Ministry to lead delivery of a Cabinet paper and RIS before the end of the year. Ministers were provided a policy decisions briefing on 19 November, and agreed to a set of policy proposals to progress with on 2 December.

- **Narrow scope and limited options** – the Ministry of Justice developed an alternative set of policy proposals to those presented by the MAG. This meant accepting the policy problem, as identified by the MAG, and narrowed the scope of feasible options when considering the most effective policy intervention. The Ministry of Justice used the MAG's proposals as the basis for developing a refined set of proposals, aimed at achieving the intended clarity for the public, with minimal legislative complexity and a lower risk of unintended consequences. Non-regulatory options were not considered. The Ministry was unable to access any material evidence to substantiate the MAG's policy problem, nor was it possible to gather any evidence from agencies in relation to arrests and defence of property (noting that this data may be difficult to gather, even with an excess of time, as Police are unlikely to record the occurrence of 'citizens' arrests', for example).
- **Lack of broader consultation** - given the timing, consultation has been pressured but various agencies (Police, Corrections, the Ministry for Pacific Peoples, Te Puni Kōkiri, the Office of the Privacy Commissioner, the Ministry for Ethnic Communities, and the Ministry of Disabled People) have provided useful (albeit, mostly high-level) feedback on the proposals. As far as possible given the timeframes, feedback has informed the advice in this RIA. With more time, the Ministry would have directly engaged with stakeholders from the retail and security industries, verifying the problem as identified by the MAG, and would have sought more comprehensive feedback from agencies.

#### Responsible Manager(s) (completed by relevant manager)

Caroline Greaney  
Deputy Secretary - Policy  
Ministry of Justice



11 December 2024

#### Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	<p>A quality assurance panel from the Ministry of Justice has reviewed the Regulatory Impact Statement (RIS) Arrest and defence of property amendments prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIS “partially meets” the Quality Assurance criteria.</p> <p>As noted in the RIS, there is limited information on the scale or significance of the problem, and the analysis has been</p>

constrained by its narrow scope, limited timeframes, and lack of broader consultation.

More time would enable consultation and further analysis to test the assumptions underpinning the problem definition and options and to better understand the scale and significance of the problem. The RIS identifies where costs and benefits may fall, but time constraints mean these can't be quantified and evidence is not available to support the judgements made. As such, there is a risk that the options proposed may have unintended consequences.

Within the constraints outlined in the RIS, the panel considers that the analysis can be relied on for decision making.

## Section 1: Diagnosing the policy problem

**What is the context behind the policy problem and how is the status quo expected to develop?**

### **The Ministerial Advisory Group for the victims of retail crime**

1. In July 2024, the Government announced the establishment of a Ministerial Advisory Group for the victims of retail crime (the MAG), as part of its plan to restore law and order. The MAG was tasked with engaging directly with victims, workers, business owners, retail experts and advocacy groups to provide the Government specific proposals to address urgent challenges in retail crime.
2. Cabinet agreed that the MAG would provide advice on legislative changes to empower security guards to deal with retail offenders, and allow retail business owners to deal with shoplifters. The MAG's initial focus has been on the defence of property, including powers to detain offenders, with retail theft offending being at the core of this work.
3. The MAG's consultation with various retail and security industry stakeholders and stakeholder groups illustrated the perception that the public does not feel empowered to intervene when they see retail offending occurring. The backdrop to this is increasing levels of retail theft.
4. The MAG's rationale is that increased certainty (with respect to when the public can intervene and what level of force is permitted) will enable and empower the public to intervene, which will then deter criminal offending.

### **Reported retail theft offending has been increasing**

5. The number of reported victimisations for theft from retail premises increased by 205% (from 29,278 to 89,287 per year) between September 2019 and September 2024. Police proceedings for theft from retail premises decreased by 33% (from 7,239 to 4,851 per year) between January 2019 and January 2023. However, since then proceedings have increased by 43%, to 6,956 per year as at September 2024.
6. Part of this increase in reported victimisations for theft from retail premises can be attributed to Auror, a theft from retail premises reporting platform. As of April 2023, around 70% of all theft from retail premises was reported through the Auror platform.

### **The status quo with respect to arrests**

7. New Zealand's approach to citizen's arrests does not grant a positive power of arrest. Instead, the Crimes Act 1961 outlines the circumstances under which criminal and civil liability will be exempted.
8. The Act only provides for justified arrests without warrant when a person is found committing any offence under the Act:
  - a. for which the maximum punishment is not less than 3 years' imprisonment; or

b. which is being committed at night (between 9pm and 6am).<sup>1</sup>

9. This provision therefore applies to more serious retail-related offences, like robbery, aggravated assault, and burglary. However, under the Crimes Act, the maximum punishment for theft, in the retail context, will only exceed 3 years if the value of the property stolen exceeds \$1,000.<sup>2</sup>
10. This means that a retailer, security guard, or member of the public who, between 6am and 9pm, sees a person committing theft of property under \$1,000 cannot justifiably arrest that person. In this context, justifiably means that the person cannot be found guilty of an offence and cannot be made liable to any civil proceeding.
11. While immunities may be available under other sections of the Crime Act after the crime has been committed, these immunities only extend to criminal responsibility and so the person performing the arrest remains liable for potential civil proceedings (e.g., a tort action for false imprisonment or assault).<sup>3</sup>
12. More serious offences like burglary, robbery, and aggravated assault have maximum penalties of more than 3 years' imprisonment (so are captured by section 35 already). Other less serious offending, that is common in a retail context, is captured by the Summary Offences Act 1981, specifically common assault, wilful damage, and being found on property without reasonable excuse – which allows for justified arrests.<sup>4</sup>

#### *Mechanical or physical restraints*

13. Mechanical or physical restraints (e.g., handcuffs, zip-ties) are currently not prohibited, when reasonable. Given this, the use of such restraints must be justified by reference to the usual criteria for use of force – that it is whether it is necessary and proportionate, in the circumstances.

#### *Contacting Police and following Police instructions, after an arrest*

14. The Crimes Act is silent on what to do after an arrest has occurred. This is unlike the Summary Offences Act 1981, which at section 39(3) states that a person effecting an arrest “shall as soon as practicable call a constable to his aid and deliver the arrested person into the constable’s custody”.

#### **The status quo with respect to defence of property**

15. Currently, the defence of property provisions allow retailers to use reasonable force, in the relevant circumstances, to defend their property, provided the person does not strike or do bodily harm to the alleged offender.<sup>5</sup> At face value, the current wording of the provisions might suggest that striking or doing bodily harm is strictly prohibited, but courts have taken a wider reading of what constitutes striking or doing bodily harm, and have ruled that not all strikes will constitute strikes for the purposes of these provisions.

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<sup>1</sup> Section 35 of the Crimes Act 1961 – Arrests of persons found committing certain crimes.

<sup>2</sup> Section 223 of the Crimes Act 1961 – Punishment of theft.

<sup>3</sup> Section 37 of the Crimes Act 1961 - Arrest after commission of certain crimes.

<sup>4</sup> Section 39 of the Summary Offences Act 1981.

<sup>5</sup> Sections 52, 53, and 56 of the Crimes Act 1961.

16. From a practical perspective, the operation of the Crimes Act implicitly allows for a higher degree of force to be used if in such circumstances the alleged offender physically resists the possessor (the person trying to defend their property). A degeneration into physical conflict between the alleged offender against the possessor may reach a level that becomes criminal assault, and the possessor may then use (a higher degree of) reasonable force in self-defence.

#### **How the status quo may develop if no action is taken**

17. The status quo, with respect to when justified arrests can be effected and what level of reasonable force can be used to defend property, is unnecessarily complicated from a legislative perspective, at least from a layperson's point of view. The legislation is not clear and does not accommodate that, practically, people often cannot be expected to differentiate, for example, theft of goods valued over \$1,000 and theft of good valued under \$1,000 as it is occurring. With respect to defence of property, the relatively prohibitive wording of not striking or doing bodily harm may be less restrictive than a strict reading of the legislation, but the public cannot be expected to know how case law expands this beyond a strict reading.
18. The proposed changes may not affect peoples' hesitancy to intervene as offending is occurring, because (based on the MAG's consultation with stakeholders) the main drivers of inaction appear to be:
  - a. the lack of professionalisation in the security industry (namely, relatively limited training for security guards, compared to comparable jurisdictions);
  - b. health and safety concerns; and
  - c. retailers' concerns about Police resourcing and responsiveness.
19. Given these external factors, it is not expected that any proposed legislative amendments will ultimately lead to any significant deviation from the status quo as the lack of understanding is not what creates the hesitancy to intervene, so there is no anticipated effect on offending levels (i.e., these proposals are not expected to deter offenders).

#### **What is the policy problem or opportunity?**

20. Currently, the law creates confusion with respect to when people can justifiably intervene to stop offending as it is occurring, and what degree of force can be used to defend property, in the relevant situations. Amending the Act provides an opportunity to make straightforward changes that make it easier for the public to understand their rights and obligations.
21. Specifically, the MAG has identified that retailers and the security industry do not feel empowered to intervene as retail offending is occurring, and that (to varying degrees) they are uncertain as to their legal rights. The MAG's view is that such feelings are likely to persist, without change. Stakeholder feedback given to the MAG shows a range of inconsistent views in relation to the law currently – with some feedback from the security industry showing that the law is well understood.



### What objectives are sought in relation to the policy problem?

22. The main objective is for retailers, and the public, to better understand their rights to intervene to stop offending, and what degree of force can be used to defend one's property. This clarity is intended to empower the public to intervene to stop offending, meaning offenders are more likely to be apprehended, and so are more likely to face consequences.

## Section 2: Deciding upon an option to address the policy problem

### What criteria will be used to compare options to the status quo?

23. The following criteria will be used to compare the options to the status quo:
  - a. certainty of law – to what extent is the law clearer for the public;
  - b. public safety – to what degree the public is safer (including retailers, security guards, and retail customers) principally from a physical safety perspective – recognising that invoking the provisions creates a risk of harm to the public (when performing an arrest or defending property) and that changes to the law may affect the level of violence potential offenders opt to use (e.g., increased use of weapons to deter arrests from retailers);
  - c. signalling to the public – the messaging to the public about the unacceptability of criminal offending; and
  - d. workability and consistency with relevant laws and obligations – whether the proposals are coherent in relation to other legislative provisions, or laws, and the extent to which they accord with New Zealand's rights frameworks.

### What scope will options be considered within?

24. As outlined previously, the timeframe within which policy options could be developed, and the nature of the commissioning, has restricted the range of feasible options which can be considered. Comparable jurisdictions have been investigated, namely the United Kingdom, Australia, and Canada, and the federal approaches of Australia and Canada have been especially pertinent given their similarity to New Zealand's legislative approach.
25. Given the MAG's problem definition, and its recommended policy proposals, has been the basis for the Ministry's refined proposals, this is necessarily limited. Broader changes to the relevant parts of the Act would require further analysis, more widespread consultation, and could not feasibly be developed and considered in the available timeframes. Non-regulatory options were not considered.
26. Further analysis on the use of restraints would have provided for more opportunities to consider the impact of such a change and whether safeguards could be included. Officials received feedback highlighting that section 87(4)(b) of the Corrections Act 2004 requires that mechanical restraints, when used on prisoners, "must be used in a manner that minimises harm and discomfort to the prisoner". But, given the timeframes, were not able to provide advice on whether a similar safeguard could be included in these proposals.



27. Furthermore, we note that the Oranga Tamariki Act 1989 does not enable the use of mechanical restraints against children or young people in Oranga Tamariki custody. We also note there is a different standard for Police to exercise powers of arrest, including the use of mechanical restraints, against children and young people when compared to adults.<sup>6</sup> Given the timeframes, we were not able to consider whether a different approach to the proposals is required for children and young people.

#### *Lack of evidence in relation to these provisions*

28. Given the arrest and defence of property provisions provide immunities for what would otherwise be unlawful conduct, it is difficult to gauge to what extent these sections are relied on for retailers, security guards, or others in practice. Information or data from Police was requested but was unable to be provided, given the short timeframes, while officials believe that useful data is unlikely to exist. Had more time been available, officials would have sought more insight into Police's operational perspective on whether these provisions are relied on from a practical perspective.

#### **What options are being considered?**

29. With the exclusion of the status quo, the following options propose amendments to the justified arrest provision (section 35) and the relevant defence of property provisions (sections 52, 53, and 56) in the Crimes Act, for clarity:
- a. the defence of property provisions and proposed amendments apply to people in peaceable possession of any movable thing or of any land or building (and to everyone lawfully assisting the possessor or acting under their authority, per the provisions); and
  - b. the justified arrest provision, and the proposed changes, apply to everyone, meaning a retailer, security guard, bystander, member of the public (etc.) can invoke the immunity provided by the provision when they intervene (arrest and detain, using reasonable force) to stop offending – this means it affects lone retailers as well as large retail premises that may have multiple security staff.

#### **Option One – Status Quo**

30. Option One is the status quo. Currently, the Crimes Act only provides for justified arrests without warrant when a person is found committing any offence under the Act:
- a. for which the maximum punishment is not less than 3 years' imprisonment; or
  - b. which is being committed at night (between 9pm and 6am).<sup>7</sup>
31. There is no process set out in legislation for what to do once a person has been arrested, and the Act is silent on the use of physical or mechanical restraints.

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<sup>6</sup> See, for example, Independent Police Conduct Authority (2024) Officer's use of force on child in Napier unjustified.

<sup>7</sup> Section 35 of the Crimes Act 1961 – Arrests of persons found committing certain crimes.

32. For the defence of property provisions, sections 52, 53, and 56, reasonable force is permitted, provided the person does not strike or do bodily harm.

### **Option Two – MAG’s proposals**

33. Option Two is what the MAG proposed:
- a. rewriting and expanding the justified immunity at section 35, to –
    - i. extend immunity from civil and criminal prosecution to anyone – who is not subject to the Bail Act 2000 or the Sentencing Act 2002, and who over the age of 18 – who arrests any person found committing an offence against the Crimes Act, provided Police are notified as soon as practicable and Police instructions are subsequently followed;
    - ii. while explicitly permitting the use of physical or mechanical restraints if reasonable in the circumstances, providing restraint causes no more than trivial harm; and
  - b. amending section 36 of the Crimes Act – which protects persons effecting arrests from criminal responsibility, where a person is found by night (9pm to 6am) in circumstances affording reasonable and probable grounds for believing that that person is committing a Crimes Act offence – to apply at any time of day;
  - c. amending the relevant defence of property provisions, sections 52, 53, and 56, replacing the current limitation on reasonable force (not to strike or do bodily harm) with a requirement to do no more than trivial, and not actual, harm; and
  - d. negating the jurisdiction of courts, tribunals, or other bodies acting judicially from determining that any of the proposed amendments (once enacted) are inconsistent with any provision of the New Zealand Bill of Rights Act 1990.

### **Option Three – Ministry’s refined proposals (recommended option)**

34. Option Three is the Ministry’s refined set of policy proposals, based off the Option Two policy proposals put forward by the MAG. These are:
- a. extending existing immunities (under section 35) to empower arrests where a person is found committing theft; and
  - b. amending relevant defence of property provisions (sections 52, 53, and 56), removing the restriction on reasonable force that the person does not strike or do bodily harm
35. These proposals are aimed at providing straightforward and targeted amendments to rectify the retail theft gap that the MAG has identified, while simplifying and relaxing the onerous wording in the relevant defence of property provisions.

### **Option Four – Ministers’ preferred approach**

36. Option Four is the set of policy proposals preferred by Ministers, it is a combination of the Option Two and Option Three policy proposals:
- a. extending existing immunities (under section 35) to empower arrests where a person is found committing *any* Crimes Act offence;
  - b. clarifying that physical or mechanical restraints, when reasonable, can be used by anyone effecting an arrest in accordance with the Crimes Act;
  - c. requiring anyone effecting an arrest to contact Police as soon as practicable, and follow any subsequent Police instructions; and
  - d. amending relevant defence of property provisions (sections 52, 53, and 56), removing the restriction on reasonable force that the person does not strike or do bodily harm
37. Proposals to clarify that restraints can be used, and which require anyone effecting an arrest to contact Police and follow their instructions, are intended to apply to all 'citizens' arrest' type provisions in the Crimes Act, not just section 35. Parliamentary Counsel Office will be able to provide advice on how this can best be achieved, and it is expected that section 39 (force used in executing process or in arrest) would be amended in relation to clarifying restraints can be used.
38. For the defence of property provisions, the Ministers' preferred approach is what was recommended by the Ministry, so these options have been combined in the second table that follows.

## Arrests - How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – MAG’s proposals (rewrite s35 and expand s36)	Option Three – Ministry’s recommend approach (expand s35 to theft)	Option Four – Ministers’ preferred approach (expand s35, introduce arrest process, and use of restraints)
<b>Certainty of law</b>	0	- Creates inconsistencies with the other arrest provisions (by introducing requirements and exclusions for s35 arrests only) so would create further uncertainty for the public.	+ A targeted amendment to the status quo that addresses the legislative gap in relation to theft of \$1,000 or less. Provides certainty that retail theft offending can lead to justifiable arrests without otherwise expanding the scope of the justified immunity of s35.	+ Codifying that restraints can be used, where reasonable, and that Police should be contacted provides clearer guidance for people effecting arrests; applying s35 to all offences, irrespective of time of day, makes is easier to understand when intervention can justifiably occur.
<b>Public safety</b>	0	- Expanding s36 increases the likelihood of innocent members of the public being arrested and detained (decreasing public safety) as it does not require offending to actually be occurring; rather it is based on reasonable and probable grounds for belief. Further, the risk of unconscious bias increases where people are arrested for suspected offending, which would have a disproportionate effect on certain minority groups (including Māori).  Rewriting s35 and creating inconsistency with other arrest provisions creates a higher risk of inappropriate use of powers, and increases the likelihood of members of the public being harmed – whether through an	0 It is not anticipated that changes to arrest provisions will impact when intervention occurs. Currently, we have seen no qualitative, or other, evidence that the provision is being frequently utilised in relation to offending (either requisitely serious offending or between 9pm and 6am) so do not anticipate people intervening more – merely because of the legislative change – so no impact on public safety is anticipated. Operational measures to enhance retailers’ confidence in using legislative powers (e.g., greater training in the security industry) could increase the likelihood of arrests being initiated which may pose a risk to public safety, but we have had no indication that this is expected to occur.	0 It is not anticipated that changes to arrest provisions will impact how frequently intervention occurs, nor is expanding s35 to apply to all Crimes Act offences expected to lead to more arrests by members of the public (given currently from 9pm to 6am such arrests can occur for all Crimes Act offences, and we have seen no evidence that this is commonplace) – so not impact on public safety is anticipated. Operational measures to enhance retailers’ confidence in using legislative powers (e.g., greater training in the security industry) could increase the likelihood of arrests being initiated which may pose a risk to public safety, but we have had no indication that this is expected to occur.

		escalation of violence (that would otherwise not occur) or through false arrests (and subsequent false imprisonment).		
<b>Signalling to the public</b>	0	<p>+</p> <p>Expansion of arrest scenarios and explicitly stating restraints are permissible (albeit only for s35) does indicate that greater intervention is permitted by the public.</p>	<p>+</p> <p>Including theft under s35 indicates that theft offending, including retail theft offending, is more unacceptable and that the public (including retailers and security guards) is further empowered to intervene to stop such offending.</p>	<p>+</p> <p>Expansion of arrest scenarios and explicitly stating restraints are permissible does indicate that greater intervention is permitted by the public.</p>
<b>Workability and consistency with relevant laws and obligations</b>	0	<p>-</p> <p>Negating the jurisdiction of courts, tribunals, or other bodies acting judicially from determining that the proposals are inconsistent with any provision of NZBORA would be highly unusual and inconsistent with constitutional principles.</p>	<p>0</p> <p>Proposals are anticipated to be justified limitations to NZBORA rights.</p>	<p>0</p> <p>Proposals are anticipated to be justified limitations to NZBORA rights; clarification of use of restraints and need to contact Police is intended to codify (but not change) the status quo.</p> <p>Perceived ability to use force, including mechanical restraints, may lead to unreasonable use of force and unlawful detention, which could be seen as being inconsistent with NZBORA.</p> <p>Also note proposal relating to the use of mechanical restraints is inconsistent with laws regulating the use of force on children and young people.</p>
<b>Overall assessment</b>	0	-	+	+

## Defence of property - How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – MAG’s proposals (replace limitation on reasonable force)	Option Three/Four – Ministry’s recommended approach and Ministers’ preferred approach (remove limitation on reasonable force)
<b>Certainty of law</b>	0	0  Trivial and not actual harm is likely to be clearer than the status quo (which is wider than a strict statutory interpretation suggests) but still provides a threshold for reasonable force that is unlikely to be easily or readily understood by the public.	 +  Putting the focus wholly on reasonable force removes the confusion that arises from the current wording and its incongruity with case law (that some strikes may not constitute strikes for the purposes of the relevant provisions).
<b>Public safety</b>	0	0  Unclear or ambiguous thresholds create the risk that members of the public think that force up to that level is necessarily reasonable, but this is a negligible risk (to public safety) given the threshold would be trivial and not actual harm.	0  No impact on public safety expected as the proposal does not allow for more than reasonable force and there is a minimal risk that retailers or the public will interpret this as allowing excessive force in applicable defence of property scenarios.
<b>Signalling to the public</b>	0	0  Retailers are concerned about ambiguity relating to the term ‘reasonable force’ and consider a more prescriptive statutory approach would provide more certainty; changing NZ’s approach to ‘reasonable force’ is not suggested.  Our view is most people are not aware of the specific details of their legal rights and obligations. Legal provisions are complex and generally not well understood by the layperson. Without wider operational measures to enhance retailers’ confidences, such changes are unlikely to be noticed or comprehended by the general public. The impact will be more relevant to legal professionals and law enforcement.	0  Retailers are concerned about ambiguity relating to the term ‘reasonable force’ and consider a more prescriptive statutory approach would provide more certainty; changing NZ’s approach to ‘reasonable force’ is not suggested.  Our view is most people are not aware of the specific details of their legal rights and obligations. Legal provisions are complex and generally not well understood by the layperson. Without wider operational measures to enhance retailers’ confidences, such changes are unlikely to be noticed or comprehended by the general public. The impact will be more relevant to legal professionals and law enforcement.
<b>Workability and</b>	0	 +	 +

consistency with relevant laws and obligations		This proposal would create a new threshold for reasonable harm in these scenarios, a threshold that is proportionate and sensible, and would be expected to be a justified limitation on NZBORA rights.	This proposal squarely puts reasonable force used, in relation to the relevant provisions, to the courts in terms of determining whether the force used is reasonable in the circumstances. This is consistent with the approach taken to self-defence (s48).
Overall assessment	0	0	+

Key:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual



**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

39. The Ministry's preferred option is Option Three, which expands justified arrests to theft offending and puts the focus of the relevant defence of property provisions on reasonable force.
40. Agency consultation indicated a strong preference for Option Three because they are simpler proposals, create fewer anomalies and inconsistencies within the Crimes Act, target actual offending as it is occurring (as opposed to suspected offending under Option Two), and, unlike Option Four, do not risk changing peoples' attitudes towards the use of restraints. Officials are of the view that Option Three delivers the highest net benefits.
41. Agencies believe that specifying the use of restraints (although already allowed under the law) may lead to unreasonable use of restraints, which is especially concerning in relation to alleged youth offenders (who may be more likely to be arrested given they are typically physically easier to restrain than alleged adult offenders). Further, Māori are more likely to be disproportionately impacted by these changes (if more arrests occur).
42. Among other things, Police is concerned about:
  - a. the inconsistent use of arrest powers and the relative lack of training retailers are likely to have in relation to arrests;
  - b. the risk that more than reasonable force is used – and that prosecutions follow, undermining the policy objectives;
  - c. the vulnerability of children and young people and how they may be detained;
  - d. offenders targeting places with less security (e.g., lone retail operators) or an escalation of violence (that would otherwise not occur) aimed at deterring arrests by retailers;
  - e. that citizens will perform arrests where Police would not, due to evidentiary or public interest thresholds for arrest and charging a suspect not being met – undermining confidence in the criminal justice system; and
  - f. that situations of low-level theft escalate into more serious violent situations.
43. For the given reasons, Police prefer Option Three as it provides a more retail crime focused approach that addresses the identified legislative gap (in relation to theft offending of \$1,000 or less).

*The Ministers' preferred option is Option Four*

44. The Ministers' preferred option is Option Four, which expands justified arrests to all Crimes Act offences, clarifies the permissibility of use of restraints for arrests, sets out a process and conditions for effecting an arrest, and puts the focus of the relevant defence of property provisions on reasonable force.

45. Option Four will achieve more certainty for retailers, and for the public, as to when intervention can occur to stop offending as it is happening, and in relation to what degree of force can be used to defend one's property. The changes are coherent, and somewhat minimise the scope for unintended consequences. In of themselves, these proposals are not expected to reduce offending levels but will provide more clarity around how intervention can occur, what should be done following an arrest, and remove confusion as to what degree of force can be used to defend one's property.
46. Given Option Four is that preferred by Ministers, it has been used for the cost-benefit analysis that follows.

### What are the marginal costs and benefits of the option (Option Four)?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
Retailers	<b>One-off and ongoing</b> – retailers may opt to review their policies around intervening as offending is occurring or what level of force they are willing to use when defending property, and this may increase the amount of ongoing training required for retailers' staff.	<b>Low</b> – unlikely to effect hesitancy around arrests or intervention given Police resourcing, health and safety laws, and security industry standards are not impacted.	<b>Low</b> – based on anecdotal evidence from MAG consultation with selected stakeholders.
Police	<b>Ongoing</b> - Police may be more likely to be called on to apprehend arrested persons.	<b>Low</b> - do not expect an influx of arrests or escalation of violence in relation to defence of property so unlikely to have a significant impact.	<b>Low</b> – limited time to engage with Police in relation to impact on Police and not included in Police high-level feedback.
Security industry	<b>Ongoing</b> – training of security guards with respect to intervention options and what constitutes reasonable force (etc.) would be expected to change in response to these proposals.	<b>Low</b> – further training not mandatory and no change from the status quo expected as training is already required.	<b>Low</b> – based on anecdotal evidence from MAG consultation with selected security industry stakeholders.
<b>Total monetised costs</b>	N/A	N/A	N/A
<b>Non-monetised costs</b>	This option is likely to create some ongoing and one-off costs for stakeholders, but	Low impact	Low certainty

	these are expected to be minimal.		
<b>Additional benefits of the preferred option compared to taking no action</b>			
Retailers	<b>Ongoing</b> – more clarity around rights and obligations when offending is occurring.	<b>Low</b> – unlikely to effect hesitancy around arrests or intervention given Police resourcing, health and safety laws, and security industry standards are not impacted.	<b>Medium</b> – based on agency analysis of the status quo and its uncertainty, in addition to corroborating anecdotal evidence from MAG consultation with selected stakeholders.
Police	N/A	N/A	N/A
Security industry	<b>Ongoing</b> – more clarity around rights and obligations when offending is occurring.	<b>Low</b> – unlikely to effect hesitancy around arrests or intervention given Police resourcing, health and safety laws, and security industry standards are not impacted.	<b>Medium</b> – based on agency analysis of the status quo and its uncertainty, in addition to corroborating anecdotal evidence from MAG consultation with selected stakeholders.
<b>Total monetised benefits</b>	N/A	N/A	N/A
<b>Non-monetised benefits</b>	This option is likely to create some ongoing benefits for retailers and the security industry, by clarifying their legal rights and obligations.	Low impact	Medium certainty

## Section 3: Delivering an option

### How will the new arrangements be implemented?

47. These proposals will require amendments to the Crimes Act 1961, likely through an amendment bill. There are no new offences being created. There may be operational implications for Police if the proposals lead to a significant deviation from the status quo, in relation to frequency of arrests or if people use a greater degree of force to defend their property, although such a deviation is not anticipated (for the reasons given in this paper).

### How will the new arrangements be monitored, evaluated, and reviewed?

48. The proposals require amendments to the Crimes Act 1961, which is periodically reviewed by the responsible policy functions. The Ministry of Justice administers the Crimes Act and is responsible for ongoing regulatory stewardship. These responsibilities will be informed by feedback from Police operations, any relevant judicial judgements, academic studies of these changes, and media reporting.
49. Stakeholders, including Police, can raise any identified concerns directly with the Ministry of Justice.
50. There will be ongoing monitoring of rates of retail crime, and other, offending. However, it will not be possible to determine whether any changes in offending rates are attributed to the changes proposed here, due to the many factors that give rise to offending behaviours