Speech by

PETER WELLINGTON

MEMBER FOR NICKLIN

Hansard 27 October 1999

CRIMINAL CODE AMENDMENT BILL

Mr WELLINGTON (Nicklin—IND) (10.16 a.m.): I move—

"That the Bill be now read a second time."

The purpose of this Bill is to modernise the law of self-defence in Queensland. The Bill repeals existing sections 271, 272 and 273 of the Queensland Criminal Code and substitutes new sections 271 and 272. The objective of the amendments is to simplify the law in relation to self-defence and defence of another and to make the law on self-defence more applicable to the situation of a person who kills a violent and abusive partner in an act of self-preservation.

The existing sections 271, 272 and 273 of the Queensland Criminal Code, which represent the law on self-defence in Queensland, are unnecessarily obscure and complex in their operation and have never been amended. They have been the subject of both judicial and academic criticism for many years. As one eminent Queensland criminal lawyer and academic, Mr O'Regan, has said—

> "Such questions about whether the initial attack was unprovoked or provoked, whether it was major or minor and whether the accused retreated (which) are critical under ss. 271 and 272 ... complicate an otherwise simple enquiry— whether the accused, in taking the defensive action (s/he) did, acted reasonably?"

The existing Queensland laws of self-defence have also been justifiably criticised because they do not easily accommodate the situation of a woman who kills her violent partner in an act of self-preservation after having put up with years of abusive behaviour. All Queenslanders have been horrified to hear of recent cases where some women have endured years of physical abuse from their husbands and partners. Even more horrifying is the fact that many women and families live with the daily reality and fear of shocking physical abuse. Should any one of these women kill or attack their violent partner, that woman then finds, to her and her family's further distress, that the current law does not work well for a woman in her situation.

Over recent weeks, I have been overwhelmed with calls from my constituents for action to have the current laws changed so that—

(i) the current self-defence requirements are reformed;

(ii) the relevance of a history of personal violence and its effects on the defender are clarified for the benefit of all, including the judge and the jury; and

(iii) requiring the judge and jury to draw necessary connections between the evidence of physical abuse and the legal rules they are required to work under.

In addition to the many letters that I have received, only yesterday I received an inquiry from a woman who wants to start fundraising and has already received a pledge of $1,000 from a friend.

I will now mention some of the major criticisms of the current self-defence requirements as they apply to defendants who take defensive and justifiable action against partners in the context of a relationship in which there is a history of violence. The current Code provisions require that an attack be "on foot" at the time that the defensive action is taken or at least that there be some immediate threat or attack that the person who claims to act in self-defence can point to.

I am aware of the pressure of time this morning and, accordingly, I seek leave to table the remainder of my speech and have it incorporated in Hansard.

Leave granted.

This accords with the historical rationale of self-defence, which was tailored to the factual situation of a one-off, confrontational encounter between two strangers of roughly equal size and strength. Women, for example, acting in self defence who kill violent partners may not "fit" this model and may in fact kill when they are not facing an actual attack, (for example, when their abuser is asleep or has the back turned or is otherwise unable or unready to strike). Though there may not be an actual attack or threat on foot, for all practical purposes, a woman in this situation is reacting to an ongoing threat represented by the constant abuse.

If the defender kills their abuser, the current self-defence provisions require the jury to consider whether the defender had a belief, on reasonable grounds, that it was necessary to use that deadly force. The surrounding circumstances may not objectively appear to warrant the use of deadly force until the full history of violence is explored. It has always been the situation that the courts, when considering cases of self defence, will look beyond the immediate facts and consider prior threats and attacks made by the victim on or towards the defender (provided that they were not too remote in time). Cases before the courts have also said that the defender's belief about the violent character of their victim and the basis for that belief is also admissible in this context. However, these longstanding principles, for whatever reason, do not seem to have assisted victims of long term abuse greatly when they ultimately resort to defensive conduct. Clearly, there are other issues at work in these cases that any law reform proposal must address. Specifically, attention needs to be directed at the question of admissibility of evidence of a history of domestic violence. The questions of how this evidence is utilised and how its relevance to the applicable legal rules is explained to the jury in the particular case should also be addressed.

In November 1998, the Government established a 20 member Taskforce on Women and Criminal Code to report and make recommendations on the operation of the Criminal Code as it impacts on women. I say in passing that I commend the Government and fully support it on this important initiative. Last month, the Taskforce produced a substantial Discussion Paper. Many of the concerns dealt with in my Bill now before the House are also raised in the September 1999 Discussion Paper prepared by the Government's Taskforce. In that Discussion Paper, the Taskforce records that—

> Our Taskforce consultations and research have demonstrated that, when a woman enters the formal justice system, one of her greatest barriers to justice is the failure of the system to hear her story.

As Justices Gaudron and Gummow said in the High Court decision of Osland, at p 185:—

> Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence.

The two High Court Justices there use the phrase "battered wife syndrome"; a medical "syndrome" suffered by a "battered woman" that has, as one of its central tenets, a concept referred to as "learned helplessness". "Battered wife/woman syndrome/reality", and the issues it represents, though now accepted by the High Court as a proper matter for expert evidence, is contentious. Particularly, there has been specific criticism of the use of the term itself and its applicability to particular cases that do not fit the syndrome's profile. In my Bill before the House, this term is not used and the proposed sections have been drafted using more general, inclusive language.

It is undesirable that there should be any doubt or confusion about the admissibility of evidence of a history of domestic or personal violence, the dynamics of abusive relationships, the effects of battering and how cultural or racial issues might impact on these matters. Legislative measures are required to clarify the relevance of this type of evidence. Legislation should identify which professionals or experts are qualified to give that evidence and how that evidence is to be dealt with in the courtroom. In particular, it is critical, as I have said, that the jury be directed on the connection between the expert or professional evidence and the self-defence on which the defender is relying. This allows the jury new insights into its deliberations about whether self-defence applies in the particular case and may assist to counter any myths about domestic violence that might exist in the jury's mind.

It is these three issues of—

- reforming self defence;
- clarifying the relevance of a history of personal violence and its effects on the defender; and
- requiring connections to be drawn between the evidence and the legal rules to aid the jury's comprehension

that the Bill before the House addresses. I have confined my Bill to the law of self-defence, because the real nature of the retaliatory behaviour of victims of battering and its effects is most often self-defensive.

This is not to accept that no further work needs to be done in considering law reform in the areas of provocation, duress, accident, diminished responsibility, sentencing and other matters. That work is also vital and needs to be brought to a conclusion as soon as possible. The Government's Taskforce is considering these and many other issues and I await anxiously for the outcome of the Taskforce's deliberations and their sympathetic consideration by government.

Before I turn to the specific proposals in the Bill, there is one further matter that should be made absolutely clear. This Bill directs its attention to the case when the justification for the criminal behaviour asserted is self-defence: for example, that at the time of the incident the accused perceived, on reasonable grounds, that her/his life was in danger and that s/he was therefore justified in killing the victim. The excuse is NOT that the accused was subjected to long term domestic violence, nor is the defence that the accused was a battered woman/person. The reformulation of self-defence proposed in no way seeks to permit a plea of self-defence when there is an unjustifiable, malicious or revenge-type killing.

Turning now to the Bill before the House, Clause 3 repeals existing sections 271 and 272 of the Criminal Code. Sections 271 (Self-defence against unprovoked assault) and 272 (Self-defence against provoked assault) are replaced by a single provision, new s 271 (Self-defence and defence of another). Section 272 is an entirely new section dealing with jury directions on self-defence. Now that the new s 271 deals with both self-defence and defence of another, there is no need for the separate provision in existing s 273 (Aiding in self-defence). Clause 4 of the Bill therefore repeals existing section 273 of the Criminal Code.

Unlike its predecessor sections, the new simplified s 271 makes no reference to issues such as whether the initial attack by the victim of the defensive action was provoked or unprovoked, nor whether the defender was responding to a major or minor assault, nor whether the defender first retreated. Rather, in accordance with the modern common law as expressed by the High Court in Zecevic v DPP (1987) 162 CLR 645, if the issue of self-defence arises on the evidence, the trial judge should direct the jury by placing the question in its factual setting, identifying those considerations which may assist the jury to reach a conclusion. Thus, each of the issues of provocation, the magnitude of the assault the defender faced and whether the defender first retreated as far as possible before attempting the defence of self or another, is simply a circumstance to be considered, with all the other circumstances, in determining whether the defender believed, on reasonable grounds, that what s/he did was necessary in self-defence.

As was previously the law, under my proposed new s 271 it is what the defender believes that is critical to the operation and applicability of the defence. This is a subjective focus on the particular defender and on his or her actual beliefs. However, while the test as to necessity is subjective, the defender's subjective belief must be based on objectively reasonable grounds. Thus the new section retains a mixed subjective and objective test, (though the further objective requirement as to a "reasonable apprehension of harm" under the old sections 271 and 272, has been removed). Further, adopting the Model Criminal Code Officers Committee model on this aspect, the defence applies in the circumstances "as perceived by the defender to be", with the result that the subjective/objective test is assessed against the situation which the defender subjectively believed s/he faced. There is the potential in this formulation, for example, for the heightened sensitivity of the defender who has been subjected to a history of personal violence against herself or himself or another person, to have their heightened ability to perceive danger from their abuser taken into account.

My new subsection 271(2) then goes on to clarify that, in determining whether the defender believed, on reasonable grounds, that the force s/he used was necessary in the circumstances as perceived by the defender, the following matters are relevant:

(a) the history of any relationship between the defender or the person defended and the person against whom force is used; and

(b) the effects of that relationship upon the defender or the person defended.

My new subsections 271(1) and (2) are substantially modelled on the formulation proposed in Rougher Than Usual Handling: Women and the Criminal Justice System 2nd ed published by the Women's Legal Service, Brisbane in 1995. As explained in Rougher Than Usual Handling, the advantage of this formulation is that it—

> ... should clear the way to admitting expert testimony about the general dynamics of domestic violence and the particular circumstances which apply to the accused and his or her relationship with the person attacked. It] would be appropriate for children, people in homosexual relationships and others who have been within the intimate circle of an abuser, as well as spouses. The testimony does not have to be branded "battered woman syndrome" but instead would be testimony regarding domestic violence as it applied to the particular case.

Testimony as to the matters identified in s 271(2) is relevant both to the existence of the subjective belief as to the necessity of the force used by the defender in the circumstances as perceived by the defender to be, and to the reasonableness of the grounds on which that belief is founded.

The two examples set out in s 271 are illustrative of the type of evidence that is relevant under s 271(2). The phrase used in Example 1 "responding to a history of personal violence" is taken from the 1994 West Australian Report of the Chief Justice's Taskforce on Gender Bias. The term "personal violence" is broad enough to include physical and psychological violence. Example 2 simply illustrates that, in certain cases, issues of sex, culture or race may be relevant to the responses of a particular accused (for example, to explain the defender's silence about the violence suffered in an abusive relationship). The defender's sex would be relevant in the case of a person who is responding to a history of personal violence (in an abusive heterosexual or homosexual relationship) who might have limited physical and/or emotional abilities or options available to him or her to respond to an continuing, actual or perceived attack.

A further example of how the s 271(2) matters are relevant could be based on Kirby J's observations in Osland v R 1998] 73 ALJR 173 concerning conduct in the nature of a pre-emptive strike. My remodelled s 271 formulation of self-defence should permit self-defensive conduct by way of pre-emptive strike in certain circumstances, though, as also stated by Kirby J in Osland, it is still necessary to discriminate between a self-defensive response to a grave danger which can only be understood in the light of a history of abusive

conduct; and a response "that simply involves a deliberate desire to exact revenge for past and potential—but unthreatened—future conduct."

Where there is a history of personal violence against the defender or another person, testimony from the persons referred to in s 271(3) regarding the history of the violence and its effects on the defender would also be relevant to determining whether the force used by the defender was necessary in response to the danger s/he perceived s/he faced in the circumstances and the options the defender understood s/he had in light of both the history of the abusive relationship and the effects of that relationship on the defender.

Subsection 271(3) adopts a broad approach as to persons who qualify as "experts" to give evidence regarding the matters that are relevant under section 271(2). It provides that social workers or domestic violence workers who have appropriate experience working in women's refuges, domestic violence services or counselling services to be experts for this purpose. This subsection removes any doubts that these people possess the requisite skills and expertise to give evidence as to the relevant issues that surround personal and domestic violence. Traditionally, psychologists and psychiatrists have given this type of evidence and those experts are also included in the subsection.

Section 272 is a completely new section that requires the trial judge to draw connections between the expert evidence given and the excuse of self-defence that provides the justification for the defender's behaviour. In cases where the defender is responding to a history of personal violence, it is critical that the trial judge sums up in a way that allows the jury to understand the relevance of the evidence of the domestic violence to the defence of self-defence. For example, where the defender has killed the attacker, as Kirby J said in Osland, the expert evidence may show how a defender's actions in taking lethal self-help against the attacker was reasonable in the extraordinary circumstances which the defender faced: this connection between the evidence and the legal rules needs to be drawn out for the jury in the summing up to assist it in its deliberations.

The formulation of my new s 272—Jury directions on self-defence, is based on s 37 of the Crimes Act 1958 (Vic). Section 37 Crimes Act 1958 (Vic)—Jury directions on consent, set out directions to be given by a Judge to a jury on the issue of consent in crimes of sexual violence, amongst other things with the objective of countering commonly held assumptions/myths/stereotypes about the behaviour of complainants in those cases. Similarly, s 272 in my Bill before the House proposes to legislate for directions to be given to juries in relevant cases to explain to them the context in which the defender has acted and how the defender's perhaps "inexplicable" behaviour is comprehensible when it is understood to be a common pattern with, for example, women who have suffered a history of domestic violence.

The substance of the directions in the proposed s 272 is taken from Kirby J's observations in Osland. There his Honour referred to the Canadian Supreme Court decision in Malott (1998) 155 DLR (4th) 513 that this type of expert evidence may be of use in explaining to the jury—

(a) why a defender subjected to prolonged and repeated abuse would remain in such a relationship;

(b) the nature and extent of the violence that may exist in such a relationship before producing a response;

(c) the defender's ability, in such a relationship, to perceive danger from the abuser; and

(d) whether the defender believed on reasonable grounds that there was no other way to preserve himself or herself from death or grievous bodily harm than by using the force that the defender did.

In conclusion I say simply that it is time to amend the Criminal Code to modernise and simplify the law of self-defence in Queensland—Queenslanders are not served by the current complex provisions and those provisions should therefore be repealed and replaced. The experience of those provisions in Queensland, and more generally throughout Australia, also makes it clear that specific allowance needs to be made to adequately provide for defenders, usually women, who kill violent partners as an act of self-preservation, after a history of prior violence by the deceased against that defender and/or others.

I commend the Bill to the House.