Speech by

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MEMBER FOR CABOOLTURE

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CRIMINAL LAW AMENDMENT BILL

Mr FELDMAN (Caboolture—CCAQ) (5.25 p.m.): I rise today to address the Criminal Law Amendment Bill 2000 and acknowledge this Government's attempt to ensure that the criminal justice system is fair to all Queenslanders. It is interesting to note that the debate on this Bill has been preceded by the debate on the Penalties and Sentences and Other Acts Amendment Bill. Our position in relation to the penalties and sentences Bill was that it was discriminatory, divisive and would simply not work. We feel that we will probably see that come out in the long term. It will, however, drive a bigger wedge between black and white Australians while doing nothing to solve the problems which divide us as a nation.

On the other hand, this Bill, which seeks to change the way certain people are treated in the court process, sets out to treat people equally. In other words, if someone is in need of that special consideration by the court, then they will be given that consideration regardless of their race, the pigmentation of their skin or any other irrelevant criteria.

We in the City Country Alliance have, as one of our core policies, support for the victims of crime rather than the perpetrator, the implementation of truth in sentencing and the provision of adequate resources to curb antisocial behaviour and provide a safe, secure and peaceful society. Further, we confirm our commitment to ensuring that the rule of law is certain, equitable and maintained.

The Minister in his second-reading speech rightly points out that the reform process is also about balancing the rights of those accused of a crime with the rights of those who are the victims of the crime and of witnesses generally. We could not agree more with that statement. While we in the City Country Alliance are very aware of the need to maintain the presumption of innocence in our courts, we believe that for far too long the rights of the accused and, more particularly, the rights of those found guilty of offences have taken precedence over the rights of all others. It has always been unacceptable to us that those who are victims of crimes involving violence, sexual assault and rape in particular have been largely unprotected by the courts and by the legal system generally.

We in no way wish to reduce an accused person's ability to defend themselves against whatever charges have been laid, and we certainly do acknowledge the right of the accused to face his accuser on the day. However, this must be done in a way that minimises the harm to the victim or an innocent witness who has necessarily been exposed to our adversarial court system.

We agree that an accused does not have the right to harass, intimidate and traumatise a witness. Speaking as a police officer, I have been harassed, intimidated and traumatised by some of the best counsel around and I know how it feels. I say that as somewhat of a professional witness rather than someone who just comes in to give evidence in a courtroom for the first time who is facing that sort of clinical yet very intimidating atmosphere of a courtroom.

The proposed amendments to the Evidence Act to prohibit an accused person from cross-examining in person children, people with an intellectual impairment and victims of sexual or violent crime are, in our view, a long overdue change. However, we do have some concerns about the mechanism involved in achieving this end.

As the Scrutiny of Legislation Committee points out, any accused has the right to represent themselves at a committal trial and a particular obligation is cast upon a trial judge to ensure that in those circumstances the unrepresented accused receives a fair trial.

The right to confront one's accuser and to cross-examine them at trial is a fundamental right presently available to any unrepresented accused. As the Explanatory Notes accompanying the Bill state, the mechanism in this Bill balances the removal of that right by inviting the accused to obtain legal representation for that purpose and, if declined, the court must order legal assistance for the limited purpose of cross-examination of that protected witness.

It would seem to us that when that situation arises and if the accused wishes for whatever reason to represent himself and refuses or is unable to arrange legal representation for the purposes of cross-examining a protected witness, then it is highly likely that upon conviction they would appeal on the grounds that the legal counsel provided to them was inadequate to do the job. It is here that I wish to address that concern to the Attorney-General. Surely a person who has had legal counsel provided to them who then goes through the appeal process and says that the counsel who was provided was totally inadequate and did not represent them as they sought fit will bog down an already overloaded Appeal Court. Surely that is just giving a person another avenue through which they could create havoc within the legal system and ensure that the system really is bogged right down. In fact, he may even be successful. Perhaps he may consider that somebody of the calibre of Adrian Gundelach would be the only person suitable to defend him and to do the job adequately for him, yet he was not provided with someone of that gentleman's calibre as counsel.

In light of the comments by the Scrutiny of Legislation Committee on the subject that "because the protected witness will usually be a crucial witness in the trial it may in some cases be a very difficult task, even for an experienced counsel, to cross-examine unless that counsel is also present during the rest of the Crown case including the Crown opening", I ask the Minister to enlighten the House in his reply as to his strategy for dealing with this type of likely occurrence.

The Scrutiny of Legislation Committee questions the need to remove the right in relation to such a broad class of witness where there is already a wide power at common law to control the questioning of a witness. The Queensland Law Reform Commission has observed—

> "It is not intended to imply that, in the absence of an express legislative provision, a court has no power to control the manner in which witnesses are cross-examined; it clearly has. It is part of the everyday role of judges and magistrates to ensure that witnesses are not confused or misled by questioning in the course of cross-examination and that the cross-examination is conducted fairly."

Yet that was never my experience as a police officer: you were always confused by legal counsel, led up the garden path, and sometimes misled up the garden path in order to arrive at a defendable position for an accused.

Unfortunately, it has been the experience of many that some judges and magistrates have been rather less than vigilant in their invocation of the discretionary powers that they have currently. Who can forget the image of a small girl being torn apart on a witness stand by an overzealous defence counsel while the presiding judge sat on his hands and let it happen? It is our contention that judges have not sufficiently fulfilled their responsibility to innocent victims and witnesses and it is now time that the rights of these innocents are set in legislative concrete.

The further amendments proposed to the Evidence Act will increase a judge's discretionary power to protect witnesses from inappropriate questioning in regard to credit or where the question is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive, or inappropriate language is used. The court in this situation is charged with taking into account the mental, intellectual and physical impairments of the witness as well as the age, education, cultural background, or any relationship that person perhaps has to any party in the proceedings.

We feel strongly that it is important that those charged with both the dispensation of justice and the protection of vulnerable witnesses in the courtrooms proactively control the conduct of their courts. It is noted that this Bill acknowledges that just because an individual has engaged in prior consensual sexual activity on another occasion or on other occasions, it does not mean that the person is more likely to have consented to the conduct at issue or is less worthy of belief as a witness. We believe that this amendment will advance the course of justice. I heard the speech made by the honourable member for Archerfield. On hearing the comments that she made at the beginning of her speech, I am certainly glad that I went to a State school rather than a private school.

The amendment to section 31 of the Criminal Offence Victims Act, which redefines the defence of duress, goes some way towards addressing the situation where people have acted in self-defence in reaction to a real or a perceived threat, such as a home invasion, and have suddenly found themselves the victim fighting for their liberty in court. Unfortunately, the existing limitations on this defence, which make it unavailable for charges of grievous bodily harm or murder, will remain. We do not see why a

person defending themselves or their family inside their own home should not be able to claim duress as a defence for their actions.

I will now address the distasteful subject of intentional female genital mutilation. While acknowledging that we live in a society that has a vast array of differing cultural and ethnic backgrounds, I am still shocked that in this day and age there are still people who would voluntarily inflict such inhumane and degrading mutilation on a member of their own family and, indeed, in many cases, their own daughter. A man or a woman who would intentionally mutilate a young woman with the premeditated intention of making that person incapable of participating in a sexual act without great pain solely to fulfil some ancient ritual or custom should in my opinion be subject to the same painful mutilation himself or herself.

We have heard that perhaps this is not as much a religious procedure as a cultural procedure by people who come from areas around the Horn of Africa. The defence of that practice on religious grounds is not one that they can take with great heart. However, we certainly believe that if people are going to live according to the old customs, the old ways, or indeed the Old Testament, perhaps they should be punished in those old ways: an eye for an eye. My only criticism of this amendment is that perhaps it does not go far enough. Fourteen years is perhaps simply not long enough for such people, but I guess that goes for all sorts of people who degrade, who humiliate and who are capable of carrying out such low-life acts. It is unfortunate that we happen to share the planet with such people.

It is also pleasing to see that the sections of the Criminal Code dealing with sexual offences have been overhauled to bring them into line with modern attitudes and practices. It is particularly pleasing to note that the offence of carnal knowledge has been broadened to include children of both sexes and that the offence of rape has been broadened to significantly take into account the level of trauma felt by a woman who suffers various forms of rape. I notice that it just calls it rape and does not follow the American path and include digital rape, object rape and a lot of other forms of the crime.

Changes to the definition of consent to read "consent freely and voluntarily given by a person with the cognitive capacity to give consent" is also a great way of bringing the definition of "consent" into a more enlightened time. I could speak to many other aspects of this Bill, but those are the subjects that I wished to address. I ask the Minister to give clarification with respect to court proceedings in his reply. On that note, we will be giving our support to this Bill. We support the changes that have been made. We congratulate the Minister on making those changes and effecting things that perhaps needed to be addressed for a long time under the code.