Speech by

Hon. R. WELFORD

MEMBER FOR EVERTON

Hansard 30 May 2001

RACIAL AND RELIGIOUS OFFENCES BILL

Hon. R. J. WELFORD (Everton—ALP) (Attorney-General and Minister for Justice) (10.53 p.m.): The Racial and Religious Offences Bill was introduced into this House by the member for Southern Downs as a private member's bill on 1 May this year. The explanatory notes state that the primary objective of the legislation is to ensure that those who commit hate crimes based on racial or religious grounds are punished not only for their actions but also for the motivation behind their actions. These are laudable objectives. I can only agree with the sentiments expressed in the explanatory notes, where it says—

It is in the interests of society for there to be a clear determination that hate crimes are unacceptable. Many crimes are based on racial and religious hatred, and it is the responsibility of the government to deter such crimes being committed by reinforcing how socially unacceptable such actions are.

However, the form of the proposed amendments to the Penalties and Sentences Act 1992 simply will not achieve the objectives and will add an intolerable burden to the administration of the criminal law in Queensland.

The proposed bill provides for a generic circumstance of aggravation for all offences where—

imprisonment can be imposed; and

the offence involves the person, by a public act, inciting hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of the race or religion of the person or members of a group in a way that includes—

(a) threatening physical harm towards, or towards any property of, the person or group of persons; or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

'Public act' as used in this bill is very similar to the definition of 'public act' to be found in the Anti-Discrimination Bill. This bill very closely mirrors the wording of the criminal offence of serious racial or religious vilification to be found in the Anti-Discrimination Bill, the amendments to which we debated earlier today. However, there are significant differences. The offence of serious racial or religious vilification is a substantive offence. It will be prosecuted upon complaint with the consent of a Crown Law officer in the Magistrates Court. In contrast, this bill seeks to apply an aggravating circumstance at large to all criminal offences for which a sentence of imprisonment can be imposed. It is very difficult to see how the aggravating circumstance would attach to an offence of actual violence unless the violence involves some incitement to other persons to perform the same act or threaten persons or their property.

I want to make this very clear. This bill would not increase the punishment of offenders whose criminal acts are motivated by racial or religious hatred if they do no public act inciting hatred. To that extent, the bill simply does not meet the objectives set out in the explanatory notes. The bill does not provide for a judge to impose an increased penalty when sentencing a person who has committed a crime motivated by racial or religious hatred. A reading of the proposed sections shows that the gist of the proposed aggravating circumstance is inciting hatred. With respect, such a requirement makes sense when one considers the government bill but makes no sense if the objective of the bill before the House now is to punish motivation.

This bill would inevitably cause great confusion about the extent a sentencing court could take into account a racial or religious motive for a crime. The present law clearly allows a sentencing court to consider a racial motive when sentencing. The case of The Crown v Dempsey and Perks, an

unreported Court of Appeal decision in 1999, is clear authority for this proposition. The amendments to the Evidence Act made last year by the Evidence and Other Acts Amendment Act now set out the degree of proof required for any allegation of fact so that a sentencing judge or magistrate can act on that allegation. If an allegation of fact is challenged, the judge or magistrate must be satisfied on the balance of probabilities that a fact is true. The degree of satisfaction required varies according to the adverse consequences of a finding.

In contrast, this bill would require the aggravating circumstance to be charged on an indictment as part of the criminal offence. The Criminal Code defines a circumstance of aggravation as—

Any circumstance by reason whereof an offender is liable to greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.

In other words, section 564 of the code requires any aggravating circumstance to be relied upon to be charged in an indictment. The aggravating circumstance would have to be determined not on the balance of probabilities for the purpose of sentencing; rather, beyond reasonable doubt by a jury or a magistrate as part of the primary offence. I note that the report of the Scrutiny of Legislation Committee on this bill thought that this also is the likely position given the present law. Importantly, a series of High Court cases has established that if an aggravating circumstance is available and has not been charged, it cannot be relied upon on sentence.

Trials involving substantive serious offences would be prolonged and complicated by trying to determine this very complex aggravating circumstance. Indeed, proof of motive generally is not required in the criminal law. The law focuses on the substantive offence. This is understandable when one considers that the elements of a criminal charge must be proved beyond a reasonable doubt. Intent to do an act is sometimes difficult to prove. How much more difficult would it be if one were required to prove motivation beyond reasonable doubt? In fact, motive may be so secret and so hidden in the psyche of an offender that it cannot be proved at all. Honourable members may think back to some notable and horrific cases, and remember that a usual comment was, 'What would make a person do that?' We can speculate, but can we really expect our law enforcement agencies to prove motive beyond reasonable doubt?

Where this aggravating circumstance was charged, trials would inevitably become mired in trying to decide the issue of the existence of a motivation to incite hatred on the basis of race or religion rather than trying to decide whether the offender committed this substantive offence. For example—

Mr DEPUTY SPEAKER (Mr Fouras): Order! I advise the Attorney-General that the Clerk has brought it to my attention that the sessional orders actually state that anybody other than the mover may speak for only 10 minutes. The Attorney-General has only three minutes left. I thought that I had better warn the Attorney-General about that. The sessional orders are very clear about that. I am sorry that we put up 60 minutes, but on private members' bills all members other than the mover have only 10 minutes to speak to the bill. That is in the sessional orders. I think it is a good idea.

Mr WELFORD: The difference between this bill and the existing circumstances of aggravation is easily illustrated by an example. Robbery is an offence with a maximum penalty of 14 years. However, various circumstances of aggravation lift the maximum penalty to life imprisonment; for example, if the offender is armed, if the offender is in company or if the offender used personal violence or wounded any person. Those aggravating circumstances are part of the charge that is decided by the jury. Clearly, those circumstances are factual and easily proved by objective observation. In contrast, the circumstance of aggravation in the bill proposed has a number of different elements, including proving whether the offence was done on the grounds of race or religion.

In my view, the government's approach of not interfering with the substantive criminal law but creating a separate offence to deal with serious religious or racial vilification is the preferred and correct approach. It is fair to concede that the new offence of serious racial and religious vilification will require a high standard of proof. That is entirely proper, as the government wanted to be quite sure that the democratic right to express opinions was not unduly compromised. The intention of the offence is not to deny people freedom of speech or stifle debate on issues of public importance, but to prohibit acts that undermine the social stability and cohesion of our community.

If someone who is motivated by racial and religious hatred commits other offences like unlawful wounding, those offences can already be prosecuted. A jury will decide if someone was, for example, wounded and a judge can then determine the appropriate sentence, taking into account all the relevant circumstances. This may include if the prosecution can prove the fact to the appropriate standard, that is, on the balance of possibilities, a motivation of hatred on the grounds of race or religion.

The government's approach reflects the existing underlying and well-established principles of our criminal law. Unfortunately, the private member's bill proposed by the member for Southern Downs today will simply not achieve the objectives it sets out to do. It is misconceived and, for those reasons, the government is unable to support the bill on this occasion.