Speech by

Mark McArdle

MEMBER FOR CALOUNDRA

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CRIMINAL CODE AMENDMENT BILL

Mr McARDLE (Caloundra—Lib) (4.27 pm): I rise to make a number of comments in relation to the Criminal Code Amendment Bill. The bill introduced by the Attorney-General is simply a blatant attempt to undermine the fundamental democratic concepts that any government would pride itself on. It should not in any circumstances be passed by this parliament. The bill attempts to remove the current sections 56, 57 and 58 of the Criminal Code because it has been proposed that they conflict with the fundamental tenets of the Westminster system of government in relation to the parliamentary privilege of freedom of speech.

The Attorney claims that section 8 of the Parliament of Queensland Act 2001 is a re-enactment of article 9 of the Bill of Rights 1688, established by the English parliament, whereby freedom of speech in debates and proceedings in the assembly cannot be impeached or questioned in any court or place outside of the assembly.

Contrast that with section 57 of the Criminal Code, which states that a person who knowingly gives false evidence in the course of examination before the assembly or a committee of the assembly is guilty of a crime and is liable to seven years imprisonment. This section applies to both parliamentarians and laypersons who are called or appear before the assembly or a committee thereof. This government would have us believe that this section of the Criminal Code is not required, due to the inconsistency with section 8 of the Parliament of Queensland Act 2001 and the principles contained in the article in the UK's Bill of Rights.

In fact, the contrary is true. In fact, both are required to maintain the accountability and democratic nature of government in Queensland. Historically, this has always been the case. The Attorney's premise for introducing the bill is article 9 of the United Kingdom's Bill of Rights, which was enshrined in section 40A of the Constitution of Queensland Act 1867 when it was amended in 1978. Subsequently, Queensland constitutional parliamentary laws were consolidated in the Constitution of Queensland 2001 and the Parliament of Queensland Act 2001 with the same principles being enshrined in these most recent acts. In her second reading speech the Attorney stated—

The Parliament of Queensland Act 2001 provides that the same behaviour is a contempt of parliament, to be dealt with by this parliament. It follows that section 57 of the Criminal Code is inconsistent with a fundamental tenet of the Westminster system, embodied in section 8 of the Parliament of Queensland Act 2001. This tenet is that debates or proceedings in parliament cannot be impeached or questioned in any court or place out of the parliament. A criminal provision such as section 57, which allows the possibility of the prosecution of a member for what that member says in the House, is inconsistent with the principle established by article 9 of the UK Bill of Rights of 1688—a principle expressly preserved in section 8 of the Parliament of Queensland Act 2001. Accordingly, the bill repeals section 57 of the Criminal Code to ensure that the principle inherent in article 9 of the Bill of Rights is preserved and reinforced.

In essence, that is the crux of the Attorney's argument for the amendment placed before the House today. However, it certainly requires a closer look at what was the historical and current legal situation here in Queensland and, more importantly, any authorities that deal with this point.

Contained in section 45 of the Queensland Constitution Act 1867 is a provision dealing with disturbing the assembly. This was regarded as a contempt of the parliament punishable by a fine according to the standing orders and if the fine was not paid immediately a person could then be confined until it was paid or until the end of the current session of parliament. At the same time, section 53 established an

offence of providing false evidence before the parliament which was regarded as a misdemeanour and a person was liable to be sentenced to a maximum penalty equal to the penalty for wilful and corrupt perjury which was 14 years. In addition, section 45 also provided for the offence of refusing to attend or give evidence before the parliament or committee which again was regarded as a contempt of parliament with a maximum penalty in accordance with my earlier statement.

We can clearly see that the Constitution Act 1867 in Queensland existed at the time that the principles of article 9 of the United Kingdom Bill of Rights existed and the legislation provided penalties for anybody who committed certain offences and that those penalties existed outside the confines of the assembly itself.

Those same offences found their way into the Criminal Code Act 1899. It is important to remember that the Criminal Code was also drafted at a time when the principles of article 9 of the United Kingdom Bill of Rights existed and that, I repeat, is the cornerstone of the Attorney's argument here today. Additionally, it is important to comprehend that the code was drafted by Sir Samuel Griffith and he, of all people, would have been acutely aware of the principles of article 9 irrespective that those sections became part of the law of this state and have remained so since 1899.

It is interesting to read what the Attorney-General of the day had to say when discussing the Criminal Code draft. He refers to sections 56 and 58 as follows—

I next draw attention of honourable members to new sections dealing with offences against the legislature—sections 56 and 58. They are provisions taken from codes in force elsewhere and the government included both of them in accordance with the suggestion of the commission. Of course it is for honourable members to say what their views are with regard to them in committee.

The commission referred to the royal commission which was established by the government of the day to examine and report on the completeness of the draft code. It therefore appears that these sections at least—sections 56 and 58—were not unique to Queensland at the time and existed elsewhere.

In addition, they were inserted into the Criminal Code at a time when the principles of article 9 were well and truly in existence and would have been known to the members of the commission. As stated, those sections, as well as section 57, became part of the criminal law of this state as of 1899.

As a consequence, the criminal law has incorporated the sections as part of the law of Queensland for well over 100 years. This parliament at an earlier time, with the knowledge of the existence of the Bill of Rights, passed the legislation. It deemed that such action was critical to the proper and effective operation of government and to maintain the integrity of this House. This continued until 1978 when section 40A was inserted into the Constitution Act 1867. That section provides that the—

Powers, privileges and immunities to be held, enjoyed and exercised by the Legislative Assembly and the members and committees thereof shall be such as those defined by any act or acts so far as those powers, privileges and immunities are not inconsistent with this act and until certified, shall be those powers, privileges and immunities held, enjoyed and exercised for the time being with the Commons House of Parliament of the United Kingdom and its members and committees so far as those powers, privileges and immunities are not inconsistent with this act or any act whether held, possessed or enjoyed by customs, statute or otherwise.

Accordingly, when that bill was passed the parliament did not attempt to remove the sections of the Criminal Code that we are debating here today. Those sections continue to operate even though the principle of the article referred to by the Attorney was now enshrined in legislation here in Queensland.

Section 40A is a restatement of the law as it stood under article 9 of the Bill of Rights. The next amendment occurred with consolidation of the various pieces of legislation in the Constitution of Queensland 2001 and the Parliament of Queensland Act 2001. Section 8(1) of the Parliament of Queensland Act 2001 states—

The freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or place out of the assembly.

Section 8(2) states—

To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688).

As such, the act specifically enshrines yet again the terms of article 9 of the Bill of Rights. In 2001 this parliament did not remove the terms of sections 56, 57 and 58 of the Criminal Code at that time. I will return to that shortly. We therefore come back to the same starting point—that is, article 9 of the Bill of Rights of 1688.

The parliament did not at the time of the passing of the bills in 2001, as I said, attempt to amend the Criminal Code. One cannot argue that the Attorney simply forgot the legislation existed. One cannot argue that the amendments would have been undertaken if the sections had been brought to the attention of the House. These sections have existed since 1899 and whether they had been utilised in the past is of no consequence.

However, if we accept the Attorney's argument that article 9 is in essence the crux of the proposed amendments, we have to consider whether any case law exists on the question of privilege and the role of courts in that arena. In particular, are there comments in relation to the chapter 8 provisions of the Criminal Code? The short answer, very clearly, is yes. In the determination of the matter of the Criminal Justice Commission and Nationwide News Pty Ltd and Madonna King, President Fitzgerald of the Court of Appeal was dealing with questions concerning the disclosure of documents before they had been authorised for

release by the parliament. In the course of the judgement the president, at page 9 of the documentation I have, made the following comment—

In any event, in a supplementary written submission received after the conclusion of oral argument, it was substantially conceded by counsel for the Speaker that there is sometimes a statutory basis for court proceedings in relation to conduct which breaches parliamentary privilege as well as contravenes the law or legal rights or duties. See, for example, Chapter 8 of the Criminal Code.

In this case, this House, by the actions of the Speaker, conceded the relevance of sections 56, 57 and 58. More importantly, it established the compatibility of the precept of article 9 and the Criminal Code. It established judicial acknowledgement of the existence of sections 56, 57 and 58 of the Criminal Code as an adjunct to the rights of this House. In addition, the president referred to the Supreme Court decision of R v Smith in which Justice Byrne made this comment—

The court will not lightly infer the implied exclusion by statute of 'the ancient and essential privilege of freedom of speech in parliament.'...yet the privilege yields to the extent it conflicts with the act. If, unlikely though it is, the privilege otherwise constituted an obstacle to enforcement of the statutory right, it gives way here.

There is clear authority for privilege to be overridden where an act stipulates it is to occur—that is, despite the existence of the legislation as touted by the Attorney. As a consequence, given the historical basis there is no impediment to the terms of the Criminal Code coexisting when one considers that they deal with very different matters. Both are serious, but both are distinct. The changes to the Constitution Act do nothing more than repeat the existing law and do not, on the cases that I have referred to, impede the continuing operation of sections 56, 57 and 58 of the Criminal Code. To argue otherwise flouts common sense and reality.

Let us turn to the real reason we are here today. It is because this government finds itself in the ludicrous position of having to protect one of its own. As a consequence, the Criminal Code is now going to be amended to remove protections for the proper and effective running of government in Queensland that have for well over 100 years been part of the democratic process of this state. The Labor Party is not doing this out of a necessity to enhance the democratic rights of individuals. Rather, it is doing so to protect itself from further attack. By doing so, it also reduces the protections offered by the criminal justice system for a person who is charged under one of these sections.

In an article by Enid Campbell entitled 'Adjudication of Parliamentary Offences', she writes at page 178—

There is much to be said in favour of a regime under which a person charged with parliamentary offences may be tried before courts of law rather than within the parliamentary forum. If a court has jurisdiction to try persons on charges of contempt of parliament those charged before the court will, subject to any statutory provisions of the contrary be assured of all the rights and protections accorded to defences in criminal cases. But when persons are tried before a house of parliament and charged with contempt of parliament, they have no legally enforceable procedural protections. The house is not bound by the rules of evidence which apply in the court. Those charged cannot rely on the privilege against self-incrimination and are not entitled to be represented by counsel. There is no standard of proof which has to be satisfied and the proceedings may be conducted in defiance of all principles of procedural fairness.

By removing the right of access to the criminal justice system, the House, in essence, places itself, in effect, as judge and jury. That is not the role of this parliament. As I made very clear in December last year, this parliament's position is not as a judicial body. If we are going to maintain the distinction between the various levels of the government, then the judiciary must always be separate from the parliament. This is also one of the cornerstones of our style of government. The Commonwealth faced a similar situation in 1959 in the Browne and Fitzpatrick privilege case involving articles being printed in the *Bankstown Observer* culminating in Browne and Fitzpatrick being required to appear before the bar of the chamber on 10 June 1955 to answer charges brought against them. On a motion from the Prime Minister of the day, both men were convicted to 90 days in jail. Appeals to the High Court and the Privy Council were unsuccessful. I would have thought that this parliament would not have wanted to be engaged in such matters, given the nature of the work undertaken in this House. Proceedings in relation to criminal matters should be dealt with more appropriately in the criminal jurisdiction.

Finally, if one considers the Parliament of Queensland Act 2001, one must look at section 47 of that act which deals with the overlap between the general criminal law and offences punishable by the Assembly. In essence, the section deals with the fact that a person's conduct can be both a contempt of the Assembly and an offence against another act. In those circumstances, the person may be proceeded against for either but not for the same offence on two separate occasions.

Indeed, the Assembly may by resolution direct the Attorney-General to prosecute the person for the offence against the other act. In particular, I refer members to the same article by Enid Campbell when she details in great length the convoluted nature of section 47 of this act. The concern here is quite clear: that this House has been asked to remove certain provisions under the Criminal Code that have been in existence since 1899, but at the same time section 47(1) provides to this parliament the option to proceed in a criminal matter for offences that could exist under other acts. If the government is going to be consistent, then it needs to deal with both matters, not just the one. It cannot have two bob each way.

If one then turns to the Parliament of Queensland Act 2001, section 36—an act that was brought into this House by this government—we find as footnotes to section 36 particular reference to sections 57 and 58 of the Criminal Code. It is simply inconceivable that this government prepared this piece of

legislation, ticked off on the terms of the draft bill, brought it into this House, incorporated the terms into the explanatory notes and now says, 'We didn't know it existed.' This is its own bill, and this is the bill that this government put together and said, 'Here are examples of where sections 57 and 58 are clearly applicable.'

This bill was brought into this House by the Premier of this state. The Premier of this state therefore acknowledged at that time the importance and relevance of sections 57 and 58 of the Criminal Code because he endorsed the terms of the bill. This government is now trying to hoodwink the people of this state by saying, 'Oops, we got it wrong. We didn't really know what was going on. We're so dreadfully sorry. We'll correct the mistake that we made and that we perpetuated for the last five years.' The simple reason they are doing that is this: they have been caught in their own petard. They have been found out in the estimates committee process. It has also been found out that what they did back in 2001 is an absolute conviction for their own knowledge that they are trying to wiggle out of now. They have been found guilty by their own stupidity.

It is simply one more example of the stupidity of this government. Can you imagine attempting to overturn your own provisions when you acknowledge their very existence a mere five years ago and highlight them as a shining light for what exactly the section is supposed to achieve?

Mr DEPUTY SPEAKER (Mr Lee): Order! The member will address his comments through the chair.

Mr McARDLE: I certainly will. I apologise to the chair.

Honourable members interjected.

Mr McARDLE: The peanut gallery up the back—through you, Mr Deputy Speaker, the peanut gallery up the back.

Sections 57 and 58 are clearly recognised by the government in its own legislation. What a backflip! It is all because it cannot admit that it was wrong before the estimates committee. This whole House and the people of Queensland now have to cop it sweet that this government is going to say to ministers, 'It's okay if you don't tell the truth, because we're going to protect you by putting this through the parliament. She'll be sweet. Say what you like.' The bill is an absolute disgrace and should never, ever have come before this House.