



Speech by

Hon. Kerry Shine

MEMBER FOR TOOWOOMBA NORTH

Hansard Wednesday, 14 November 2007

CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL

Hon. KG SHINE (Toowoomba North—ALP) (Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland) (9.49 pm): On 9 August this year, the member for Caloundra introduced into parliament as a private member's bill the Criminal Code (Assault Causing Death) Amendment Bill 2007. The explanatory notes to the bill state that the purpose of the bill is—

... to amend the Criminal Code Act ... by introducing a new offence of 'Unlawful assault causing death' and by increasing the sentence range available for crimes committed against s 544, 'Accessories after the fact to crimes'.

With respect to the new offence of unlawful assault causing death, the explanatory notes point to the recent cases in which Supreme Court juries acquitted two young men—Little and Moody—who were charged with murder or manslaughter where death followed from an assault. The new offence provides—

... that a person is not excused from criminal responsibility for the death of the other person because the offender does not intend or foresee or can not reasonably foresee the death.

This provision in effect ousts the operation of section 23(1)(b) of the Criminal Code, which provides that a person is not criminally responsible for an event which occurs by accident. According to case law, an event occurs by accident if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.

Section 23 applies to all persons charged with any criminal offences against the statute law of Queensland. In his second reading speech, the member for Caloundra stated—

The Queensland Coalition considered amending s 23 to limit its application in certain circumstances, however, it was recognised such might cause legislative uncertainty.

The government opposes the new offence of assault causing death for these reasons: firstly, it adds nothing to the existing range of offences—to which significant penalties apply—able to be charged as alternatives to murder and manslaughter; secondly, the attempt to modify the accident defence may have an unintended effect on the availability of other defences; and, thirdly, it is premature to create a new offence or to consider any other changes to existing laws given that I am already reviewing the accident defence in homicide cases and am consulting on the issue.

Currently, section 544 of the Criminal Code provides a maximum penalty of two years for being an accessory after the fact to a crime unless another penalty is expressly provided. The bill proposes making an accessory after the fact liable to the same punishment as the principal offender. The explanatory notes point to a number of judicial statements that the current maximum penalty of two years is absurdly low. I acknowledge that section 544 of the Criminal Code requires amendment, but I oppose the replacement of section 544 as outlined in this bill because the increased penalties are disproportionate to the culpability of an accessory and because amendments I am currently drafting to the Criminal Code will provide a more appropriate sentencing range.

Section 10 of the Criminal Code defines an accessory after the fact as a person who receives or assists another person who is, to the person's knowledge, guilty of an offence in order to enable the person to escape punishment. Section 544 of the Criminal Code provides the offence of accessory after the fact to

a crime and carries two years imprisonment. Section 544 applies to accessories after the fact for all crimes except murder, as section 307 specifically provides for a maximum penalty of life imprisonment for an accessory after the fact to murder.

Accordingly, an offender who is an accessory after the fact to stealing simpliciter, a crime which carries five years, is liable to the same two-year maximum as an offender who is an accessory after the fact for crimes of manslaughter or attempted murder, which both carry life imprisonment. The Chief Justice commented in *R v Shales* [2005] QCA 192 that manslaughter and possibly attempted murder would be the most serious principal offences to which section 544 could apply and that the legislature should consider according sentencing judges a wider discretion when dealing with such cases.

I will now turn to the bill in more detail. Clause 3 of the bill inserts a new clause 341 into the Criminal Code which provides a new offence of unlawful assault causing death. It says that any person who unlawfully assaults another causing the death of the other person is guilty of a crime and is liable to imprisonment for seven years. Subsection (2) provides that the person is not excused from criminal responsibility for the death of the other person because the offender does not intend or foresee or cannot reasonably foresee the death. As I have previously noted, this subsection is clearly an attempt to oust the operation of section 23(1)(b) to ensure that a person is not excused from criminal responsibility for the death of the other person in circumstances where the offender does not intend or foresee or could not reasonably have foreseen the death.

According to the explanatory notes, the new offence will provide an alternative to murder and/or manslaughter charges in cases where an unlawful assault caused the death of the other person but where the elements of the more serious charge cannot be successfully made out. It is already possible for the prosecution to charge a lesser offence in the alternative to a more serious charge, leaving the jury with the option of convicting on either charge. For example, a person may be charged with attempted murder, with a charge of assault laid as an alternative. A verdict of assault would be open to the jury if the jury were not satisfied to the requisite degree that the offender was trying to kill the victim.

For some other offences the Criminal Code provides what are known as statutory alternatives—that is, an alternative verdict that is available to the jury even if it is not specifically charged by the prosecution. For example, section 576 provides that, where a person is charged with murder, a jury may return a verdict of manslaughter. Thus a manslaughter verdict is always available on a charge of murder. For any other verdict to be open to a charge of murder or manslaughter, the prosecution must specifically charge another offence in the alternative. Because the bill does not make the new offence a statutory alternative to murder or manslaughter, the new offence would only be available if specifically charged. The other sections of the bill as set out are the same arguments that I have detailed thus far in my speech and they apply in like manner.

On 11 October this year I released a discussion paper which provides a review of the law in relation to accident and provocation. The discussion paper also outlines the results of an audit of 80 murder and 20 manslaughter trials. The purpose of the paper is to provide information about the nature and frequency of the use of these defences. It is premature, therefore, to consider any amendments to the Criminal Code before that consultation process has been completed.

I turn to the proposed replacement of section 544. The proposed new section would mean that any person who becomes an accessory after the fact to a crime is guilty of a crime and is liable if no other punishment is provided to the same punishment as if the person had committed the crime committed by the principal offender. However, no amendment is proposed to section 545, which provides for accessories after the fact to misdemeanours and some summary offences. The punishment provided by section 545 is one-half of the punishment applying to a principal offence.

One difficulty with the approach adopted in this bill is that the Criminal Code does not distinguish between crimes and misdemeanours on the basis of the penalty. As a result, there are some crimes with lower than or the same penalties as those applying to some misdemeanours.

The effect of the bill will be to render an accessory after the fact to wounding—a misdemeanour carrying seven years—to a maximum penalty of 3½ years, whereas an accessory after the fact to assault occasioning bodily harm, a crime carrying seven years, will be liable to a maximum penalty of seven years.

I am aware that the penalties imposed by existing section 544 are inadequate. The concern that a maximum penalty of two years imprisonment for an accessory after the fact is inadequate when dealing with principal offences such as manslaughter and attempted murder is justified and requires redress. The maximum of two years is also inadequate in many other instances. As a result, the provision as a whole has already been reconsidered.

In summary, the amendments currently being drafted to sections 544 and 545 of the Criminal Code will provide that, one, an accessory after the fact to an offence which carries mandatory life—for example,

murder—is liable to a maximum penalty of life imprisonment; two, an accessory after the fact to an offence which carries life imprisonment is liable to a maximum penalty of 14 years; and, three, in other cases an accessory after the fact will be liable to one-half of the greatest punishment to which the person convicted is liable. The code should not be the subject of piecemeal and ill-conceived amendments. Instead, amendments should be carefully considered and subject to appropriate consultation. The government will oppose the bill.