Speech by

Mark McArdle

MEMBER FOR CALOUNDRA

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CRIMINAL CODE AND CIVIL LIABILITY AMENDMENT BILL

Mr McARDLE (Caloundra—Lib) (3.01 pm): First of all, I would like to thank the Attorney-General for allowing his staff to talk to me this afternoon about the Criminal Code and Civil Liability Amendment Bill. The bill itself is only nine pages long. It is not a long bill but it is a very important bill. Firstly, it deals with the particularly important issue of the dangerous driving provisions of the Criminal Code, and I will come to that shortly. Those provisions have been the subject of much public and media comment in the past two to three years, in particular with regard to the sentences that have been handed down by our courts. Secondly, the bill deals with the issue of skimming of cards by machines and that information then being used fraudulently to acquire goods, services or cash. Thirdly, the bill amends the Civil Liability Act as a consequence of the Newberry decision in the Court of Appeal.

Turning to the bill itself, as I said, it amends the Criminal Code and the Civil Liability Act 2003. As those acts are dealt with separately in the bill, I will also do the same in my contribution. It is important to understand the provisions of section 328A of the Criminal Code as it currently stands. For the offence of 'dangerous operation of a vehicle', firstly, a person who operates, or in any way interferes with the operation of, a vehicle dangerously commits a misdemeanour and is subject to the maximum penalty of 200 penalty units or three years imprisonment. Secondly, if the offender at the time of committing the offence is adversely affected by an intoxicating substance or has a prior conviction of an offence against this section, they are subject to a maximum penalty of 400 penalty units or five years imprisonment. Thirdly, if the offender has a prior conviction against this section committed while the offender was adversely affected by an intoxicating substance or has at least two prior convictions of the same prescribed offence or different prescribed offences, the court is obligated to impose, as the whole or part of the punishment, imprisonment.

The fourth provision, and perhaps the most commonly known provision to the public, encompasses two types of offences. Firstly, a person who operates, or in any way interferes with the operation of, a vehicle dangerously and causes the death of or grievous bodily harm to another person is liable to imprisonment for seven years. Secondly, if the offender at the time of committing the offence is adversely affected by an intoxicating substance, he is liable to imprisonment for 10 years or, if the intoxicating substance is alcohol and the offender was, at that time, over the high alcohol limit, then he is liable to imprisonment for 14 years. The current legislation certainly carries a range of penalties depending on the type of action that is involved and also whether the offender has been consuming alcohol or other substances.

It is important to understand recent circumstances as to why this bill has actually come before the House. What I would like to do is consider an actual case reported and decided by the courts—the case of Anthony John Wayne Keymes, who was struck and killed by a car driven by Jason Bottom in the early hours of 18 October 2003. On 2 December 2005 Bottom pleaded guilty to charges of dangerous driving causing death whilst intoxicated, dangerous driving whilst intoxicated and failing to stop at the scene of an accident and was sentenced to seven years imprisonment to be eligible for post prison community based release after serving two years and six months of the total term. I point out to the House that Anthony

Keymes's mother, Tina Johnson, is a constituent of Caloundra and has been to see me on a number of occasions in relation to her son's death.

The sentence imposed by the court provides for full-time discharge of Mr Bottom on 1 December 2012 and post prison community based release on 2 June 2008. However—and this is one of the concerns that the public has—it took almost two years for Bottom to enter pleas of guilty and be sentenced. In the intervening period of time, the initial charge of manslaughter—which the House has to acknowledge is a rare circumstance in these matters, and that is why 328A was instituted into the Criminal Code—was dropped to one of dangerous driving causing death whilst being affected by alcohol. As I understand, the decision to amend the charge from manslaughter was based on a change of opinion by the police officer who undertook the investigation of the vehicle. In his statement of 5 November 2003, he came to the following conclusion—

As a result of my inspection, I am of the opinion that the vehicle was in a dangerous mechanical condition due to the condition and operation of the brakes and steering that I believe to have been defective for some time prior to the accident. I did not drive the vehicle due to the dangerous condition of the brakes and steering.

That statement was not sustained during the committal hearing in the Magistrates Court in Maroochydore. Quoting from correspondence to me by the Director of Public Prosecutions dated 17 July 2006, Ms Clare states as follows—

Under cross examination under Magistrates Court the witness backed away from his description of a dangerous vehicle. In court he said the steering was 'totally controllable' and declined to comment on the efficiency of the brakes but believed they would have been functioning adequately.

I highlight that case because over a period of time Ms Johnson has become quite clearly very concerned about the way this case was conducted within the judicial system. I do intend to refer this matter to the police minister, because I do believe there needs to be some investigation as to what took place with regard to the initial statement by the police officer and the subsequent testimony in the court at Maroochydore.

The point is this: Anthony Keymes had a young son Jordan—a very young boy at the time his father died. Jordan now lives without his father. He will never have the contact with and knowledge that a father should pass to a son. That is because somebody got behind the wheel of a motor vehicle full of alcohol and killed his father. The raw emotion is what this House is dealing with today when we are talking about dangerous driving causing death or dangerous driving in any circumstance. What people do not understand is that we need to look very closely at the individual circumstances and facts behind every case. I think everybody here can be guilty of reading a newspaper report and coming to a conclusion that the newspaper report is gospel and therefore the matter's determination was wrong.

Tina Johnson was and still is devastated by the sentence. She has never got over the loss of her son and she never will. She will never come to grips with the concept that a person can kill her son and then go to jail for what she sees as a very short period of time. That is quite understandable. This is the sense of outrage that the public has had for a number of years now in relation to this particular offence, particularly when it takes away the life of a loved one and also takes away from the children of that loved one the contact that they should have had with their parent as they develop and grow.

In the *Sunshine Coast Daily* on 2 March there are details of a case against Andrew Nelson, who at 34 years of age was jailed for 18 months in the Maroochydore Magistrates Court after five drink-driving convictions, including one where his blood alcohol reading was .234, and four disqualified drink-driving convictions in the past five years. In five years Mr Nelson had what one would call a horrendous driving history. On the night in question, 24 February, his vehicle was stopped by the police for doing a burn-out just after midnight. At the time he was pulled over he had a blood alcohol reading of .176. When he appeared in court he already had a two-year disqualification which was due to expire in November of this year, but the most recent charges also breached a suspended jail sentence and a probation order. Nelson had a prior conviction for which he was given a jail term of 12 months, suspended after four months for various traffic offences. The magistrate activated the suspended sentence concurrently and set a parole date for release in October of this year and disqualified him for driving for a period of five years.

The comparative sentences in relation to these two matters with regard to early release from jail simply do not stack up. That is what people are seeing when they read the newspapers and see what they perceive to be lenient sentences handed out to drink drivers or to drivers who drink and then kill in their motor vehicle. When one looks at the sentences, in particular the period to be served before being eligible for release and the crime that was committed, one can clearly understand Tina Johnson being upset and angry at the legal system. When one looks at the comparative sentences for dangerous operation of a motor vehicle while adversely affected by alcohol or a substance, for which the maximum penalty can be either 10 or 14 years, one sees significant divergence of opinion by the courts. In R v Smout in 2005 where the offender was liable to 14 years imprisonment he was sentenced to six years with a recommendation for post prison community based release after 2½ years. But in the decision of R v Antoney the offender was sentenced to four years imprisonment with a parole recommendation after 15 months, again with a maximum sentence of 14 years. In R v Cusack in 2000, the offender was liable to 14 years imprisonment

and was initially sentenced to three years to be suspended after a period of four years, which on appeal was changed to three years imprisonment to be suspended after nine months with an operational period of three years.

Those sentences are what the people of Queensland are seeing coming down from our courts. What they are seeing is that divergence of opinion. But at the end of the day the maximum sentence in these circumstances clearly showed somebody died. It is very difficult to reconcile the death of a person to such terms of imprisonment when one considers that to many people in the community these people are nothing short of murderers. They see that they have taken the life of their loved one and in their opinion they should suffer the maximum penalty.

In 2003 in the decision of R v Quinn, the Queensland Court of Appeal was considering a charge of causing grievous bodily harm whilst having excess alcohol over the high alcohol limit which would have carried a maximum sentence of 14 years. Justice Holmes in that decision made this comment—

Council for the crown on sentence submitted that the Court of Appeal authorities showed that the normal tariff was a head sentence in the range of three to four years often suspended after a period of between 18 months and two years. Defence council agreed with this proposition.

What we have here is a court putting in print what it believes is the range of sentences that should be imposed in the—if I can use the words—normal circumstances of a case of this nature. Again this is what people are seeing and this is why they are outraged. The public in Queensland are becoming very concerned that sentences do not reflect the public outrage of matters of this nature, particularly when the lives of people are taken as a consequence of some idiot getting behind the wheel after consuming large quantities of alcohol.

I will now move to what the bill before the House will provide as future sentences under section 328A. Firstly, the section is going to add at least one new circumstance of aggravation. If a person operates a vehicle in a dangerous manner and the circumstance of aggravation is either excessive speeding, taking part in an unlawful race or an unlawful speed trial, for that alone a person can be liable to a penalty of up to five years. It also increases the penalty of three years, for the earlier offences that I referred to, to five years.

The amendment in the bill also deals with the charge resulting in death or grievous bodily harm and creates new penalties. If the person is adversely affected by an intoxicating substance or is excessively speeding or taking part in an unlawful race or unlawful speed trial and the result is death or grievous bodily harm, then a term of 14 years can be imposed as a consequence. In addition—and this is a new provision within the bill—a person will be liable to 14 years imprisonment where death or grievous bodily harm occurs and the person knew or could reasonably have known the other person had been killed or injured and the offender leaves the scene of the incident except to obtain medical help or other help for the injured person before the police arrived. That is commonly called a hit-and-run scenario or flee-the-scene scenario. A provision is now put in place where, if someone is killed or suffers grievous bodily harm and the other elements have been complied with and a person then flees the scene, that person can be liable for up to 14 years imprisonment. The third penalty is for an increase in the seven-year penalty to 10 years if neither of the preceding points I have dealt with come into play.

In relation to the question of comparative sentences, in October 1988 in New South Wales this issue became very much alive when the appeal court actually embraced the English approach to guideline judgements. The first guideline judgement was delivered in the case of Jurisic. In that case the Chief Justice indicated that the purpose of guideline judgements was to reinforce public confidence and the integrity of the process of sentencing by showing that they were responsive to public criticism of sentencing decisions. The Chief Justice acknowledged public criticism of particular sentences for inconsistency or excessive leniency was sometimes justified and that such criticisms were not allayed by the usual case-by-case appellant process. The Chief Justice in that case went on to make this comment—

It appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving. The existence for such disparity constitutes an appropriate occasion for the proclamation of a guideline judgement by a Court of Criminal Appeal.

The Chief Justice felt that the nature of the offence was not one that the court could devise a simple table—I make that very clear—in which indicative penalties could be linked to a quantitative measure of the offence. However, in the case of an offence covering a wide range of conduct which varies quantitatively, the court can indicate in a general way the kind of case which would usually require a particular level of sentence whilst acknowledging that there will always be exceptional cases.

The New South Wales Court of Appeal in that decision determined that what needed to be done was a reflection in its own reasoning of the public concern that courts sometimes are seen as being lenient. I would ask the Attorney-General whether there is any suggestion from his perspective that that is perhaps a relevant step to consider here in Queensland. Certainly not by imposing a table—that cannot be done because circumstances vary—but is there some worth in that comparative arrangement being considered at least in very general terms?

I raised another point with regard to section 328A with the Attorney's staff this morning. Often the judge imposing the sentence in these matters will also impose a disqualification period under Queensland legislation, though not under the Criminal Code—I accept that. Anybody who has a disqualification in excess of two years has the right at the end of two years to come back to the court and seek the renewal of their licence. A person can have a life disqualification but they can come back after two years, if they are so minded, and seek to have the disqualification lifted. Though I accept that it is most unlikely in these circumstances that a court will lift the disqualification after two years, is there some worth in considering the trial judge in a matter of this nature having the capacity to impose a 'not before' time, irrespective of other terms of the transport legislation before which a person cannot return to seek their licence? I will come back to the clauses with regard to section 328A in the debate at a later stage.

I do want to go on to section 408D, which is also a new provision in the Criminal Code which deals with identification information. The explanatory notes highlight that advances in the technology have established a growth industry where crimes are committed through the utilisation of technology mostly with regard to credit card skimming, where financial details are obtained through a variety of methods including the use of electronic devices in banks and automatic teller machines that read the information on EFTPOS cards and other machines. That information is then downloaded and used to obtain funds or goods via that information.

The paper titled *Australasian Identity Crime Policing Strategy 2006-2008* acknowledged that identity fraud is a priority matter in the Commonwealth, states and territories of Australia. In March 2003 the Australasian Identity Crime Policing Strategy 2003-05 was launched by the Australasian Police Commissioners. The strategy was endorsed by the Australian Police Ministers Council in July 2003 and the Model Crime Code Officers Committee of the Standing Committee of Attorneys-General issued a discussion paper in March 2004 on the question of credit card skimming devices. Page 4 of the document states—

The 'skimmed' data is generally stored in the skimmer and then transmitted to a computer. The data can then be downloaded onto another magnetic strip, in most cases a counterfeit credit card which becomes an exact copy of the original. However the skimmed credit card data can be downloaded onto any form of media that has a magnetic strip, including a library card, a security card or even a parking ticket.

The counterfeit cards or other media are then used to make fraudulent purchases of goods or to withdraw funds from ATMs. The form of media that the skimmed data is downloaded onto will limit the possible uses—data on a parking ticket is unlikely to be used to purchase goods 'over the counter', but could be used in some instances to withdraw cash from ATMs.

Most people in the House would recall the news late last year of three men standing around ATM machines. They had implanted a skimming device into the segment of the machine that reads the card as it goes into the machine itself. When the card was withdrawn, the information was gathered by the device which was clicked to the machine. That was then downloaded onto a computer or other substance or other item and used to acquire funds.

At page 5 of the document the following comment is made—

The most common skimmers are reprogrammed magnetic strip readers. Battery powered magnetic strip readers that are the size of a cigarette packet are commercially available in Australia and have a wide range of legitimate uses. These commercially available magnetic strip readers can be reprogrammed to act as skimmers, although this requires a degree of technical sophistication.

Hand-held, portable skimmers have been found in Australia that are no larger than a pager, however there are reports that even smaller skimmers, the size of a book of matches, have been found overseas. These more sophisticated skimmers appear to be designed as skimmers rather than modified commercial magnetic strip readers.

When people go into a shop and their card is skimmed to buy petrol, those skimmers can be reprogrammed not just to skim the card but to skim and capture the information. It is those sorts of devices that this legislation is meant to capture.

In 2002 credit card fraud cost the Australian economy between $100 million and $120 million and it is estimated that world wide something like $3 billion is lost per year. Technology clearly is advancing day by day. It is moving ahead in significant leaps and bounds. It will be critical that we have legislation that continues to keep in contact with that technology because this form of crime is technology driven.

A clause of the bill deals with information for the purpose of committing or facilitating the commission of an indictable offence for which a person can serve three years imprisonment. It was pointed out to me during the briefing that this would not cover under-age children who entered a licensed premises or perhaps used a false ID card as they would not be indictable offences. In any event, that is certainly not the intention of this particular clause; it is to capture those people who are going to use the information to defraud banks, entities and other financial institutions. I will come back to clause 6 during the consideration stage as there are a number of questions I want to put to the Attorney.

The third matter, and in some ways the most important one, is the Court of Appeal decision of Newberry v Suncorp Metway Insurance. Very quickly, the circumstances of that case were that Mr Newberry in his role as employee was in a motor vehicle being driven by his brother. He was in a course of conduct tied to his employment when there was a motor vehicle accident and he was injured. Mr Newberry took the step of suing the compulsory third-party insurer of the vehicle and did not take any

action against the employer. The Court of Appeal in the determination ruled that the action had to fall for determination under the Civil Liability Act. The act itself quite clearly is meant to exclude any action related to workers compensation or where a person is injured whilst he is an employee.

The amendment will simply rectify that situation and clarify once and for all that that is not the case: that today, or in the future, Newberry's case would not be decided in that manner and that Newberry's set of circumstances would in fact fall for determination under the relevant workers compensation legislation. The only question I have in regard to that matter for the Attorney is the issue of retrospectivity. I understand of course that the legislation will only bar actions that occurred or were occurring from 6 November 2006. That means it is most unlikely to catch any action because it is almost impossible for action to have been commenced in these circumstances since that date, given it is only March of 2007. I will come back to those issues if I can, but I can indicate, as the Attorney-General may well have guessed, that we will be supporting the legislation before the House.