



Speech by

Hon. Cameron Dick

MEMBER FOR GREENSLOPES

Hansard Tuesday, 1 September 2009

CRIMINAL CODE (MEDICAL TREATMENT) AMENDMENT BILL

Hon. CR DICK (Greenslopes—ALP) (Attorney-General and Minister for Industrial Relations) (7.38 pm): I move—

That the bill be now read a second time.

The purpose of the bill before the House is to ensure that our Criminal Code remains relevant to the realities of life in Queensland today and into the foreseeable future. The amendments contained in the bill clarify that the section of the Criminal Code that applies to surgical procedures should also apply to medical procedures. The government's overriding policy prescription is to clarify the law. It is not to alter the current law with respect to abortion, either to increase or decrease its prevalence or availability.

I fully accept that members of parliament from either side of the House and Independent members of parliament have varying views on the substantive issue of abortion, and that these views are honestly and legitimately held. This legislation is not about seeking to alter the current law, which has been clear in Queensland since 1986. It is about making sure that the law is, as far as is possible, certain for both health professionals and the public.

There can be little doubt that when Sir Samuel Griffith drafted the Criminal Code he could not have foreseen many of the technological or medical advances that have occurred over the last century, and therefore the provisions necessitate revision from time to time to ensure they remain clear. Section 282 of the Criminal Code is one such section. This section relieves a person from criminal responsibility where they perform an operation on a person for the patient's benefit or where the operation is performed upon an unborn child for the preservation of the mother's life. To obtain protection currently under section 282, the surgical operation must be (a) performed in good faith; (b) performed with reasonable care and skill; and (c) reasonable having regard to the patient's state at the time and all of the circumstances of the case. The section has operated since the inception of the code as a general excuse for a range of surgical procedures that, but for the operation of the section, would be a criminal offence.

Historically medicine concerned itself with the diagnosis of illness with limited tools for treatment or care. Surgery grew from responding to emergencies such as a trauma, injury and tumours large enough to disrupt normal physiological functions. The 20th century saw a phenomenal growth in the range of medical and surgical interventions including antibiotics, chemotherapy, radiotherapy, safer anaesthesia, ventilation, cardiac surgery and laparoscopic surgery. Fifty years ago the concept of a cardiologist being able to stent a coronary artery or replace an aortic valve without a surgical operation was unheard of. Now, daily, patients have heart arteries unblocked through catheters passed from an arm or a leg. Similarly, radiologists will unblock a renal artery without the need for surgery. The historical distinction between medicine and surgery is being challenged.

Moreover, increasing best practice in the treatment of many conditions requires a combination of surgical and medical treatment. Cancer patients will often have initial surgical treatment and the combination of radiotherapy and chemotherapy depending on various prognostic factors. In some cases medical approaches have become the first line of approach, with surgery reserved for those unsuitable for medical treatment or who fail medical therapy.

When the Criminal Code was originally written the only safe approach to terminations of pregnancy to preserve the life of a mother was surgical. In some cases this remains the best approach. But in the overwhelming majority of cases, termination of pregnancy is now undertaken using a combination of medications. This is the world standard resulting in fewer long-term complications and removing the need for anaesthesia. It makes no logical sense for the protection that section 282 offers for surgical interventions not to apply equally for drug interventions for the same procedure in the same circumstances. It makes no sense that a cardiologist, radiologist or gastrologist would not have the same defence in law available to them as a surgeon when they carry out procedures that are not usually defined as surgery but achieve a similar outcome.

Should there be a difference in law between surgical removal of a tumour, the embolisation of the tumour or the implications of radioactive pellets or local infusion of a toxic drug? It does not make sense. However, the current section 282 excuse does not explicitly state that it applies to non-surgical medical treatment—for example, prescribing or administering a drug, as well as surgical operations.

The government's amendments clarify this situation to make it clear that the same protection, under the existing law, applies to medical as well as surgical treatments. This protection for surgical and medical procedures is a general defence for proper medical practice and is not specific to terminations. As I noted at the outset, medical science has advanced since the inception of the code. There are a range of medical treatments that now provide an alternative to more traditional surgical methods. Such medical alternatives are frequently less invasive, involve fewer risks to the patient and do not necessitate an act upon the patient that could otherwise constitute a wounding or grievous assault.

Gastric and duodenal ulcers were traditionally treated surgically, but medical developments now mean that they can be effectively treated through the use of antibiotics and anti-ulcer medications. Likewise, benign prostatic hypertrophy, voluntary castration or behaviour-altering brain surgery now have medical alternatives.

Another common example of medical treatment would be modern cancer treatment, where radiation and chemotherapy are commonly used in treatment. In relation to terminations, the amendments reflect the development of medical treatment—namely, the use of drugs—which provide alternatives to traditional surgical procedures. Bearing these medical advancements in mind, there is no substantive reason to distinguish between surgical and medical actions for the purposes of the excuse. The core policy goal remains to ensure that doctors who are lawfully providing a treatment can do so in the way that is best for the patient without fear they will be prosecuted because they administered a pill rather than an operation.

Were a doctor to be presented with a patient in need of treatment, it would seem incongruous for a treating doctor to be criminally liable for treating the person with a pharmaceutical or other medical treatment but be protected from criminal liability for achieving the same result through what may be a more risky and painful surgical procedure. Doctors and others need to be certain of the legal protection they enjoy when administering appropriate medical treatment to patients. Clarification that the same legal protection applies to both forms of procedure is consistent with both good public policy and responsible medical practice.

The proposed amendments to the Criminal Code will extend the operation of the section 282 excuse to the provision of medical treatment. Section 282 applies to a person who performs in good faith and with reasonable care and skill a surgical operation upon a patient for the patient's benefit or upon an unborn child for the preservation of the mother's life. The defence will be amended by mirroring the 'performance of a surgical operation' with the concept of 'providing medical treatment' for both parts.

The bill also introduces an amendment to the Criminal Code to insert a subsection which clarifies that a person does not commit an offence under the code where that person allows a treatment to be delivered to them or who self-administers a treatment if the treatment is administered, conducted, prescribed or otherwise delivered under the protection of section 282 as amended—that is, if the treatment falls within the excuse in section 282, then the patient will be relieved of criminal responsibility. This will also apply where a person acts upon the reasonable belief that the direction of a health professional to self-administer a medical treatment is lawful. A patient, therefore, will not be charged with a criminal offence where they have followed a reasonable direction, albeit one they could not have known was unlawful. In the context of medical treatment, this provision is important because such treatments often involve a component of self-administered prescription drugs. Therefore, it is necessary to clarify that a patient does not commit an offence by self-administering a treatment in compliance with a prescription.

Section 11 of the Criminal Code already provides that a person is not criminally responsible for conduct unless the conduct constituted an offence when it occurred and at the time the person is charged with the offence. The final aspect to the amendments of note is that, in addition to the section 11 provisions already within the code, it will apply retrospectively to any proceedings already commenced. It should be noted in this context that no such proceedings exist. It was, however, important to ensure that the medical community in Queensland were given the highest possible certainty as to the implications for these amendments to ensure that business as usual in hospitals across the state was not affected.

There is little doubt that there are many that will view these amendments through the single issue of terminations of pregnancies. It would be naïve to suggest that this issue has not been a key consideration in the reform of this provision of the code. However, the proposed amendments should not be misinterpreted as doing anything to alter the current position at law of abortion within the state.

Section 282 is a general excuse at law. Whilst limb 2 of the section may make clear provision for the situations in which the operation of the excuse will intersect with procedures involving an unborn child, limb 1 has a far more general application. The current amendments are intended to clarify the excuse to ensure it allows medical practitioners and others who provide surgical and medical treatment to patients with the certainty to do their job.

I conclude by reiterating that the government's overriding policy prescription in introducing this bill into the parliament is to clarify the operation of the criminal law in Queensland. It is not to alter the current law with respect to abortion. As I noted earlier, members of parliament from either side of the House and Independent members of parliament have varying views on the substantive issue of abortion. The law in Queensland has been clear since 1986 and these amendments are intended to make sure that the law is, as far as is possible, certain for both health professionals and the public. This bill is not about altering the substantive law concerning abortion; it is about clarifying the current law in our state. I commend the bill to the House.