



Speech by

Hon. Cameron Dick

MEMBER FOR GREENSLOPES

Hansard Tuesday, 9 February 2010

CRIMINAL CODE (ABUSIVE DOMESTIC RELATIONSHIP DEFENCE AND ANOTHER MATTER) AMENDMENT BILL

Hon. CR DICK (Greenslopes—ALP) (Attorney-General and Minister for Industrial Relations) (8.29 pm), in reply: At the outset I want to thank all honourable members for their contributions to this debate on the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill. I particularly want to thank members of the government for their support and, in particular, the role played by the member for Toowoomba North in initiating this project.

Two broad themes came through this debate. I thought it was a very thoughtful and measured debate and it was a credit to all members of the parliament. Firstly, there was a broad and deep condemnation of domestic and family violence by all members who spoke to the bill. I think that is a great credit to the parliament. Domestic violence is a scourge on society, and it is a credit to the parliament that each and every member who spoke to the bill—and a very significant number of the members of this parliament spoke to this bill—condemned domestic and family violence absolutely in all its forms.

I want to acknowledge the work of the men and women who work each and every day to support the victims and survivors of domestic violence. Many groups in which those people were involved were mentioned by members of parliament, and particularly the work that those groups do in their respective electorates and communities. Many of the people involved in those groups are volunteers, and I want to pay tribute to them. In fact, many of those people work to help rehabilitate people who perpetrate domestic violence as well. The particular groups I want to acknowledge are the Women's Legal Service, the Domestic Violence Prevention Centre Gold Coast and, in my electorate, the Zig Zag Young Women's Resource Centre at Camp Hill, which provides information, advocacy, referral support and counselling services to young people, particularly those who have experienced sexual assault and violence and homelessness. These groups do wonderful work in the community and I want to put on record my thanks for the work that that organisation does in my electorate.

On a broader level, the other issue that came through the debate was the acknowledgement by many members of parliament of the disproportionate impact of mandatory sentencing in cases where individuals are charged with the offence of murder and the disproportionate impact that the mandatory sentence of life imprisonment can have. This bill is a legislative measure that the government is moving through the parliament to try to address that disproportionate impact that mandatory sentence can have. In Queensland, quite rightly, the mandatory sentence for murder is life imprisonment. But as all members in this debate have acknowledged, that can have a disproportionate impact in cases where someone has been a victim of serious domestic violence in an abusive relationship. In fact, if I am not mistaken the member for Currumbin said that more can be done in relation to discretionary sentencing. I think that is right. I think it is something that all members of parliament need to consider as we move forward and we consider crime and punishment in our state.

Criminal sentencing is a very significant issue in the Queensland community and I think acknowledging—and I think these were the words that the member for Southern Downs used—the disproportionate impact of mandatory sentencing in the case of life imprisonment in respect of this bill is a

lesson for all of us. We need to lift the debate in Queensland about crime and punishment. We need to lift the debate about sentencing. Sentencing needs to be evidence based; it needs to be soundly based. So calls for mandatory sentencing across-the-board, which has happened in this place previously, need to be put in context. When people again come to this House and talk about mandatory sentencing, they should remember that mandatory sentencing has the effect of having a disproportionate impact on people who come through the criminal justice system. So the Sentencing Advisory Council that I have announced on behalf of the government will be a way for all members of parliament to engage in that dialogue with the community so that we can have a high-level debate, which is our duty when it comes to crime in this state. I look forward to that debate continuing.

The bill amends the Criminal Code in two ways. Firstly, it inserts a new partial defence to murder of killing in an abusive domestic relationship. This defence will apply to victims of seriously abusive relationships who kill their abusers. The partial defence recognises the importance of maintaining a mandatory life penalty for persons convicted of murder. However, it also recognises that victims of seriously abusive relationships merit special consideration within the criminal justice system. The partial defence will be available only where, firstly, the accused has unlawfully killed a person; secondly, the person killed was in an abusive domestic relationship with the accused and had committed acts of serious domestic violence against the accused in the course of that relationship; thirdly, at the time of the killing the accused believed that his or her acts were necessary for the person's preservation from death or grievous bodily harm; and, fourthly, there were reasonable grounds for this belief, having regard to the abusive relationship and all the circumstances of the case.

In operation, the accused will bear the evidentiary onus, meaning that the accused will have to ensure there is sufficient evidence before a jury to raise the defence. It is immaterial whether this evidence is introduced by the prosecution or the defence. Once the evidence on the case raises the defence, the onus will be on the prosecution to negative the defence beyond a reasonable doubt. That is also how the existing defences of self-defence and honest and reasonable mistake of fact operate under our Criminal Code. Importantly, the defence is framed in a way that ensures that it will not be abused by unmeritorious individuals—for example, the primary perpetrators of the domestic violence.

As I said earlier, I would like to acknowledge the contribution to the consideration of this issue by the stakeholder groups. In particular, the Women's Legal Service prepared a detailed and thoughtful analysis of the law relating to this issue and took the time to meet with me to discuss its concerns. Whilst I acknowledge the matters raised by the Women's Legal Service, I believe that the bill as presented to the parliament represents the proper approach to be taken at this time.

The first concern of the Women's Legal Service is that the defence is only a partial defence in that it reduces the offence from murder to manslaughter. This government is of the view that this approach best reflects community attitudes. Women who kill in these circumstances should be able to have access to mitigating factors on sentencing but not be totally excused for the killing. The Women's Legal Service also has some concerns about other defences being excluded if this defence is used. That is not the intention of the bill. Certainly, the explanatory notes expressly provide that all other available defences will still apply. If the courts interpret the law in the manner that has been suggested by the Women's Legal Service, of course that is something we will look at but, at this stage, we have no reason to believe that the courts will do so.

There were other concerns raised about drafting issues. Again, if these issues prove to be problematic in the future the government will, of course, give further consideration to the issues. However, the government's assessment of the bill as drafted is that it will achieve the policy objective and that there is no need to make amendments.

The bill also amends section 408D of the Criminal Code by inserting a new offence of possessing equipment for the purpose of obtaining or dealing with identification information. For example, it will be an offence to possess an ATM-skimming device. Under section 408D of the Criminal Code, it is already an offence to obtain or deal with another entity's identification information with the intent to commit an indictable offence. Therefore, it is already an offence to obtain or use another person's credit card details by skimming an ATM or EFTPOS machine. Some common items can be used to obtain identification information, including mobile phones with cameras or laptop computers. To prevent the mere possession of these items being unlawful, the offence requires the prosecution to prove that the accused possessed the items for the purposes of committing an identity theft offence.

I will now address some of the matters raised by honourable members during the course of the debate. At the outset, I would like to affirm the comments made by the member for Southern Downs, who acknowledged the disproportionate effect that a mandatory life sentence may have upon offenders. I mentioned that earlier. So when that debate comes on, I hope members can, in a solemn and dispassionate way, reflect on the debate we have had on this bill and reflect on their comments about the disproportionate impact that mandatory sentencing can have on people in the criminal justice system. As I said earlier, no-one is arguing that there should not be a mandatory life sentence for murder. Murder is the

most heinous of all crimes and is deserving of the most serious penalty that the law allows. But even in such a situation, the honourable member for Southern Downs has acknowledged that there are circumstances in which such a sentence may have a disproportionate effect. If true in the context of this offence and this bill, it no doubt remains the case in other cases.

I also note that the member for Glass House appeared to go further with respect to mandatory life sentencing for murder, quoting from the Legal Aid submission that advocated revisiting this penalty. It has been the view of the government that the community would not accept a change in the penalty for murder, which would apply across-the-board. Instead, it has been the government's view that the most appropriate mechanism through which to address any disproportionate effect is through the provision of appropriate defences, both partial and full, that can be used in relevant cases of murder.

The member for Southern Downs compared this defence with the existing defence of self-defence. The focus of the existing defence of self-defence and the reasonableness of the accused's reaction is on the initial assault by the deceased. In the new defence, the reasonableness is linked to the belief of the accused, bearing in mind the history of the domestic relationship. Self-defence requires the presence of an initial assault and an accused responding to that assault. This defence does not require the initial unprovoked assault.

The member has also asked why the provision does not contain ancillary evidentiary provisions as suggested by the Bond University professors in their final report on the topic. In their final conclusions on the topic, the Bond University professors recommended the inclusion of an ancillary evidentiary provision to assist juries in determining whether there was a genuine belief in the necessity of the action and reasonable grounds for this belief. As a result, the details of their suggestion were put to key legal stakeholders. The unanimous response was that it was not necessary to include such provisions given the existing laws and rules relating to the admission of evidence in a criminal trial. Such provisions do not exist in relation to the operation of any other defence in the Criminal Code. The government is satisfied, having regard to the broad consultation on the issue, that they are not necessary for the effective operation of the defence.

The member for Southern Downs also asked about the application of the defence and who is able to rely on it. The member for Currumbin was also interested in this issue. The bill provides a defence to those in a domestic relationship. The term 'domestic relationship' is defined by reference to the Domestic and Family Violence Protection Act 1989 and includes spousal relationships, intimate personal relationships and family relationships as defined under that act. These provisions contemplate past and present relationships.

The extension of such a defence to family members or other third parties to the relationship beyond the proposed definition for domestic relationship was not canvassed in the Queensland Law Reform Commission report or the original discussion paper released by Bond University. It was not raised in the report of the Task Force on Women and the Criminal Code. The issue has therefore been the subject of very limited consultation and law reform consideration in Queensland.

One risk with extending the defence may be the use of the defence by unmeritorious defendants whose motivations to kill may be more related to anger, revenge and vigilantism rather than fear, desperation and a belief that there is no other viable way of escaping the danger as a result of being the subject of the abuse. Relationships are often complex. The dynamics of domestic relationships can often be misinterpreted by third parties or family members, particularly by children of relationships. There is also the risk of allowing unmeritorious parents who murder their children to utilise the defence, something that we would all seek to avoid.

The member for Currumbin was concerned about the possible abuse of the defence, as was the member for Gregory. The defence is framed in a way that will ensure that it is reserved for genuine victims and not abused by unmeritorious individuals—for example, the primary perpetrators of the violence in the relationship. Firstly, it requires acts of serious domestic violence to have been perpetrated against the person. This will exclude those who may have been subject to minor levels of domestic violence, for example where the victim may have on occasions responded to the primary perpetrator of violence with low-level violence or threats. Secondly, at the time of the killing the person has to have believed his or her acts were necessary for the person's preservation from death or grievous bodily harm. This will require an analysis of the motivation and reasoning behind the killing. Thirdly, that belief will need to be based on reasonable grounds having regard to the abusive domestic relationship and all of the circumstances of the case. Therefore, the defence is not dependent on the accused's belief alone. It will require a jury to analyse all of the evidence and have regard to the reasonableness of the belief.

A number of members opposite raised concerns about the reference to serious violence including acts that appear minor or trivial when considered in isolation. Proposed subsection 4 states that a history of acts of serious violence may include acts that appear minor or trivial when considered in isolation. It does not dictate what amounts to serious domestic violence. It is a facilitating provision that allows context

to be given to the circumstances of the relationship. It ensures a correct picture of the cumulative violence within the relationship is presented in the case. The defence will still require that when viewed as a whole the history of the violence in the domestic relationship was in fact serious. It will also be necessary for the actions of the accused to have come from a belief that the actions are necessary to preserve him or her from death or grievous bodily harm and that such belief is reasonable.

The member for Currumbin asked why this was not a complete defence. During their detailed review on the development of the defence, Bond University professors Mackenzie and Colvin raised the question of whether the defence should operate as a complete defence. A complete defence would mean that an accused charged with murder would escape criminal responsibility entirely. A partial defence would mean such an accused would be held responsible for the killing where no other defence operated but would be able to reflect the individual mitigating circumstances of the case during their sentence. A majority of key stakeholders who provided feedback during the Bond review supported the introduction of a partial defence over a complete defence.

There is some argument that the value our community places on human life must prevent us allowing killing in non-confrontational, unreasonable or excessive cases to go unpunished. It is inconsistent with community standards regarding acceptable levels of violence and may be interpreted as allowing the person to go unpunished on the basis that the abuser deserved it. The opposing argument is that the victim of the abuse who kills the abuser does not deserve a conviction for murder and the sentence of mandatory life imprisonment.

The government is of the view that persons should not go unpunished where their actions are deliberate and where there is no immediate assault or threat of assault or reaction in the heat of the moment or as a result of a mental illness. The defence does not absolve the abused person of criminal responsibility altogether. It does not interfere with the operation of the existing complete and partial defences in the Criminal Code. It allows a sentencing court to have regard to mitigating circumstances of the accused. As such, it represents a responsible and fair balancing of competing interests.

In relation to the identification information defence, the member for Currumbin has stated that the government has reduced the penalty. It does not amount to a reduction of the maximum penalty. The elements of the new offence are different from the existing offence. In order to convict a person under section 510 of the Criminal Code, it is necessary to prove that the person is intending to use the thing to forge a document. Therefore, in order to gain a conviction under section 510 the prosecution must prove beyond a reasonable doubt the requisite intent which includes proof beyond a reasonable doubt that the information or thing being forged is a document. While the definition of 'document' as provided in the Criminal Code is broad, the proposed new offence does not contain such a hurdle. When police apprehend a person who possesses equipment, they have options to charge under existing section 510 if the evidence exists to support the charge. If not, then this new section provides an alternative charge. My experience of the Queensland Police Service is that it looks at these matters very carefully and charges appropriately.

The member for Southern Downs raised a concern in relation to the abusive domestic relationship defence that a jury may choose to apply this defence as opposed to the defence of self-defence and as a result the intent of the bill would be subverted. In order to rely on the defence the accused person will bear an evidentiary onus—that is, the accused will need to ensure that there is sufficient evidence before the court, whether through the Crown case or the accused's case, for the defence to have been raised. This may include evidence from the accused himself or herself or through a version provided to police by the accused. It may also include witness accounts and the calling of experts. Once the defence is raised on the evidence, the state will then bear the onus of disproving the defence beyond reasonable doubt. This process is also the process for self-defence and some other defences under the code. The defence does not prevent the operation of other defences such as self-defence and provocation. It will operate in addition to other existing defences and excuses within the Criminal Code for victims of an abusive domestic relationship who kill their abuser. A trial judge is required to direct the jury in relation to all evidence in the case relevant to the reaching of a verdict, including in relation to defences.

The member for Kawana was concerned that the bill did not include provisions to allow expert witnesses to be called to support the defence case. I would clarify for the member that such specific provisions are unnecessary for the operation of the defence. The issue of evidentiary provisions was put to key legal stakeholders and the unanimous response was that it was not necessary to include such provisions given the existing laws and rules relating to the admission of evidence in a criminal trial in Queensland. Such provisions do not exist in relation to the operation of any other defence in the Criminal Code. The government is satisfied having regard to the broad consultation on the issue that they are not necessary for the effective operation of the defence.

Both the members for Gaven and Bundaberg questioned the appropriateness of the onus of proof applied in this bill. Once the defence is raised on the evidence, the Crown will then bear the onus of disproving the defence beyond reasonable doubt. The onus of proof adopted in this bill reflects the current

process in relation to most of the existing defences under the Criminal Code, including self-defence, provocation and reasonable mistake of fact.

In conclusion, I would note that we do not implement the partial defence to murder included in this bill in the anticipation, let alone hope, that it will be used. Like many such amendments to our criminal law, we hope it will remain dormant, dusty and unused, one day to be viewed as an historical quirk. We hope that domestic violence will never again drive an individual to kill their abuser, because we hope that domestic violence itself can be eradicated. But perhaps that might be somewhat naïve.

Sadly, as all members of parliament recognised during this debate, domestic abuse and family violence exist within our community and tragically can have fatal consequences. As important as it is to punish those who commit offences, it is our responsibility to do everything we can to prevent such acts of violence and any acts of violence that are a precursor to them. We as a government, as a parliament and as a community must never dismiss nor forget our twin obligations: to condemn in the strongest terms possible domestic violence wherever and whenever it may occur and to do all we can to support victims of such abuse.

I again thank all honourable members for their contributions to this very sobering debate. I also thank all stakeholders for their valuable input during the development of this piece of legislation. In particular I thank the Bond University professors who worked on this project, Professors Geraldine Mackenzie and Eric Colvin, for their very fine work on their report to government. I also recognise the Queensland Law Reform Commission, which highlighted this issue to government, and the stakeholders who provided such detailed and thoughtful submissions to assist the Bond University professors in their report to government. I also particularly acknowledge my departmental officers Kerry Bickle, Andrew McGills and Louise Shepherd for their work on this important project. I commend the bill to the House.