



Speech by

Hon. Cameron Dick

MEMBER FOR GREENSLOPES

Hansard Wednesday, 24 November 2010

CRIMINAL CODE AND OTHER LEGISLATION AMENDMENT BILL

Second Reading

Hon. CR DICK (Greenslopes—ALP) (Attorney-General and Minister for Industrial Relations) (3.00 pm): I move—

That the bill be now read a second time.

The criminal justice system plays an important role in creating a safe community for all Queenslanders. This bill represents the Bligh government's continuing commitment to monitor Queensland's criminal laws and amend the laws as required to ensure they reflect modern community standards and values.

The primary objectives of the Criminal Code and Other Legislation Amendment Bill 2010 are to amend the excuse of accident found in section 23(1)(b) of the Criminal Code to omit the term 'accident' and substitute the term with a phrase which better reflects how the courts have approached this exception to criminal responsibility; to recast the partial defence of provocation which is found in section 304 of the Criminal Code to address its bias and flaws; to amend relevant provisions of the Criminal Code to overcome evidentiary difficulties which can arise in the prosecution of wilful damage cases where the owner of the relevant property is not readily identifiable, for example, gravestones and certain public property; to criminalise the unlawful interference of graves and like property such as war memorials, where such interference may not fall within the meaning of damage, to allow for a prosecution of wilful damage; to amend the Criminal Code in relation to the joinder of charges which will contribute to the modernisation and streamlining of the criminal justice system; to amend the Appeal Costs Fund Act 1973 to allow a convicted person to recover from the appeal cost fund the additional costs incurred in appealing their sentence or in responding to an appeal against their sentence, where the appeal is relevant to the giving or review of a guideline judgement as contemplated in the Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010; and to amend the Retail Shop Leases Act 1994 to ensure that rent reviews are not avoided under ratchet clauses preventing decreases in rent and to enable assignees from lessees to claim compensation under section 43 of the act.

The Queensland Law Reform Commission's final report titled *A review of the excuse of accident and the defence of provocation* was tabled in parliament on 1 October 2008. The QLRC recommended that the Criminal Code should continue to contain an excuse of accident and endorsed the current reasonably foreseeable consequence test as the appropriate test to determine whether an event occurred by accident. This test provides that a defendant will not be criminally responsible for an event unless the prosecution can establish that the defendant intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the defendant would reasonably have foreseen the event as a possible outcome.

Although it did not form the basis of a recommendation, the QLRC canvassed the issue of the term 'accident' and how it does not reflect the essence of the excuse, and may create misunderstanding within the community. As stated in the report, the word 'accident' may be thought to convey an occurrence that

happens without fault, something tragic brought about by a random unexpected act. Under section 23(1)(b), the term has a different meaning—an unintended, unforeseen and unforeseeable event. Where a death flows from an assault, it is difficult for the community to understand how an accused may be acquitted on the basis the death was an accident. The bill amends section 23(1)(b) to omit the term 'accident' and legislatively enshrine the reasonably foreseeable consequence test.

In recent years the courts have dealt with a number of cases where the prosecution for murder has resulted in a conviction for manslaughter at trial, after the accused has submitted evidence that taunts of infidelity have prompted them to lose self-control in the heat of the moment. A person who is otherwise guilty of murder may instead be convicted of manslaughter if the jury decides that the murder was committed while the accused was provoked. The partial defence of provocation applies where a person does the act which causes death in the heat of passion caused by sudden provocation and before there is time for the person's passion to cool. If raised on the evidence, the onus is upon the prosecution to negative the defence beyond a reasonable doubt.

As outlined in the QLRC report at page 225, it is not uncommon for men who kill their intimate partners to raise the defence of provocation on the basis that they were provoked to kill by their partner's infidelity, insults or threats to leave the relationship. Further, at page 465 the QLRC states—

The defence operates in favour or those in positions of strength at the expense of the weaker. The application of the defence has produced different outcomes in cases that involve comparable circumstances. In accordance with authority, trial judges play their role as 'gate-keeper' with caution. And it is at least arguable that the defence has been left to the jury, contrary to authority, in those cases in which the provocative conduct consisted only of words.

The QLRC recommended that the defence be recast to address its bias and flaws, in particular to include a provision to the effect that, other than in circumstances of an extreme and exceptional character, the defence cannot be based on words alone or conduct that consists substantially of words; to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship; and to place the onus of proof upon a defendant seeking to rely on the partial defence.

The bill implements these QLRC recommendations by amending section 304 of the Criminal Code to remove insults and statements about relationships from the scope of the defence and to recognise a person's right to assert their personal or sexual autonomy. The amendments will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy and will reflect that, in determining what are circumstances of a most extreme and exceptional character, regard may be had to any history of violence that is relevant in all the circumstances—for example, a history of domestic violence between the defendant and the deceased.

The bill also reverses the onus of proof in accordance with the QLRC's recommendation. The reversal of onus takes into account that the prosecution is often not in a position to contest the defendant's claims because the only other witness is the deceased; the prospect of more clearly articulated claims of provocation; the enhanced capacity of the trial judge to prevent unmeritorious claims being raised; and the analogy with the defence of diminished responsibility, which also reduces murder to manslaughter, and where the defendant bears the onus.

In April this year the community expressed outrage when four people charged with damaging gravestones had charges dismissed over the question of whether the damage had been caused without the owner's consent. The amendments in this bill reflect the government's commitment to protect important places of remembrance such as graveyards. The legislation reflects community expectations concerning how places of remembrance should be respected, and why those people who commit serious acts of vandalism should be punished.

An element of the offence of wilful damage which must be proven by the prosecution is the absence of the owner's consent. Proving this element can be problematic where the owner of the property is not readily identifiable. The bill addresses the issue by amending the offence of wilful damage of property fixed in a cemetery, crematorium, public street or square by reversing the onus of proof concerning the issue of unlawfulness and requiring the defendant to prove that he or she acted with the consent of the owner or entity responsible for administering the relevant site.

In recognition of the community's outrage at graveyard vandalism and similar conduct, the bill amends section 469 of the Criminal Code to provide an increased maximum penalty, where the damage or destruction is caused to a cemetery, gravestone, place of worship or war memorial. Further, a new offence of interfering with a grave and like property is inserted into the Summary Offences Act 2005. The new offence will address the issue of persons inappropriately interfering with graves and like property, but where the conduct does not, in law, amount to damage, to allow for a prosecution of the offence of wilful damage under the Criminal Code. Property is damaged within the meaning of section 469 when it is rendered imperfect or inoperative. The new offence is drafted to ensure conduct such as urinating on a grave and other such conduct that would offend a reasonable person is prohibited.

Other amendments in the bill include an amendment to section 568 of the code which provides for cases in which several charges may be joined to allow multiple offences of identity theft to be incorporated into a single count. Additionally, amendments are made to the Appeal Costs Fund Act 1973 to allow a privately funded convicted person, or Legal Aid Queensland, to seek reimbursement from the appeal costs fund for any additional expenses incurred as a result of an appeal against the convicted person's sentence or in responding to an appeal against their sentence where the appeal is relevant to the giving or reviewing of a guideline judgement as contemplated in the Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010.

The bill also amends the Retail Shop Leases Act 1994. Under section 43(1) of the act, a lessor can be liable to pay compensation to a lessee, for example, for taking actions that restrict the lessee's access to, or use of, the leased shop. Under section 43(2) of the Retail Shop Leases Act 1994, a lessor can be liable to pay compensation to a lessee for making a misrepresentation during the negotiation of a lease. In *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal and Another* [2006] QSC 172, the Supreme Court held that the provisions in section 43(2) could not be relied upon by an assignee from the lessee. It is only fair and reasonable that the right to compensation under section 43 should apply equally to an assignee from a lessee. The bill will apply to retail shop leases assigned or entered into after commencement.

Section 27 of the Retail Shop Leases Act 1994 limits the way rent for a retail shop lease may be reviewed. From the second reading speech and explanatory notes for the Retail Shop Leases Bill 1994, it was clearly the intention that the act would prohibit the use of 'ratchet' clauses where rent can rise but not fall. However, in *Connor Hunter (A Firm) v Keencrest P/L & Ors* [2009] QCA 156, the Queensland Court of Appeal held that the act permits 'ratchet' clauses. The bill will restore the intention of the legislation by ensuring that rent reviews are not avoided under 'ratchet' clauses preventing decreases in rent. The bill continues the Bligh government's commitment to the ongoing modernisation and reform of Queensland's legal system. I commend the bill to the House.