Speech by

Jarrod Bleijie

MEMBER FOR KAWANA

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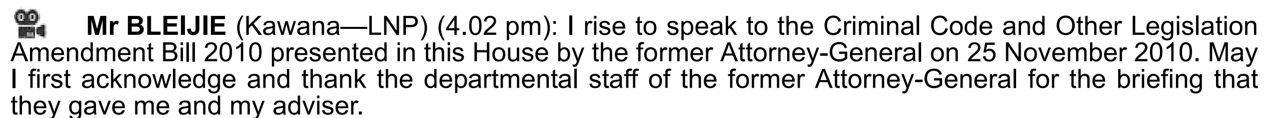
CRIMINAL CODE AND OTHER LEGISLATION AMENDMENT BILL



Mr BLEIJIE (Kawana—LNP) (4.02 pm): I rise to speak to the Criminal Code and Other Legislation Amendment Bill 2010 presented in this House by the former Attorney-General on 25 November 2010. May I first acknowledge and thank the departmental staff of the former Attorney-General for the briefing that they gave me and my adviser.

The proposed amendments in the bill follow the Queensland Law Reform Commission's final report entitled *A review of the excuse of accident and the defence of provocation*, tabled in the House in October 2008. Some 2½ years later we finally get to debate in this parliament the amendments proposed in this report relating to accident and provocation provisions within the Criminal Code and various other legislative amendments. I take this opportunity to commend the Queensland Law Reform Commission for the role it has played in providing assistance to the Attorney-General of the day in reviewing areas of law in need of reform in Queensland.

In the report tabled by the Law Reform Commission several recommendations were made with reference to section 23 of the Criminal Code—specifically homicide provisions relating to the excuse of accident, the partial defence of provocation and the complete defence of provocation to assault. Recommendation 10-1 states—

Section 23(1)(b) of the Criminal Code (Qld) should continue to excuse a person from criminal responsibility for an event that occurs by accident.

The purpose of this bill before the House is to omit the term 'accident' and substitute it with a phrase that better reflects the 'reasonably foreseeable consequence' test, a change canvassed by the Law Reform Commission.

The LNP is committed to a justice system that ensures the rights of victims of crime are foremost ahead of those of the criminals. The Bligh Labor government has a strong history of merely tinkering around the edges of our justice system, without any real change that restores any deficits. Any ideas which are often enacted, such as the Sentencing Advisory Council, come from LNP original policy as this long-term government does not have the will or the fortitude to enact real reform to the Queensland justice system.

As shadow minister I have noticed the government's legacy in neglecting to appropriately consult with relevant stakeholders and industry experts that deal with the practical elements of the laws passed in this House. The Bligh government has been caught out playing catch-up with yet another legislative amendment in this parliament.

In 2007 the opposition moved to introduce a new offence of assault causing death after several high-profile cases where the offender was able to use the accident defence definition to escape prosecution. The bill was debated and rejected by the Bligh Labor government in 2008. Instead, the issue was referred to the Law Reform Commission in another example of buck-passing and delay by a long-term Labor government that has run out of ideas, is low on talent and is very low of competence.

Government members interjected.

Madam DEPUTY SPEAKER (Ms van Litsenburg): Order! Members on my right!

Mr BLEIJIE: I did say it had some talent. If the unions and Mr Ludwig had their way we would have the member for Everton on the front bench and the member for Brisbane Central on the front bench, but we all know what happened there. Let us not talk about this 'can't-do' Labor government and talk about a 'can-do' LNP team.

Over three years since the referral, the government has finally introduced and we are debating a bill that the people of Queensland have been calling for since 2007, when we originally talked about it. There were three widely publicised cases of the tragic deaths of two young men, David Stevens and Nigel Lee, and a young woman, Taryn Hunt, who tragically died in separate incidents. Damien Karl Sebo was acquitted of the murder of Taryn Hunt and sentenced to 10 years for manslaughter. In this case the defendant, who was the boyfriend of the victim, claimed that he was provoked during an the argument. I am dealing with the elements of the provocation amendments in the bill.

There were also two other high-profile cases that were widely reported in the media. Jonathon Little was acquitted of the charges of murder and manslaughter of David Stevens. Ryan Moody was also acquitted of the murder and manslaughter of Nigel Lee. In both these cases, section 23 of the Criminal Code—the accident defence—was relied upon for Little and Moody, who both claimed that they should not have been held criminally responsible for the accidental deaths. Without referring to the specific details of these cases, the definition of the term 'accident' needed to be clarified under the provisions in Queensland's Criminal Code.

In debating the legislation that is before the House today, it is always important to consider historical context. The judicial interpretation of the current Criminal Code needs amending for clarity and, in a sense, to reinforce messages like 'One Punch Can Kill'—a campaign led by the Queensland Homicide Victims Support Group.

Section 304 of the Criminal Code refers to the issue of a partial defence and the prosecutorial burden required to negative this defence beyond reasonable doubt. This partial defence applies when someone commits the act which causes death in the heat of passion caused by sudden provocation and before there is time for the person's anger to subdue. The chairman of the Queensland Law Society criminal law section stated—

We do have some concern about the approach of changing long-established laws on the basis of public disquiet about a couple of cases.

I understand the concerns as stated by the Law Society on these amendments, but ultimately it is important that balance on the requirements of the onus of proof in these matters is struck.

Chapter 12 of the Queensland Law Reform Commission's report refers to data on intimate partner homicide. Section 12.2 of the report refers to anecdotal evidence from studies that consistently demonstrated that men and women kill under different circumstances. Section 12.2 of the report states in part—

Speaking generally, in the context of intimate partner homicides, men who kill their intimate partners (or their love rivals) are more likely to kill out of jealousy, to maintain control, in response to losing control of another person or to defend their 'honour'. Women are more likely to kill in fear or despair—to protect themselves or their children against a violent partner.

Section 12.3 of the report states—

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.

Recommendation 21.1 to 21.5 of the Law Reform Commission report suggests that the partial defence of provocation be recast to address the current bias and flaws. This is instigated by limiting provocation to serious wrongs, defining 'provocation' and, as discussed in section 21.163 of the report, reversing the onus of proof—which strikes the right balance between the rights of the individual and the wider interests of the community. The commission recommended that section 304 of the Criminal Code be amended by adding a provision to the effect that the defendant bears the onus of proof of the partial defence of provocation on the balance of probabilities.

The Queensland Law Society did express some concerns over these legislative amendments, stating that the proposed changes would lead to less autonomy for juries. I agree with the recommendations as proposed in the bill and submit to the House that the onus of proof needs to be reversed as stated in the following reasons provided in the explanatory notes. It states—

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the deceased;
- it will lead to more clearly articulated claims of provocation, which is fairer to all concerned including the jury;
- it enhances the capacity of the trial judge to prevent unmeritorious claims being raised; and
- an analogy with diminished responsibility, which also reduces murder to manslaughter, and where the defendant bears the onus.

A loophole that has been used by defendants in the past has been a verbal confirmation by the defendant of an encounter with the victim, which obviously cannot be verified if the victim has been murdered. I am pleased to see that this loophole will be tightened and the scope narrowed for a partial defence of provocation.

I would like to publicly acknowledge the Queensland Homicide Victims Support Group for the role they play in standing up for the rights of the victims. The group was founded in 1995 in northern Queensland when five families united to address the desperate lack of assistance and support for all families who have experienced the loss of a loved one through murder. They provide confidential peer support, assistance and understanding to victims of homicide and create awareness of the needs of homicide victims whilst promoting education and reform. I encourage all members to support the upcoming Homicide Awareness Day, which will be held in King George Square on Thursday, 5 May.

Section 469 of the Criminal Code refers to the offence of wilful damage whereby any person who wilfully and unlawfully destroys or damages property. There have been previous evidentiary difficulties that have arisen from wilful damage prosecutions where the owner of that relevant property is not readily identifiable—for example, as we discussed in the debate today, in the case of gravestones and certain public property.

In April 2010 the former shadow Attorney-General, the member for Southern Downs, backed calls from the Queensland police for changes to the current laws that allowed four satanic worshippers to walk free from court on charges relating to the smashing of graves at the Toowong Cemetery after the case was originally dismissed. The disrespect that was shown for this property was disgraceful. Respect for others and respect for property are two fundamental principles of society that are paramount. We as legislators need to ensure that the property, particularly any property in a cemetery, is protected and address any evidentiary difficulties that may arise in wilful damage prosecutions.

The issue at the Toowong Cemetery involved the fact that the prosecution did not tender into evidence that the accused did not have permission to destroy the graves in question. The age of the graves and the headstones were such that this was impossible and it created a loophole for the accused to have all charges dismissed. Needless to say that the Friends of Toowong Cemetery President, Hilda Maclean, has welcomed the legislative amendment.

There were also further issues raised about this case that exposed a lack of resourcing in the Office of the Director of Public Prosecutions. Some serious questions are raised as a consequence of this case about the workload of our struggling prosecutorial services. We know for a fact that caseloads per prosecutor in the DPP are significantly higher than in other states. Time and time again we hear about the lack of preparation time for prosecutors in the DPP office. In relation to this case we should be asking: why was this particular deficiency not picked up before the matter went to committal? This case has opened up ongoing problems with the director's office.

Changes to the Summary Offences Act insert a new section 26A to create the offence of interference with a grave. This new offence will apply to interference with a grave, vault, memorial in a cemetery or crematorium; a war memorial; or a thing fixed at a place of religious worship. For this particular offence, the definition of 'interfere' is stated to include dealing with the thing in a way that is likely to cause offence to a reasonable person. This new offence will extend to acts such as urinating on a war memorial or conducting a satanic ritual on or near a grave site. It talks about the reasonable person in the community in terms of expectations and so forth.

The bill before the House amends the Appeal Costs Fund Act 1973 to allow a person to access the appeal fund in an appeal of a guideline judgement. The Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010 provides the Court of Appeal with the power to give and review guideline judgements to be taken into consideration by courts in sentencing offenders. The bill before the House will allow the recovery from the appeal fund of any additional costs outlaid from an appeal of a sentence that is dealt with or is part of a guideline judgement.

The bill before the House also amends the Retail Shop Leases Act 1994 to ensure that rent reviews are not avoided under 'ratchet' clauses, preventing decreases in rent and to entitle assignees from lessees to claim compensation under section 43 of the act. Under the Retail Shop Leases Act 1994 there is only one method in which rent is able to be reviewed at any given time. There has been great debate about a clause that states that the lease contains a provision stating that the rent is reviewed to market but also contains a ratchet clause stating that the rent will not be less than the rent payable in the previous year because the latter may not be considered as a method of review.

This point has been topical in the legal community, but the general consensus amongst various stakeholders in the legal community was that such clauses were not allowed. However, as we know—and of course the Attorney would know—lawyers look for loopholes in many pieces of legislation and cases and so forth. There was always room for lawyers to get around certain things with respect to that act. This

clause does not apply to commercial or industrial leases, only to retail. Because it is the standard practice that is accepted by most of the legal community over the past decade, this amendment will prevent those ratchet clauses, making them totally void and not a method of review, as was pointed out in the case.

The provisions in the bill which relate to these ratchet clauses will allow the market to regulate the rent if it decreases. It is important to protect the smaller operators in the marketplace, who would otherwise be forced out by larger developers or landlords in maintaining rental prices through the basic premise of supply and demand. A summary of a specific case example involves a retail shop lease of premises at Cleveland, known as 'Connor's case'. The lease contained annual CPI rent reviews and a market review at the beginning of the option term. The lease stipulated that the new rent could in no circumstances be less than the rent payable for the previous year—the ratchet clause. The issue was whether the ratchet clause was void under sections 27 and 36 of the act.

The issue was previously addressed in 2002 in the District Court in Oz Sushi Pty Ltd v Lloyd Bennett & Associates Pty Ltd [2002]. In that case the court confirmed the widely held view that ratchet clauses of the type considered in Connor's case did offend sections 27 and 36 of the act and were void. The practice of most lessors was not to include ratchet provisions in retail leases because they were unlawful. However, Connor's case did provide a level of uncertainty and upheaval amongst the legal fraternity as the legality of such ratchet clauses was called into question.

Section 27 of the act requires that a rent review must be made using a single basis for review. The court rejected the lessee's submission that the clauses determining the rent at the commencement of the option term provided for a review of rent on two bases including, firstly, a market rent review and, secondly, the ratchet clauses stating that the rent will not be less than the rent payable in the previous year.

The court rejected the lessee's submission that the clauses providing for the annual CPI rent review was a review of rent on two bases; namely, a CPI increase and, secondly, the ratchet clause stating that the rent would not be less than in the previous year. The court held that the ratchet clauses did not amount to a basis for reviewing the rent in the sense of adjusting or revising it. In neither form nor substance did the ratchet clauses effect any change in the rent. The court held that because the review clauses did not provide for two bases for reviewing the rent, section 27 was, in fact, not breached.

Section 36(e) of the act renders void a rent review which adopts the highest rent of two or more methods—for example, the higher of the CPI or a market review. The majority view that was held was that the ratchet clauses did not operate to adopt the higher of two or more methods of calculating the rent. This is because they operate only to limit the application of the stated method of calculating rent—the CPI or the market. The effect of the ratchet clauses was to provide that, if the CPI or market review did not result in an increase to the rent, there was to be no review to the rent.

In conclusion, I reiterate some of the concerns that I raised in terms of the length of time it has taken for this bill to come before the House for debate. However, I will always give credit where credit is due and the fact that we are debating it today is a good start. I am pleased that small business operators will be protected with the proposed amendments to the Retail Shop Leases Act under a long-term 'can't-do' Labor government that has made doing business in Queensland expensive and difficult and tough. It is the LNP that has always stood up for Queensland's small business sector—simply put, the mum and dad businesses that increase competition in the marketplace, employ local residents and support local products.

It is important to address the loopholes that have been shown to exist in our justice system. I feel great sorrow for the families of the three victims I mentioned earlier. Great community outrage was expressed following the sentences handed down to those charged with manslaughter in the abovementioned cases. When we talk about the term of 'accident' being redefined, it is important to note to members of the House that it will not change the law in Queensland. The term 'accident' has been defined in court cases and in fact does not change the law in Queensland. It simply puts a proper definition in terms of the reasonably foreseeable consequence test into legislation. I hope that it will be available to lawyers to more accurately advise clients and not be so reliant on precedent in cases where the legislation should provide the answers.

I also support the comments in relation to provocation. There have been situations in Queensland where people—some of these cases were men—felt threatened by their partners because the partner questioned the relationship or questioned whether or not one person was having affairs which led that person to be provoked and then murder the partner. That is just unacceptable. We should not let people get away with the fact that they get in a total fit of rage when someone turns them down for various situations in a relationship or whatever other matter. The clauses which recast the position of provocation as a defence in Queensland will provide more stability to the families of the victims in particular and will not

allow people to get away with murder because they do not like what someone is saying. In reality, in most of the cases in Queensland it is clearly just murder.

As I have just stated with regard to the Retail Shop Leases Act, industry accepted the view that ratchet clauses were generally not accepted. However, the ingenious lawyer would always try to get away with it. I recall reading leases where the landlords would always have a shot at the tenants in that they say, 'In three years time we'll review your rent. It'll be a market review rent for instance. But if in the event the market review rent is less than what you're paying now, then the rent that you pay now will continue to apply.' The reality is that you cannot call it a market review rent if it does not in fact go down. The whole point of a market review rent is market review in terms of the economic times. Including this in the legislation should provide some certainty to not only the profession but also both small business operators and tenants in the retail industry.

Just to finish, I again refer to the three victims that I mentioned earlier. I say to the families of those people that a change in the law will do nothing to bring your children back, but their legacy will always be directly related to bringing about a much needed change with the initial review and then subsequent amendment of the accident and provocation provisions within the Criminal Code of Queensland.