




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 30 November 2016

CRIMINAL LAW AMENDMENT BILL

Introduction

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (4.00 pm): I present a bill for an act to amend the Bail Act 1980, the Criminal Code, the Criminal Proceeds Confiscation Act 2002, the Director of Public Prosecutions Act 1984, the Drugs Misuse Act 1986, the Evidence Act 1977, the Jury Act 1995, the Justices Act 1886, the Penalties and Sentences Act 1992, the Recording of Evidence Act 1962 and the Telecommunications Interception Act 2009 and the acts mentioned in schedule 1 for particular purposes. I table the bill and the explanatory notes. I nominate the Legal Affairs and Community Safety Committee to consider the bill.

Tabled paper: Criminal Law Amendment Bill 2016 [\[2186\]](#).

Tabled paper: Criminal Law Amendment Bill 2016, explanatory notes [\[2187\]](#).

I am pleased to introduce today the Criminal Law Amendment Bill 2016. The bill comprises an array of criminal law related amendments to acts within my portfolio. Perhaps most notably, it includes amendments to the Criminal Code to ensure that a person who commits murder cannot rely on an unwanted sexual advance, other than in exceptional circumstances, as a basis for the partial defence of provocation. This also fulfils our government's pre-election commitment to make such amendment. The government acknowledges the importance attached to this reform recognising as it does the modern and progressive society Queensland is in 2016.

The other miscellaneous amendments in the bill come both from the lapsed Justice and Other Legislation Amendment Bill 2014 and from stakeholder consultation and aim to improve the operation and delivery of Queensland's criminal laws. I would like to record my thanks to our legal stakeholders who offer valuable insight into ways to enhance aspects of our criminal justice system. Let me now briefly outline the bill's significant amendments, starting with those to the Criminal Code.

As I mentioned, the bill includes amendments to section 304, killing on provocation, of the Criminal Code. First though, it is necessary to remind the House of the context in which section 304 of the Criminal Code operates. The issue of killing on provocation is only relevant where a jury is satisfied beyond reasonable doubt that the defendant has killed with the intent required for murder. It is then up to the defendant to prove that provocation applies. However, it is not a complete defence; it is only a partial defence. The successful application of section 304 reduces the criminal responsibility of the defendant to manslaughter, and therefore means the defendant avoids the punishment of mandatory life imprisonment imposed for murder.

The amendment to section 304 provides that the partial defence is excluded if the sudden provocation is based on an unwanted sexual advance, other than in circumstances of an exceptional character. I know that there has developed a reference to this amendment as removing the 'gay panic' defence—that is, a situation where the defendant claims to have been provoked to murder by a homosexual advance by the deceased. I absolutely acknowledge this amendment's importance to the

lesbian, gay, bisexual, trans and intersex community—as it is to all Queenslanders who have voiced their criticism that such an advance could establish the partial defence.

The amendment is not confined to excluding an unwanted homosexual advance but uses the gender neutral phrase ‘unwanted sexual advance’. This provides that the partial defence of provocation cannot be based on an unwanted heterosexual or homosexual advance, other than in circumstances of exceptional character. This properly reflects our society’s expectations on the exercise of self-control. I want to reiterate section 304 operates where the defendant has killed with murderous intent.

Let me be perfectly clear and remove any doubt: an unwanted homosexual advance is not of itself to be considered an exceptional circumstance. Consistent with the other subsections of section 304, which limit the operation of the defence, a proviso is included to allow for circumstances of an exceptional character. Such a proviso is included to act as a safeguard in case of any unjust outcomes as it is impossible to foresee the myriad circumstances that may arise in homicide matters. As to what circumstances fall within the exception, no examples are provided. This will be a matter for the trial judge to assess on a case-by-case basis.

Having said that, new subsection (6A) makes it clear that for proof of exceptional circumstances regard may be had to any history of sexual conduct, or of violence, between the person and the person who is unlawfully killed that is relevant in all the circumstances. This clear articulation also recognises the amendment’s gender neutral language and as such may be of relevance to women, particularly in the context of a woman who unlawfully kills their partner after receiving an unwanted sexual advance in the context of a history of long abuse. This approach is also consistent with existing subsection 304(6) which permits recourse to the history of relevant violence between the parties in considering the operation of the proviso for existing subsections (2) and (3). This in no way is intended to limit the circumstances of an exceptional character to which consideration may be had.

A corresponding amendment is also made to omit the words ‘a most extreme and’ from the provisions in the existing subsections for consistency in language. This amendment does not, however, lower the applicable threshold. As to the term ‘unwanted sexual advance’, this is defined in new subsection (9) as meaning a sexual advance that ‘is unwanted by the person’ and ‘if the sexual advance involves touching the person—involves only minor touching’. The term sexual advance is not defined and carries its everyday meaning and the conduct can transpire in infinite ways. It refers to conduct of a sexual nature towards the person, including conduct made up of no words or touching, such as a gesture.

I must remind the House that under existing section 304(2) the partial defence of provocation does not apply if the sudden provocation is based on words alone, other than in certain circumstances—so that a sexual proposition unaccompanied by any physical contact is already excluded. An example of what may be minor touching is included. Relevantly, the non-exhaustive example makes it clear that minor touching of the defendant is to be considered depending on all the relevant surrounding circumstances.

Finally, the amendment is clear that for the purposes of this section ‘minor touching’ may amount to a sexual assault under section 352(1)(a) of the Criminal Code—that is, an unlawful and indecent assault. This is because the spectrum of conduct that falls within the offence of sexual assault is very broad. Therefore, depending on all of the relevant circumstances of the case, a touch that amounts to a sexual assault may still be considered ‘minor touching’ by a jury such to exclude the defendant from relying on the partial defence of provocation. What needs to be stressed again though is the context in which the partial defence of provocation operates. Section 304 is only applicable where it is proven to the satisfaction of the jury that the defendant killed with a murderous intent—that is, killed, intending to kill or cause grievous bodily harm.

I know this has been a long-awaited reform, and I want to note the former Labor government’s commitment to this issue in 2012. The previous Labor government established an expert committee tasked with reviewing the issue and announced the intention to amend section 304 to give effect to the chair’s recommendation. However, that was not subsequently progressed by the Liberal National Party government.

Today, I met with Father Paul Kelly, who is a long-term advocate for changes to this area of the law. Father Kelly was very happy that the government has taken action to clarify the law around this issue. Again, let me thank our legal stakeholders for their comments given during consultation—all of which have contributed to the overall development of the amendment—and all of those thousands of people who signed the change.org petition supporting this change.

I will move to another amendment in relation to misconduct with a corpse. A person involved in the death of another can benefit by destroying or contaminating evidence by disposing of, or hiding, a

body. I am sure we can all recognise that, for loved ones, the recovery of a body that has been interfered with, or that cannot be recovered at all, can add to the suffering in an already traumatic situation. The bill acknowledges this and further acknowledges that misconduct with a corpse is serious criminal conduct by increasing the maximum penalty from two to five years imprisonment where a person improperly or indecently interferes with, or offers any indignity to, a body or human remains.

In addition to increasing the penalty, the offence will be added to the list of offences in the serious violent offence regime. This will mean that in those cases where the court orders that imprisonment for this offence is to be served cumulatively with a sentence for a related offence, such as manslaughter, the combined period of imprisonment will be relevant for the purpose of the serious violent offence regime. The effect of this is that if the combined sentence is imprisonment for 10 years or more, the offender is automatically required to serve a minimum non-parole period of 80 per cent of the imprisonment imposed.

The bill will clarify that Public Service officers can be appropriately authorised to provide services in their private capacity. This is often necessary in rural and remote areas. An amendment will be made to the Criminal Code to create an exception to the offence in section 89 (Public officers interested in contracts) for public officers who acquire or hold a private interest made on account of their employment, having first disclosed to, and obtained the authorisation of, the chief executive of the relevant department. The requirement for disclosure and authorisation of the chief executive will limit the application of the exception to appropriate circumstances.

I turn now to the various amendments to other acts. Confiscation of illegally obtained proceeds of crime is a key strategy for disrupting criminal activity. The bill contains amendments to ensure that all contraventions of restraining and forfeiture orders made under the Criminal Proceeds Confiscation Act 2002 are prohibited whether intentional or otherwise. Maximum penalties for contraventions of restraining or forfeiture orders will be increased from the existing 350 penalty units to 2,500 penalty units for a financial institution or 1,000 penalty units for all other persons or the value of the property the subject of the offence, whichever is the greater. The existing defence for a person who had no notice or reason to expect that the property was subject to a relevant order will remain for the protection of those people acting in good faith.

The bill also includes amendments to improve the operation of criminal law related practices and procedures. Amendments to the Justices Act 1886 and the Criminal Code adopt three existing practices from the Supreme and District courts for application in the Magistrates Court. The first is joinder of trials. This amendment will allow trials for a number of different people for offences arising from substantially the same set of facts to be heard at the same time. The second of these amendments extends the procedure providing for admissions of fact to summary trials for simple offences and breaches of duty. This amendment will allow certain facts to be agreed by the parties in a trial without needing to call witnesses to have those facts placed before the court.

The third practice provided for by the bill is bulk arraignments. This amendment will allow legally represented defendants to enter a single plea to a number of charges at the same time in the Magistrates Court. Each of these amendments will improve consistency in practice for criminal proceedings and support efficient trial procedures. A further procedural amendment will be made to the Justices Act to extend the availability of registry committals, which occur on the papers and do not require an appearance in court, to those defendants remanded in custody.

The bill makes a number of amendments to the Evidence Act 1977, including extending the ability of the court to exclude the public from a courtroom while the prerecorded evidence of an affected child witness, or special witness, is being played. This will provide further protection for these most vulnerable witnesses. Amendments will also allow, in certain circumstances, a court to use the soundtrack obtained from a video recording when the video cannot be played. This provides a practical alternative to having to recall the witness. The amendments also allow for appropriate destruction of recordings held by the courts in accordance with court issued practice directions and make a number of technical amendments to reflect contemporary court practices, such as the use of digital recording technology.

The Evidence Act will also be amended to limit the circumstances in which a DNA analyst is required to give evidence about an analyst's certificate. This amendment will not have any impact on the evidence given by analysts about the results of DNA profile comparisons. An amendment to the evidentiary provisions providing for a drug analyst's certificate in the Drugs Misuse Act 1986 will accommodate scientific and technological advances. The amendment acknowledges that an analysis or an examination may not be made by an analyst on every occasion but could be supported by automated processes or laboratory technicians.

The modernisation of the courts' use of technology in the jury selection process will be accommodated by amendments to the Jury Act 1995, for example, by allowing certain notices and

summons to be given electronically. The Bail Act 1980 will be amended to clarify the process for forfeiture of cash bail and to encourage police to exercise their discretion regarding bail when a person cannot be taken promptly before a court.

The Penalties and Sentences Act 1992 will be amended to provide a mechanism to return offenders sentenced to a recognisance order who fail to properly enter into the recognisance back to the court and to allow for their resentencing at the court's discretion. The bill will also allow the Director of Public Prosecutions to delegate his or her functions and powers to an appropriately qualified person and make other minor and technical amendments.

This bill enhances the administration of justice and in many ways supports a criminal law response to a modern Queensland. I commend the bill to the House.

First Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (4.15 pm): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to the Legal Affairs and Community Safety Committee

Madam DEPUTY SPEAKER (Ms Linard): Order! In accordance with standing order 131, the bill is now referred to the Legal Affairs and Community Safety Committee.

Portfolio Committee, Reporting Date

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (4.15 pm), by leave, without notice: I move—

That under the provisions of standing order 136 the Legal Affairs and Community Safety Committee report to the House on the Criminal Law Amendment Bill by 21 February 2017.

Question put—That the motion be agreed to.

Motion agreed to.