Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

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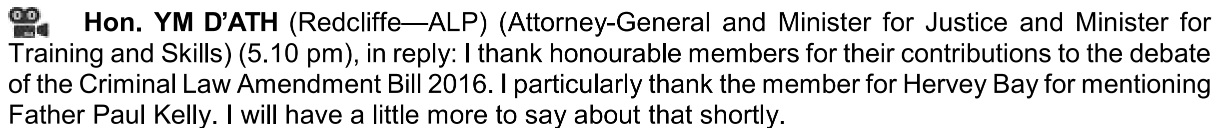
CRIMINAL LAW AMENDMENT BILL



Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (5.10 pm), in reply: I thank honourable members for their contributions to the debate of the Criminal Law Amendment Bill 2016. I particularly thank the member for Hervey Bay for mentioning Father Paul Kelly. I will have a little more to say about that shortly.

The bill makes a variety of amendments, including minor and technical amendments, to Queensland's criminal laws to support the continuing effective operation of our criminal justice system. The penalty for the offence of misconduct with regard to corpses is increased and the offence is added to the schedule of serious violent offences to properly reflect the criminality of the offending and the consequences to loved ones as well as to investigations that can flow from this crime.

I know that much of the focus of this bill has been on the gay panic defence—and rightly so—but I want to emphasise the significance of the amendment in relation to this particular offence and the penalty. Changing this from a misdemeanour to a serious offence, which means 80 per cent of a sentence of imprisonment of 10 years or more must be served, shows the significance of this matter. Where someone's life is taken, someone interfering with or moving the body causes significant distress to family members. It also potentially interferes with very important evidence in determining whether in fact it was manslaughter or murder. The provision relating to misconduct with a corpse is extremely important. That interference can sometimes mean those bodies are not found immediately or at all. This can result in further distress for the family. I emphasise that I am proud of this provision in the Criminal Law Amendment Bill. It is certainly needed. I hope it will lead to some peace of mind for families going forward.

An important exception is included to the offence in section 89 of the Criminal Code to ensure, where appropriate and with proper authorisation, our public officers can provide services in a personal capacity. This is often necessary in rural and remote communities, where access to service providers can be more limited.

A number of amendments to the Criminal Proceeds Confiscation Act will support the objective of that act to remove the financial gain and increase the financial loss associated with illegal activity. This includes ensuring that all contraventions of court issued forfeiture and restraining orders are prohibited and supported by an appropriate deterrent penalty and by extending the provisions to allow financial institutions to provide information to officers of the Crime and Corruption Commission about a matter for which a serious drug offender confiscation order could be made.

The bill implements an important reform to the partial defence of provocation in section 304 of the Criminal Code—a defence that operates to reduce a person's criminal responsibility from murder to manslaughter if successfully raised and then accepted by the jury. The amendment gives effect to the recommendations of the chair of the 2011 expert committee tasked by the former Labor government to consider the operation of section 304 in the context of an unwanted homosexual advance.

As I said in my second reading speech, this amendment delivers on an important promise we made to the people of Queensland, and particularly to the LGBTI community, that this government would remove what has been referred to by some as the gay panic defence. The amendment to section 304 under this bill makes it clear that an unwanted sexual advance alone is not enough to support a defence of provocation to murder, other than in circumstances of an exceptional character. What circumstances are exceptional in each case simply cannot be predicted. Our judges of the Supreme Court are best placed to consider all of the many and varied factors that may be relevant in each case to determine whether they may amount to circumstances of an exceptional character. This was also the view of the LGBTI legal services.

The amendments to be moved during consideration in detail propose to include a number of factors that may be considered by the court in determining if a circumstance of an exceptional character exists and, further, whether a sexual advance involves only minor touching. It is the government's position that clause 10 as it is drafted leaves the greatest latitude to the court to consider on a case-by-case basis what is or is not a circumstance of exceptional character. Providing this breadth is the best approach to insuring against potential injustice.

Clause 10 of the bill has been modelled on the findings of the chair of the expert committee. That report did not propose to define the concept of 'circumstance of exceptional character'. Further, the chair of the expert committee expressed his view that a person suffering post-traumatic stress disorder as a result of abuse suffered as a child should fairly be permitted to argue before the judge that, in their case, the circumstances potentially fall within those of exceptional character. In such cases it will be a matter for that judge to determine if the partial defence should be fairly left to the jury. The court has the experience and expertise and is well placed to make an assessment on a case-by-case basis as to whether or not the circumstances in the matter before them give rise to the proviso. It would be a matter for the jury to decide, having regard to everything placed before them, whether that circumstance exists.

I also note that the framing of clause 10 in this regard adopts a consistent approach to this very concept under existing section 304. The inclusion of further parameters on what may be circumstances of an exceptional character has the potential to fix the concept or limit the scope of what may otherwise be considered to be circumstances of an exceptional character.

The issue regarding minor touching was raised before the committee and was addressed and explicitly referenced in the explanatory notes. The amendment provides some context to what may be minor touching by including legislative examples. The non-exhaustive examples make it clear that the consideration as to whether the conduct listed is minor touching depends on all of the relevant circumstances. Relevant circumstances are not limited to what might be generally expected—such as force or pressure used, position where the person was touched, duration, mechanism of touching, whether accompanied by words of aggressive future intent—but also broader matters such as the history between the parties and the geographical place and the time the offending occurred.

Without limiting the circumstances of an exceptional character to which consideration may be had, new subsection (6A) makes it clear that 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 replicates existing section 304(6), which permits recourse to the history of violence between the parties in relation to subsections (2) and (3). This may be particularly relevant to women in the context of a history of violence with a partner.

At the end of the day, an accused person cannot kill another with murderous intent simply on the basis of words alone or because the deceased made an unwanted sexual advance towards them and rely on that conduct by the deceased to ground a partial defence of provocation, other than in circumstances of an exceptional character. To be very clear, an unwanted homosexual advance is not of itself to be considered a circumstance of an exceptional character.

We believe that what has been outlined in the amendment could potentially see a narrowing or reading down of what this amendment seeks to achieve. We also have concerns in relation to the level of consultation. As I said in my second reading speech, this provision has been consulted on widely across the legal profession and also has gone through a parliamentary committee process. I appreciate and acknowledge that the opposition has noted from the explanatory notes that the QLS was consulted in relation to the development of the proposed amendment; however, I am unsure how broad the consultation has gone beyond the QLS. Considering the views of the LGBTI legal services and others in the parliamentary committee process and also the consultation with the government in drafting this, I do not believe it is appropriate to consider potentially narrowing or trying to further define the terms. I take the views of those stakeholders who believe that is best left to the courts to consider.

The last point I want to make is that the member for Hervey Bay specifically talked about Father Paul Kelly and I also reiterate his contribution and his significant lobbying over many years for this. I was very proud to stand with Father Kelly on the day that we announced that we would be introducing this bill and he is very pleased to see that we are debating this and—from what I can see, further amendment or not—importantly passing this very important reform. It is important to note that I appreciate that the opposition is putting forward an amendment, but I am grateful that the provision is being supported and that this bill is being supported. I do disagree with the amendment, but I do welcome the fact that the substantive elements of this amendment bill are supported by the opposition as well as the government of the day, as they should be.

In conclusion, I once again want to thank all honourable members for their contributions during the debate. I want to thank the committee and its secretariat and all stakeholders who made submissions in relation to this bill for their ongoing contribution to the important parliamentary committee process. I commend the bill to the House.