



Speech By  
**Hon. Yvette D'Ath**


**MEMBER FOR REDCLIFFE**

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Record of Proceedings, 21 March 2017

## **CRIMINAL LAW AMENDMENT BILL**

### **Second Reading**

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (2.30 pm): I move—

That the bill be now read a second time.

On 30 November 2016 the Criminal Law Amendment Bill 2016 was introduced into the Queensland parliament. Parliament referred the bill to the Legal Affairs and Community Safety Committee for consideration and requested the committee to report on its consideration of the bill by Tuesday, 21 February 2017. The committee tabled report No. 47 on 21 February and made one recommendation: that the Criminal Law Amendment Bill 2016 be passed. I thank the Legal Affairs and Community Safety Committee for its consideration of the bill.

The bill before the House delivers on an important promise to the people of Queensland, and particularly to the LGBTI community, to remove what has been referred to by some as the gay panic defence. An amendment to section 304 of the Criminal Code will ensure that a person who commits murder cannot rely on an unwanted sexual advance as the basis for the partial defence of provocation other than in circumstances of an exceptional character. When successfully applied, the partial defence of provocation reduces criminal responsibility for an offence from murder to manslaughter. This has the effect of avoiding the mandatory sentence of life imprisonment which applies to a person convicted of murder.

While section 304 itself has always been cast in gender-neutral and equal terms, it has been established by common law that in some circumstances an unwanted homosexual advance could form the basis for applying the partial defence. This is unacceptable. This does not reflect modern societal views about criminal responsibility and about the expectation to exercise self-control. An unwanted sexual advance, even one that involves minor touching, cannot be enough, other than in circumstances of an exceptional character, to reduce criminal responsibility for killing a person with murderous intent.

The bill amends section 304 of the Criminal Code to exclude the partial defence if based on an unwanted sexual advance. The amendment is framed in gender-neutral terms and will apply equally to any unwanted sexual advance, whether homosexual or heterosexual. An unwanted sexual advance to a person is defined in the bill to mean a sexual advance that is unwanted to the person, meaning the accused, and if it does involve touching the touching must only be minor. Guidance in the interpretation of minor touching is provided by the inclusion of examples in the bill and must always be considered in all of the relevant circumstances of the particular case. The reality is that the varied and unique circumstances that could possibly arise in these cases cannot be anticipated by the legislature. The amendment recognises this by including a proviso to allow for circumstances of an exceptional character. This provides a safeguard against unintended and unanticipated injustice. Each of the existing provisos in section 304 are amended by the bill to similarly require circumstances of an

exceptional character. Accordingly, the bill removes the words 'of a most extreme and' which currently appears in the existing provisos under section 304. This is in response to a recommendation made by the 2011 expert committee tasked with considering the section 304 defence in the context of an unwanted homosexual advance. To omit these additional words will ensure consistency throughout the section, remove any ambiguity in the requirements of the proviso, but it is not considered to lower the threshold required. In terms of interpreting the proviso—that is, what is meant by that phrase 'circumstances of an exceptional character'—I note that in its report the committee acknowledged the concerns identified by some stakeholders regarding the lack of definition of the term and, in particular, thank the Queensland Law Society for its contribution to the examination of this issue.

In its report the committee recorded that the LGBTI Legal Service recognised the concern raised by the Queensland Law Society in relation to the absence of a definition of circumstances of an exceptional character. However, the LGBTI Legal Service considered that the judiciary is very capable of interpreting the intent of these amendments and applying them in the spirit of the bill.

The committee also agreed that the amendments to section 304 under the bill should be reviewed in five years time to establish whether they have operated as intended. The non-government members of the committee also suggested that it would be beneficial for further consultation with the Queensland Law Society and the Bar Association to take place in relation to the terminology of circumstances of an exceptional character with a view to perhaps providing examples in the bill. I want to assure the members of this House that during the development of these amendments and prior to the introduction of the bill, the legal stakeholders, such as the Bar Association of Queensland, the Director of Public Prosecutions, the public defenders of Legal Aid Queensland, the Queensland Law Society, the Aboriginal and Torres Strait Islander Legal Service and the Lesbian Gay Bisexual Trans Intersex Legal Service were consulted on a proposed draft of the amendments to section 304 of the Criminal Code.

Additionally, the matters referred to by the Queensland Law Society during the committee's consideration of the bill have also been further examined. However, as has been the case with the existing provisos under section 304 which already draw on this concept of circumstances of exceptional character, what will fall within the ambit of the exception will be a matter for the trial judge determined on a case-by-case basis. It is impossible for the legislature to identify the infinite circumstances that may arise in a homicide case. It is not intended to define the phrase 'circumstances of an exceptional character' or to amend the bill in this regard. I note that the opposition have circulated amendments and I am currently giving consideration to those amendments. I acknowledge that the opposition see that it is important to ensure that we do not have unintended consequences when we are drafting legislation and that it is important that we listen to stakeholders' views in this regard.

The concern is that to define such a phrase may limit its scope which may ultimately lead to unjust outcomes. This is particularly so given the broad range of examples that may, depending upon the circumstances of the particular case, constitute circumstances of an exceptional character in the particular context. To be very clear, an unwanted homosexual advance is not of itself to be considered a circumstance of an exceptional character. This very clear policy position is also reiterated in the explanatory notes to the bill. Without in any way limiting what might be considered circumstances of an exceptional character, the bill also makes it clear that when considering the proviso 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. I note that amendments have been circulated, as I said, that go to issues raised by the Queensland Law Society at the committee and I will give further consideration to these matters. Equality before the law is a fundamental principle of human rights. The amendment to section 304 will ensure that this provision operates equally for all members of our community.

Turning now to the various other amendments to Queensland's criminal and related laws in the bill, I will outline the more significant amendments. The bill amends the Criminal Code section 236 to increase the maximum penalty for the offence of misconduct with regard to corpses from two years to five years imprisonment where a person improperly or indecently interferes with or offers any indignity to a body or human remains. The offence is reclassified from a misdemeanour to a crime and amendment to the Penalties and Sentences Act 1992 will add the offence to the serious violent offence regime. These amendments reflect the community's repugnance of improper dealing with human remains and recognise that such offending conduct can cause significant distress for the family and loved ones of a deceased person. The increase in maximum penalty also recognises the significant adverse forensic consequences that can flow from the offending by concealing or corrupting evidence of a more serious crime. It is not uncommon for this offence to be charged in conjunction with a related homicide offence.

The addition of the offence to the serious violent offence regime will also ensure that, in those circumstances where the court is sentencing an offender for the offence of misconduct with a corpse and a related manslaughter offence and imposing a cumulative term of imprisonment for the misconduct with a corpse, the combined sentence of imprisonment can be considered for the purpose of the serious violence offence regime. This means that, if the combined sentence of imprisonment is greater than 10 years, the offender must automatically be required to serve 80 per cent of their sentence in prison before becoming eligible to apply for parole.

An amendment to section 89 of the Criminal Code creates an exception to the offence 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. A number of amendments will be made to the Criminal Proceeds Confiscation Act 2002—most notably, amendments to sections 52, 60, 93ZT, 93ZZH, 143 and 171—to ensure that all contraventions of restraining and forfeiture orders made under the act are prohibited, whether intentional or otherwise. The offences will be recast to address a number of issues raised by the Court of Criminal Appeal in the decision of *State of Queensland v Bank of Queensland and Brett Raymond Stevens*. The recast sections do not include intent as an element or set out the circumstances in which dealings and contravention of an order will be void at law, and state that contravention of an order can be prosecuted as a contempt of court offence under another act.

Further, the maximum penalties for contraventions under these sections are increased from 350 penalty units to 2,500 penalties units for a financial institution and 1,000 penalty units for all other persons or the value of the property subject of the offence, whichever is greater. The increased penalties are intended to motivate timely compliance with orders in the modern financial reality where large sums of money can be moved very quickly by electronic means. An existing defence is retained in the recast sections to provide for a person who had no notice or reason to suspect the property was restrained or forfeited.

The bill also extends the existing provisions in section 249 that allow financial institutions to voluntarily provide information to investigators that they believe is relevant to an investigation of criminal activity or to assist in the enforcement of the Criminal Proceeds Confiscation Act by clarifying that information can be provided to officers of the Crime and Corruption Commission about a matter for which an order may be made under the serious drug offender confiscation order scheme in part 2A of the Criminal Proceeds Confiscation Act. This bill will also make the following minor amendments to improve the operation and delivery of Queensland's criminal related laws. Amendments to the Bail Act 1980 will clarify provisions relating to cash bail and police powers to grant bail to avoid inconsistency in interpretation.

A general power of delegation will be inserted into the Director of Public Prosecutions Act 1984 to allow the Director of Public Prosecutions to delegate functions and powers to an appropriately qualified person. This power will provide a range of options to facilitate prosecutions in Queensland. This might include allowing the temporary appointment of a prosecutor from outside of the Office of the DPP in a situation where there may be perceived bias or to allow the prosecution of state charges to be conducted by the Commonwealth DPP in circumstances where a defendant has both state and Commonwealth charges before the Magistrates Court. Amendments to the Drugs Misuse Act 1986 modernise the requirement for drug analysts' evidentiary certificates, reflecting changes in technology and laboratory practices in recent decades.

The protections afforded to vulnerable witnesses by provisions in the Evidence Act 1977 allowing for evidence to be prerecorded will be clarified by amendments making it clear that the public is to be excluded while the prerecorded evidence of an affected child witness or special witness is being played during a trial, as well as while the recording is being made. Other minor and technical amendments will be made to the Evidence Act, including to provide for the appropriate management and destruction of certain recordings and to clarify the process for requiring a DNA analyst who has provided a noncontentious DNA evidentiary certificate to give evidence.

The bill amends the Jury Act 1995 to allow for increased use of technology by our courts, including to provide the option to communicate with prospective jurors electronically. Amendments to the Justices Act 1886 and other legislation will allow for joinder of summary trials, bulk arraignments for legally represented defendants and the admission of alleged facts in the Magistrates Court in certain circumstances. The bill will also extend the existing registry committal process to defendants who are remanded in custody. The bill further provides a process to lawfully return an offender who fails to sign a recognisance order to court and allows for the appropriate disposal of records of legal proceedings in the Magistrates Court under an authority by the State Archivist, as well as making various other technical amendments.

This bill will deliver on another election commitment, particularly in relation to section 304 and killing on provocation. As I have stated already, I am aware that the opposition has circulated amendments. I appreciate that the opposition is interested in trying to avoid unintended consequences, which I hope we would seek to do in any bills that come before this parliament, and also in listening to stakeholders' views in that regard. I will take those amendments into account during the debate that will progress on this bill.