Crimes Amendment Bill 2007

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Extract from NSW Legislative Assembly Hansard and Papers Tuesday 25 September 2007.

Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [8.10 p.m.], on behalf of Mr David Campbell: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Crimes Amendment Bill 2007. We have proposed that the House deal with this bill as a matter of urgency. As members would be aware, in recent times there have been a number of incidents involving people who have thrown rocks at or dropped rocks on moving vehicles. People who are caught throwing rocks at cars and causing injury are typically charged with recklessly inflicting grievous bodily harm. The bill proposes to increase the maximum penalties available for that offence. It is therefore necessary to deal with the bill urgently to ensure that its proposals to increase penalties for recklessly inflicting grievous bodily harm become law as soon as possible.

The Government is concerned that, with the recent attention this issue has gained in the media, there is a strong possibility that some people might be tempted to commit copycat offences. The Government is especially concerned that this might occur during the fast-approaching school holiday period. Many New South Wales families will be on the roads over the next two weeks and the Government is determined to send a clear and strong message this week that this dangerous and idiotic activity should stop. By putting politics aside and responsibly dealing with this bill as a matter of urgency, this House can ensure that anyone thinking of engaging in this kind of stupid behaviour will think twice.

In addition to these important changes, the bill also introduces a number of other amendments aimed at modernising and simplifying the Crimes Act 1900. Most notably, this includes removing the archaic fault element of "maliciously" from the Crimes Act and replacing it with the more modern fault elements of "recklessly" and "intentionally" where appropriate. The bill also tightens offences relating to the infecting of a person with a grievous bodily disease and ensures that the new penalties for recklessly causing grievous bodily harm also apply to this offence. The bill also makes miscellaneous repeals, amendments and renumberings that are aimed at simplifying and modernising the Act. It is hoped that this bill will be the first in a serious of bills that will bring the Crimes Act 1900 into the twenty-first century.

Firstly, the bill removes the archaic fault element of "maliciously" from the Crimes Act and replaces it with the more modern fault elements of "recklessly" and "intentionally" where appropriate. Section 5 of the Crimes Act contains the definition of "maliciously", which reads as follows:

Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

This compound definition is used in some 34 provisions for offences in the Act and has not been amended since the Crimes Act was enacted in 1900. Members can imagine the difficulty in explaining this archaic formulation to juries who may be required to determine very serious cases based on this definition. The confusing and outdated nature of the definition has been raised by several judicial officers over a period of 50 years. For example, as long ago as 1955 the Hon. Mr Justice Fullagar of the High Court in *Mraz v R (1955) 93 CLR 493* described the definition of "malice" in the Crimes Act as "a mere question-begging definition".

The term "recklessly", which will largely replace "maliciously", is well-known to the criminal law and it is not proposed to codify or define this term at this time. The matter of *R v Coleman (1990) 47 ACrimR 306* is the leading New South Wales case on the term "recklessly". In that case, His Honour Mr Justice Hunt stated that "recklessly" is said to mean:

… a realisation on the part of the accused that the particular kind of harm in fact done … *might* be inflicted … yet he went ahead and acted.

In light of the significance of this change, consultation has been undertaken with key stakeholders. In 2005 the Criminal Law Review Division of the Attorney General's Department issued a discussion paper which raised the prospect of replacing the term "maliciousness" throughout the Crimes Act. Formal responses were received

from various stakeholders, including the Chief Magistrate of the Local Court, the Law Society of New South Wales, the Director of Public Prosecutions and the Legal Aid Commission of New South Wales. There was general support among all respondents for the idea of deleting all references to the word "maliciously" in existing offences and instead inserting the term "recklessly", or "intentionally or recklessly", as required.

Item [2] of schedule 1 to the bill deletes the definition of "maliciously" from the Crimes Act. A savings and transitional provision is created by item [26] of schedule 1 to ensure that the repealed definition endures for historical offences and any regulatory offences outside the Crimes Act that contain "maliciousness" as an element. Item [3] lists the offences for which the term "maliciously" is to be replaced with "intentionally or recklessly". Item [12] lists the offences where the term "maliciously" is to be deleted entirely from the provision. In these offences the term "maliciously" has little or no work to do as a fault element, as "intent" is already contained elsewhere in the provisions and the prosecution will still be required to prove the voluntariness of any physical elements of the offence. Item [13] lists the offences where the term "maliciously" is to be replaced with "recklessly" only.

It is not intended that the elements of any offence, or the facts that the prosecution needs to establish to prove the offence, will change substantially. The current section 5 definition of the term "maliciously" also contains the phrase "in any… case without lawful cause or excuse". It should also be noted that these amendments are not intended to abolish defences that are currently available under existing law. The removal of the complex definition of "maliciously" will make criminal offences easier to understand for juries and the public and will improve the consistency between New South Wales criminal law and the Model Criminal Code, Commonwealth law and modern statutes in other Australian jurisdictions.

I now refer to section 33: Wounding etc. with intent to do bodily harm or resist arrest. In light of the deletion of "maliciously", item [4] of schedule 1 recasts the offence in section 33 of wounding with intent to do bodily harm or resist arrest. The New South Wales Court of Criminal Appeal has commented in the case of *Safwan (1986) 8 NSWLR 97* and again in the case of *R v Livingstone [2004] NSWCCA 122* that the current offence is confusing and difficult to explain to juries. In the redrafted provision "maliciously" is eliminated and the two limbs of the offence are separated out, namely, intentionally inflicting grievous bodily harm and inflicting grievous bodily harm with intent to resist lawful arrest. The shooting offences in the old provision are transferred to the offence in section 33A.

Thirdly, item [5] of schedule 1 recasts section 33A in light of the deletion of "maliciously". The shooting offences previously contained in section 33 are transferred to this provision and the existing offences that carry lesser penalties are not replicated as they are virtually identical to the transferred offences. Fourthly, I refer to section 35: Increasing the penalties for recklessly causing grievous bodily harm. As noted earlier, the bill contains important provisions to increase penalties for recklessly inflicting grievous bodily harm.

New South Wales already has a range of offences that cover the criminal activity of rock throwing with maximum penalties ranging from five years to 25 years imprisonment. People who throw rocks at cars and cause injury are typically charged with this offence under section 35 of the Crimes Act. Rock throwing is dangerous and stupid, and the people who throw rocks are not just cowards but criminals who should face tough jail terms. Item [7] of schedule 1 recasts the offence in light of the deletion of "maliciously", but also increases the maximum penalties available for this offence from 7 years to 10 years and from 10 years to 14 years when the offence is committed in company. The maximum penalty for recklessly wounding a person remains at 7 years. It will, of course, remain open to the prosecution in any case to argue that a wounding amounts to grievous bodily harm as a matter of fact and, therefore, charge a person with the more serious grievous bodily harm offence.

This increase also creates a more consistent set of offences where grievous bodily harm is inflicted either recklessly or intentionally. Some members of the judiciary and the legal profession have previously commented that the maximum penalty applicable to the offence under section 33 of the Crimes Act, that is, maliciously inflict grievous bodily harm with intent to do grievous bodily harm, and the maximum penalty applicable to the offence under section 35 of the Act—maliciously, or recklessly, inflict grievous bodily harm—are too disparate. Section 33 currently carries a maximum penalty of 25 years imprisonment, whereas section 35 carries a maximum penalty of 7 years imprisonment.

For example, His Honour Judge Ducker of the New South Wales District Court has indicated in his judgment in *R v TRR* of 6 August 2003 that he considers the disparity in sentence and the low level of maximum sentence in relation to the section 35 grievous bodily harm offence as "irrational, unsustainable and in need of urgent reform". A comparison with other Australian jurisdictions that have a similar offence to maliciously inflict grievous bodily harm indicates that a maximum penalty of seven years is at the low end of the range of maximum penalties imposed. Item [8] of schedule 1 recasts the offence contained in section 35A of causing a dog to inflict grievous bodily harm or actual bodily harm using the new mental fault element of "recklessly". The maximum penalty for recklessly inflicting grievous bodily harm is also increased from 7 years to 10 years in line with the amendments made to section 35 for the equivalent offence.

I turn now to the offence of inflicting a grievous bodily disease. Intentionally or recklessly infecting someone else

with a serious disease is a horrifying breach of trust that many people in the community would find abhorrent. In some cases this can mean giving someone a lifelong illness or disability as well as helping to spread these terrible diseases. It is important to help protect the community from these crimes through punishing those offenders, with the prospect of them staying behind bars for a long time. This area of the law has been somewhat uncertain since the United Kingdom case of *R v Clarence (1888) 22 QBD 23*. The majority of the court in Clarence held that infecting another person with a sexually transmissible disease could not amount to inflicting grievous bodily harm. The authority of Clarence has been substantially eroded by a long line of critical or contrary decisions in the United Kingdom, Canada and Western Australia. However, it is at least arguable that it remains good law in New South Wales.

As a result of this uncertainty, in 1990 the New South Wales Parliament enacted section 36 of the Crimes Act—causing a grievous bodily disease—and, in doing so, it is arguable that Parliament conceded that serious diseases did not amount to grievous bodily harm. The section 36 offence essentially re-enacted the relevant part of the section 33 offence of intentionally inflicting grievous bodily harm, with the words "grievous bodily disease" substituted for "grievous bodily harm". During the 1990 parliamentary debate the then Labor Opposition noted that the requirement of specific intent in the second limb of the offence made the reference to maliciousness in the first part of the offence redundant and, further, that the offence did not cover the situation where a person was reckless as to the infection of another.

The practical result is that the offence under section 36 is rarely prosecuted. In most situations where an offender passes on a serious disease to a victim the offender does not specifically intend that the victim contract the disease; the offender is simply reckless as to the possibilitythat is to say that he or she does not care whether the disease is passed on. Item [9] of schedule 1 repeals the seldom-used offence in section 36. Item [1] of schedule 1 then inserts the following into the general definition of "grievous bodily harm" contained in section 4 of the Act:

(c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease).

This extended definition will ensure that the infliction of a grievous bodily disease can be dealt with under all general grievous bodily harm offences in the Crimes Act and, consequently, specific offences such as that in section 36 are not required. Item [10] of schedule 1 recasts the poisoning offences under sections 39, 41 and 41A. These archaically worded offences are redrafted using modernised language and the term "maliciously" is removed. The alternative verdict provision contained in section 40 is transferred to section 39 (2) and then applied to both sections 41 and 41A. This allows section 40 to be repealed. I turn now to modernising house breaking offences. The current section 112 of the Crimes Act provides that an offence is committed by any person who breaks, enters and commits a serious indictable offence in:

any dwelling-house, or any building within the curtilage of any dwelling-house and occupied therewith but not being part thereof, or any school-house, shop, warehouse, or counting-house, office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty or to any Government department, or to any municipal or other public authority.

Section 113 of the Crimes Act repeats the same list in relation to the offence of breaking and entering with intent to commit a serious indictable offence. The list is lengthy, old-fashioned, and potentially contains gaps. For example, it has been held in 1970 that a building belonging to the Commonwealth is not "a building belonging to His Majesty or any Government Department". More recently, in December 2003, a District Court judge found that a bowling and recreation club did not fit within any of the described premises. Items [19] and [20] of schedule 1 delete this archaic list and replace it with the term "building", which is consistent with the Model Criminal Code. Item [17] inserts an inclusive list for the term "building" in section 105A and its meaning is extended to places of divine worship. This allows item [18] to repeal the offences under section 106 and 107 that deal specifically with places of divine worship.

Next I refer to modernising blackmail and extortion offences. The current blackmail offences, which are contained in sections 100 to 105 of the Crimes Act, were inserted in 1974. The terms are anomalous and out of keeping with the contemporary approach to the offence. First, the offence as currently drafted only "catches" threats intended to cause monetary or property gain to the offender, cause the offender to be appointed to an office, or cause monetary or personal loss to another person. In practice, many blackmail threats cannot be categorised in terms of gain or loss. For example, a demand that a prisoner be released would not be an offence under the section.

Second, the offence as it currently exists only extends to making unwarranted threats to publish matters "concerning any person". In reality, blackmail can take the form of a wide array of threats to the victim, for example, by implying that associates of the offender will damage the victim's property if the threat is not complied with. Item [16] of schedule 1 repeals the existing blackmail provisions and item [22] replaces it with a provision based on the Model Criminal Code offence of blackmail. The Government believes that the revised drafting will improve the offence in the following ways. First, the offence will no longer be artificially limited to

threats intended to cause property gain or loss. It will also cover the situation where the blackmailer intends to influence the exercise of a public duty.

Second, the offence will now require that the unwarranted demand is made "with menaces", which is a well-known term at law. It is not confined to threats of harm or violence, and will be defined, non-exhaustively, in the legislation to include express or implied threats of detrimental action. Finally, the offence will no longer be artificially limited to unwarranted threats to publish, abstain from publishing, or prevent the publication of certain material. The maximum penalty of 10 years imprisonment will remain unchanged from the current offence. An aggravated offence will be created which carries a maximum penalty of 14 years imprisonment where the threatened accusation is that a person has committed a serious indictable offence. This mirrors the existing provisions.

I now turn to other amendments. The bill also makes a number of other miscellaneous amendments. Item [25] of schedule 1 repeals the archaic offence of killing pigeons under section 511 of the Act, which is now dealt with under modern statues such as the Prevention of Cruelty to Animals Act 1979. Schedule 2 contains a number of amendments that update cross-referenced provisions that have been altered by schedule 1 amendments, rename part and division headings and renumber several offence provisions. A new schedule is created to contain provisions that abolish common law offences that are currently spread throughout the Act. Item [11] of schedule 1 abolishes the second limb of the offence of, for example, not providing wife or servant with food in section 44, as this type of criminal behaviour is now covered by general assault provisions.

The Iemma Government is committed to making sure that people in this State have a right to be safe and to feel safe as they go about their daily lives. A key part of delivering on this commitment is making sure that our laws are effective, up-to-date, and provide appropriate punishments for those who would seek to break them. By updating several offences, and introducing increased penalties for others, this bill ensures that the Crimes Act continues to be effective in deterring and punishing criminal behaviour. I commend the bill to the House.