

CRIMINAL CODE AMENDMENT (PREVENTION OF LAWFUL ACTIVITY) BILL 2015

Discharge of Order and Referral to Standing Committee on Legislation — Motion

Resumed from an earlier stage of the sitting.

HON SIMON O'BRIEN (South Metropolitan) [5.08 pm]: Before we broke for questions without notice, it was made pretty clear that the concept of the word “thing” is not something that has ever defeated the judicial system or, indeed, the Parliament of Western Australia. I referred to section 370 of the Criminal Code. I am referring to the Criminal Code in all of these matters because that is the substantive statute that the bill seeks to amend. I could be referring to any one of a number of statutes right across the statute book, for example, but I am using the Criminal Code. Before I move on from this concept of “thing”, I refer to section 392 of the code, which defines “robbery” as “A person who steals a thing”. “Thing” is not an unusual word and it is not difficult to understand.

Another thing that makes it very hard for the opposition to understand is the question of the so-called “reversal of onus of proof”. Whenever we see something that it terms “reversal of onus of proof” it means the end of civilisation as we know it, a collapse in the judicial system and proof positive that any form of legislation containing this device should be done away with. We have debated this many times in this place over the years. For the benefit of those lacking in knowledge or experience, let me patiently go through a couple of examples that will show members that either they have got it wrong or, in good faith, they have accepted the inaccurate advice of whatever genius it is who creates the Mark McGowan–Australian Labor Party website with its fast facts and so on. The reality is that the reversal of onus of proof—as it is sometimes called—is not a strange thing in the Western Australian statute books or in the statutes of the commonwealth. There are many cases in which it is not only exhibited, but exhibited for the very good reason that it is the only way the law can be made practicable, and it does not mean that people are denied their rights under international agreements or common law or anything else. Plenty of members opposite have been saying this, so I want to challenge them to see whether they have the integrity to at least look at what I am referring to in the context of the debate and see whether they have got it wrong. Members should look at the references I will give and see whether they have got it wrong and their leader has also got it wrong.

Hon Ken Travers: Our leader would never get anything wrong. We might but she would never —

The PRESIDENT: Order, members!

Hon SIMON O'BRIEN: It might well be that the Leader of the Opposition the member is referring to is Hon Mark McGowan.

Hon Ken Travers: I am referring to Hon Mark McGowan and Hon Sue Ellery.

The PRESIDENT: Order, members! I have just reread the motion before the house and I hope that the words “referral” or “Standing Committee on Legislation” appear in the discussion at some time. We know that these debates are quite narrow in the scope of why this matter should or should not be referred to this particular committee.

Hon SIMON O'BRIEN: Of course, I will jam in a reference at some point to the word “referral”. I have already done so and I will come back to it, but I am also expediting the processes of the house by making this my second reading contribution. But if members opposite want me to have another go —

Hon Ken Travers: Please do.

Hon SIMON O'BRIEN: Okay, we might do that.

Hon Ken Travers: Help us to understand why the bill should or should not go to the committee.

Hon SIMON O'BRIEN: Absolutely. In helping members to understand why this bill should or should not be referred to the legislation committee, I direct their attention again to the Criminal Code and ask them to contemplate the following words found in section 214 —

Any person who, without lawful justification or excuse, the proof of which lies on him —

If that is not a reversal of the onus of proof, then I do not know what is. It is unashamedly and explicitly a situation in a Western Australian statute of a reversal of onus of proof —

Any person who, without lawful justification or excuse, the proof of which lies on him —

Members opposite might be hyperventilating, but as with the definition of “thing” this is also something that has to be read in context; something that does not defeat the Parliament or the judiciary in Western Australia. I will refer to section 214 of the Criminal Code and then subsection (2) in its entirety, which becomes —

Any person who, without lawful justification or excuse, the proof of which lies on him —

...

- (2) Improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;

In that case, the Parliament has legislated that it is appropriate for there to be a so-called reversal of the onus of proof. We would not want a mortician, for example, to be charged by some overzealous copper and risk —

Hon Sue Ellery: An overzealous copper walking through a mortuary at the time.

Hon SIMON O'BRIEN: Yes, walking through a mortuary at the time. We would not want to risk the poor old mortician being subject to imprisonment for 12 months and a fine of \$12 000. I wonder what the debate was like about that particular section when it went in. The fact of the matter, of course, is that if a person has a legitimate reason for having to deal with a dead human body or human remains, they can easily demonstrate their purpose—it is not an onerous thing to do—and, if not, they have committed a crime. This is a section of the Criminal Code, which was last amended on two occasions in 2004 under the stewardship of the then Labor government and its Attorney General, Hon Jim McGinty.

Hon Michael Mischin: Surely not!

Hon SIMON O'BRIEN: Yes. It was apparently innocuous and, indeed, desirable then.

Hon Sue Ellery: Hon Simon O'Brien, will you take an interjection?

Hon SIMON O'BRIEN: If I must!

Hon Sue Ellery: So the difference between the two offences is whether or not you have a lawful excuse, which I would say is much easier to prove than your intent, which is what the bill before us goes to.

Several members interjected.

Hon SIMON O'BRIEN: Indeed. That is a good try, but I do not think the Leader of the Opposition is properly examining —

Hon Sue Ellery: So a committee probably should.

Hon SIMON O'BRIEN: Perhaps it should. Have a look at section 70A of the Criminal Code, which relates to trespass, and subsections (2) and (3).

Hon Sue Ellery interjected.

Hon SIMON O'BRIEN: I am addressing the house, Mr President. It is most likely that when the honourable Leader of the Opposition made her second reading contribution, no-one was listening, so I will repeat this example. Section 70A states —

- (2) A person who, without lawful excuse, trespasses on a place is guilty of an offence and is liable to imprisonment for 12 months and a fine of \$12 000.
- (3) In a prosecution for an offence under subsection (2), the accused has the onus of proving that the accused had a lawful excuse.

It is absolutely explicit. Is that law unreasonable? Does it work? Has the sky fallen? Again, members opposite cannot prosecute the claims that have been made about the bill now before the house in all good conscience when precedents of the sorts that I am giving examples of already exist. I hope I will not have to ask for an extension, Mr President!

Hon Peter Katsambanis: There's just so much material.

Hon SIMON O'BRIEN: Indeed, there is. This is a very serious offence, although they are all serious offences. Section 306(5) states —

In proceedings for an offence under subsection (4), proof that —

- (a) the accused person took a child, or arranged for a child to be taken from Western Australia; and
- (b) the child, while out of Western Australia, was subjected to female genital mutilation,

is proof, in the absence of evidence to the contrary, that the accused person took the child, or arranged for the child to be taken, from Western Australia, as the case may be, with the intention of having the child subjected to female genital mutilation.

There, Leader of the Opposition, is the reversal of the onus of proof related specifically to intent. This Parliament was clearly of the view when it contemplated this section, inserted in 2004 at the initiative of the Labor

Attorney General Hon Jim McGinty, that it was a just and reasonable provision to have in the statutes of Western Australia in relation to a very, very serious offence.

The PRESIDENT: Order! Noting the time, I could give the member an extension for the whole weekend but he would be talking to himself!

Debate adjourned, pursuant to standing orders.