




Speech By
Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 13 August 2020

CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AND OTHER LEGISLATION AMENDMENT BILL

Introduction

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.02 pm): I present a bill for an act to amend the Co-operatives National Law Act 2020, the Criminal Code, the Gaming Machine Act 1991, the Interactive Gambling (Player Protection) Act 1998, the Legal Profession Act 2007, the Liquor Act 1992, the Police Powers and Responsibilities Act 2000, the Racing Integrity Act 2016, the Wagering Act 1998 and the legislation mentioned in schedule 1 for particular purposes. I table the bill, the explanatory notes and a statement of compatibility with human rights. I nominate the Legal Affairs and Community Safety Committee to consider the bill.

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 [1367](#).

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, explanatory notes [1368](#).

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, statement of compatibility with human rights [1369](#).

I am pleased to introduce the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. The bill implements the recommendations of the Queensland Law Reform Commission's review on consent laws and the excuse of mistake of fact. The Queensland Law Reform Commission's report on its review was tabled in the House on 31 July 2020.

The QLRC is an independent review body and consists of a chairperson who is assisted by part-time members. I would like to take this opportunity to thank the QLRC members who produced this report. I will particularly identify them because a number of these members are retiring from the QLRC and I want to thank them for their work. I thank the then chairperson, the Hon. Justice David Jackson, Justice of the Supreme Court of Queensland; the Hon. Margaret Wilson QC, retired Justice of the Supreme Court of Queensland; His Honour Judge Brian Devereaux SC, Judge of the District Court of Queensland; Ms Penelope White, barrister; Dr Nigel Stobbs, barrister and senior lecturer at QUT's School of Law; and Ms Ruth O'Gorman, barrister.

I also take this opportunity to thank all Queenslanders who made submissions to the QLRC, in particular, those survivors of sexual violence who gave up their time and also put themselves through the traumatic task of having to discuss their personal experiences. The QLRC held several rounds of consultation facilitated by both targeted and public invitations for submissions and feedback. Appendix B to the QLRC's report shows the wide breadth of consultation undertaken by the commission, which included a workshop with representatives from organisations that support and represent victims and survivors of sexual violence.

The QLRC has applied its considerable expertise to this review of significant public interest. The nature and breadth of the QLRC's review of the practical operation and application of Queensland's laws on consent and the excuse of mistake of fact is unprecedented. The transcripts from 135 rape and

sexual assault trials during 2018 and 40 appellate decisions from between 2000 and 2019 were examined in addition to another 76 trials referred to it at its invitation. This is an astounding amount of work and analysis for which I thank the QLRC for undertaking. The evidence uncovered by this review is invaluable because it is specific to the operation of Queensland's Criminal Code, which functions differently in key respects to the criminal law in common law jurisdictions in Australian states such as New South Wales, Victoria and South Australia. The inclusion of an analysis of trial transcripts has provided the most accurate evidence base possible as it avoids biases and inherent problems of relying solely on appellate decisions for analysis.

The rigorous approach of the QLRC gives the Palaszczuk government confidence in accepting and implementing all of the QLRC report's five recommendations. The QLRC found four legal principles that can be distilled from the current case law in Queensland that would benefit from being explicitly spelt out in the Criminal Code. Those principles are: silence alone does not amount to consent; consent initially given can be withdrawn; a defendant is not required to take any particular 'steps' to ascertain consent, but the jury can consider anything the defendant said or did when considering whether they were mistaken about consent; and the voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent, though it can be relevant to the honesty of that belief.

The QLRC also recommended an amendment to ensure that the definition of consent applies uniformly to sexual offences in chapter 32 of the Criminal Code. All of these recommendations are implemented in the amendments to the Criminal Code in this bill.

The implementation of the QLRC's recommendations in this bill will strengthen and clarify the operation of the law in Queensland. Furthermore, it represents further progress towards Queenslanders being able to live free of sexual violence. These amendments to the Criminal Code will strengthen, modernise and make the law more accessible for all Queenslanders and facilitate a more consistent and correct understanding of the law by judges, legal practitioners and juries.

The amendments to the Criminal Code in this bill are consistent with the draft bill at appendix G to the QLRC's report with the only addition being a transitional provision. The transitional clause provides that the bill's amendments to the Criminal Code will operate prospectively to offences in chapter 32 of the Criminal Code, charged after the date of commencement but will be able to be applied to offences that are committed before commencement.

I note that the QLRC's report also identified some areas for future reform. The QLRC observed that there may be merit in giving consideration to the creation of a standalone offence for the practice known colloquially as 'stealthling' and the modernising of language in chapter 32 of the Criminal Code by removing the term 'carnal knowledge'. The Department of Justice and Attorney-General will consult with stakeholders on these issues.

While the QLRC report concluded that there should be no amendment to the Criminal Code to deal specifically with a circumstance in which a person consents to a sexual act under a mistaken belief there will be a monetary exchange for that act, it also noted that the proposal raised broader policy issues relating to the regulation and protection of sex workers which was outside the scope of its review. This issue will, therefore, be incorporated into a proposed review of regulation of the sex work industry by the QLRC, which the government has already publicly foreshadowed. I want to be clear that the amendments to the Criminal Code in this bill are only one aspect of the Palaszczuk government's ongoing response to prevent and protect Queenslanders from sexual violence and support the survivors of sexual violence.

As the QLRC observed in its report, there are limits to what can be achieved in terms of changing social practices with amendments to the criminal law. Work at the front end of the criminal justice system must also occur to see real change. In addition, the Palaszczuk government has already made significant reforms in the area of sexual violence, including: introduction of a sexual assault counselling privilege; amendment to give victims of a sexual offence who are giving evidence in a proceeding for an offence against the offender automatic status as a 'special witness'; and introducing offences relating to the non-consensual sharing of intimate images.

It is important to point out that the ANROWS National Community Attitudes Survey report published in November 2018 found the following: too many Australians are willing to excuse violence as part of a 'normal' gender dynamic in a relationship; one in five Australians believe domestic violence is a normal reaction to stress and that sometimes a woman can make a man so angry he hits her without meaning to; two in five Australians believe that women make up false reports of sexual assault in order to punish men; one in eight believe that if a woman is raped while she is drunk or affected by drugs she is at least partly responsible; and one in three think it is natural for a man to want to appear in control of his partner in front of his male friends.

Many Australians hold attitudes suggesting that sexual aggression can be attributed in part to men's natural sex drive. One in three—33 per cent—Australians believe that rape results from men being unable to control their need for sex. One in four—28 per cent—Australians believe that when sexually aroused men may be unaware that a woman does not want to have sex. One in six—between 13 per cent and 15 per cent—Australians feel that non-consensual sex is justified if the woman initiates intimacy.

In the second half of 2019, the Palaszczuk government released *Prevent. Support. Believe. Queensland's framework to address sexual violence*, a new sexual violence prevention framework for Queensland. That framework includes a range of strategies under the priority areas of prevention, support and healing, and accountability and justice to provide a whole-of-government response to sexual violence.

We know that only a fraction of cases reported end up in court. Further work is required across government to examine the experience of women in the criminal justice system with a view to reducing the high attrition rate of sexual assault complaints. These significant reforms are designed to improve the experiences of sexual violence survivors in the criminal justice system and ensure their voices are heard with clarity.

Legislation is only part of the story. As a community, we need to work smarter on education and awareness, particularly among Queenslanders reaching the age of consent, to change attitudes and prevent sexual violence in the first place. Furthermore, the Department of Justice and Attorney-General and the Department of Child Safety, Youth and Women will work together across multiple government departments and in consultation with the Queensland Police Service to develop appropriate education programs to support the amendments in this bill. The Palaszczuk government will continue to work with victims of sexual violence and domestic and family violence to better understand how we can encourage more victims to come forward and be supported.

The bill also reaffirms the Palaszczuk government's commitment to reducing harm from alcohol related violence by progressing additional initiatives to advance our Tackling Alcohol-Fuelled Violence Policy. Changes to the Liquor Act 1992, Gaming Machine Act 1991 and Police Powers and Responsibilities Act 2000 implement the second tranche of the government's legislative response to the final evaluation of the Tackling Alcohol-Fuelled Violence Policy by: providing greater rigour around ID scanning and the banning regime; increasing the minimum duration of police banning notices from 10 days to up to one month; ensuring the ongoing effectiveness of safe-night precincts by legislating a three-yearly review of safe-night precincts; and increasing transparency and accountability around liquor and gaming machine decisions. These amendments support the government's comprehensive, multifaceted policy framework aimed at changing the culture around drinking, promoting responsible drinking practices and ensuring a safer night-time environment.

The bill also legislates Queensland's commitments under the National Consumer Protection Framework for Online Wagering in relation to restrictions on wagering inducements to open accounts. Amendments to the Interactive Gambling (Player Protection) Act 1998, Racing Integrity Act 2016 and Wagering Act 1998 complement and further support the harm minimisation objective of the proposed inducement bans by additionally prohibiting the offer of inducements to customers not to close an account with an interactive wagering operator or racing bookmaker and prohibiting the offer of inducements not to unsubscribe from direct marketing materials.

The bill also contains miscellaneous amendments to provide: liquor accords and safe-night precinct local boards a legislative process for exemption from cartel behaviour; flexibility for wagering operators in respect of dividends; and a minor, technical amendment to the Co-operatives National Law Act 2020.

The bill also contains amendments to the Legal Profession Act 2007 which clarify the operation of certain provisions in relation to the Legal Practitioners' Fidelity Guarantee Fund. The fund is administered by the Queensland Law Society and was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor/law practice. The Legal Profession Act currently provides that the society may limit the amount payable from the fund to \$200,000 for a single claim and \$2 million for all claims made in relation to a single law practice—the statutory caps. The statutory caps were introduced as protection against an extraordinary claim against the fund which, if paid in full, would result in the fund being exhausted to the detriment of subsequent claims. However, the act allows the society to exceed the caps if satisfied that it would be reasonable to do so after taking into account the position of the fund and the circumstances of a particular case.

The application of the statutory caps resulted in a number of claimants between 2009 and 2016 not having their claims against the fund paid in full to the extent of approximately \$6 million. I am pleased to advise the House that the Queensland Law Society is supportive of revisiting those claims so they

may be paid in full. I commend the society for its decision in this matter which will promote both fairness in the administration of claims and public confidence in the profession. The amendments will empower the society to make these additional payments and provide clear guidance as to when the statutory caps can be applied. I commend the bill to the House.

First Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.15 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 Legal Affairs and Community Safety Committee

Mr DEPUTY SPEAKER (Mr Weir): In accordance with standing order 131, the bill is now referred to the Legal Affairs and Community Safety Committee.