




Speech By
Amy MacMahon

MEMBER FOR SOUTH BRISBANE

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

 **Dr MacMAHON** (South Brisbane—Grn) (12.10 pm): I rise to speak to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. Survivors of sexual assault in Queensland have been asked to share their stories time and time again. Just a little over a week ago, thousands of people gathered outside this very building for the Women's March 4 Justice saying 'enough is enough'. Victims of sexual assault shared their stories. Women who sit in this chamber shared their stories. Last year the review by the Law Reform Commission saw victims and advocates share their stories and argue for change. Witnesses then were asked to come before the Legal Affairs and Community Safety Committee to share their stories again.

Yet the bill we have before us today disregards those stories. It goes nowhere near far enough to amend Queensland's definition of consent. It goes nowhere near far enough to close the mistake-of-fact excuse that currently exists in Queensland. This bill still puts Queensland far behind other jurisdictions and fails victims/survivors yet again. This is why I now table amendments to the bill to strengthen the guiding principles of the act, introduce an affirmative model in the definition of consent and restrict the use of mistake-of-fact defence to reflect that affirmative model of consent.

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, amendments to be moved by Dr Amy MacMahon [404](#).

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, explanatory notes to Dr Amy MacMahon's amendments [405](#).

I want to outline the most significant ways in which the bill before us is severely inadequate and out of line with community expectations. Firstly, in codifying what already exists in case law in Queensland, the bill will make very little difference for victims/survivors in Queensland. After promising to make change and dragging survivors through often traumatising processes of consultation, a survivor navigating our hostile legal system once this bill is passed and implemented will get little further protections than someone navigating that system today.

Secondly, in the definition of consent, the bill fails to legislate an affirmative model as long called for by survivors and advocates. An affirmative model of consent means consent is freely given for different acts within a sexual encounter, where steps have been taken to actively ascertain and that consent is clearly and positively expressed either verbally or through actions. While an affirmative model puts the onus on all persons involved to find out whether the other person consents and continues to consent to each sexual act, the minor changes to the model of consent in this bill leaves the onus on victims to express non-consent or actively resist.

While I am pleased that the bill states consent can be withdrawn and that silence can no longer constitute consent, it fails to introduce an affirmative model of consent. An affirmative model would send a clear message to the community and addresses outdated myths around rape and sexual assaults. It removes the opportunity for the implied consent narratives and victim blaming—referring to how someone dresses or behaves or prior indications of consent—to be introduced into court.

Our current laws and this bill are stuck on outdated and dangerous understandings of consent. The best practice model, the affirmative consent model, more accurately reflects the realities of sexual violence, where it is a common and understandable response for victims to freeze, shut down or simply comply during an attack. An affirmative model in our laws would mean defendants do not just have to look for a stop sign but would have to wait for a green light. Such a model has been in place in Tasmania and Victoria for many years. In Victoria the legislation defines consent as meaning ‘free agreement’ and sets out a non-exhaustive list of circumstances in which a person does not consent.

Finally, the bill makes only minor changes to the mistake-of-fact excuse. Mistake of fact allows accused perpetrators to claim they had a mistaken but reasonable belief that sex was consensual. The defence has been used by defendants who claim that a woman’s behaviour—including previous flirting or visiting someone’s house, what someone wore or how they acted—would be mistakenly interpreted as consent. This defence has also been used in cases where someone freezes or did not fight back enough, where there are language barriers or alcohol involved, and where cases involve domestic violence, people with disabilities and children.

The mistake-of-fact defence has been part of Queensland law since 1899, and two-thirds of defendants who use the mistake-of-fact defence get off without charge. The bill in its current form only codifies existing case law in relation to the mistake-of-fact excuse and again makes very little difference to victims’ experiences of the justice system.

I am pleased that the bill states that a defendant’s voluntary intoxication cannot be taken into account regarding mistake of fact. However, I share advocates’ concerns around the provision which states that ‘regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act’. This allows defendants to point to anything they did to ascertain consent, no matter how small or unreasonable. While this is already included in case law and therefore may not materially worsen survivors’ experiences within the justice system, it again fails to reflect an affirmative model of consent by requiring the defendant to take reasonable steps to ascertain consent.

I am also concerned that the bill makes no explicit provisions for eliminating the mistake-of-fact excuse if a person is asleep, unconscious or heavily intoxicated when a defendant has sex with them, such as where someone has fallen asleep or is unconscious after initially giving consent. Our amendments would narrow the use of mistake-of-fact excuses to instances only where the defendant can show they took positive and reasonable steps to ascertain the other person’s consent and remove the ability to argue the mistake of fact where the victim/survivor was unconscious, asleep or intoxicated and had not positively expressed consent.

Before finishing, I want to remind the House that 12 frontline organisations providing support to victims/survivors of sexual assault and two other community organisations yesterday wrote a letter to the government saying that the bill is not fit for purpose and will do little to improve the safety and wellbeing of women, and they have asked the government to find courage. I table their letter today.

Tabled paper: Letter, dated 23 March 2021, from various organisations, to the Premier and Minister for Trade, Hon. Annastacia Palaszczuk, and the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, Hon. Shannon Fentiman, regarding the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 [406](#).

I feel that the minister’s speech yesterday ignored their concerns, telling them that existing safeguards are working fine, as though survivors’ experiences are not valid. I table their letter to remind the House of the very real voices behind these calls.

I acknowledge that there is a very welcome broader review underway—the Women’s Safety and Justice Taskforce—but survivors of sexual assault and advocacy organisations that support them have already been through a rigorous and detailed consultation process on sexual violence and consent. Now we are asking them to share their stories, their trauma, their expertise and their recommendations yet again. I am asking the government to listen to them now. Sexual violence is an urgent issue and the status quo is just not enough. If we do not take every opportunity in this place to ensure our laws reflect the society we want to live in—a society free from rape and sexual assault, which rejects rape myths—then I question what we are doing here at all.

While I will not be opposing this bill given it simply codifies existing case law into legislation, I implore the House to support my amendments today which would genuinely improve the experiences of victims/survivors of sexual assault in our justice system and introduce an affirmative model of consent.