Speech By

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MEMBER FOR GLASS HOUSE

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

Mr POWELL (Glass House—LNP) (6.06 pm): I am a son. I am a brother. I am a husband. I am a father. I am a boss. I am a colleague. I am a friend. I am surrounded by amazing women and girls who enrich my life and the community in which I live and work. I abhor all violence. I particularly abhor violence towards women and children. Sexual violence has no place—no place—in our society. My wife, Taryn, and I are raising our sons to be strong but gentle, providers and protectors. We are raising our daughters to be strong, confident, safe and under no illusion that, like my sons, when they grow up they can do whatever they set their minds to.

The conversation the nation is having at the present time needs to be had. In fact, it is long overdue. The stories we are hearing should never have happened but because they did it is important that they are shared. Our society needs to change its culture. It starts with each individual, with each family, with each community and this parliament can play its part, as we do today in debating the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020.

I am a member of the Legal Affairs and Safety Committee. The inquiry we undertook on the bill was challenging and that was before we saw unfold the events in our nation's capital. At the outset I thank my parliamentary colleagues on the committee and, in particular, the committee secretariat—Renee, Margaret, Kelli and Lorraine.

As member for Clayfield detailed, this bill arose out of a very specific request from the former government to the Queensland Law Reform Commission, the QLRC, around consent and mistake of fact. The bill proposes to amend the Criminal Code to implement the five recommendations of the subsequent QLRC report. As the explanatory notes advise—

> The recommendations in the QLRC's report are based on a rigorous examination of the operation of the laws on consent and excuse of mistake of fact in Queensland. 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. The QLRC's analysis should be recognised as extensive constituting an almost exhaustive and entirely forensic examination of the current operation of the relevant laws in Queensland. The rigorous approach of the QLRC has produced an objectively solid evidence base for the most appropriate form of legislative amendment in response to the community concerns which gave rise to its Terms of Reference.
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> The QLRC's extensive and rigorous review did not find evidence to support a conclusion that Queensland's current laws should be the subject of extensive change. However, the QLRC concluded that some aspects of the existing law of Queensland would benefit from being made more explicit in the Criminal Code.

The member for Clayfield and others have referenced the specific recommendations, so I will not reiterate them. Suffice it to say, four of them relate to principles that can be distilled from the current case law in Queensland but are not currently explicitly spelled 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 a 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.

A number of submitters to the committee, particularly those from the legal fraternity, highlighted the fact that these legislative changes codify existing case law. For lawyers and judges this is not always seen as necessary, but I like how the Bar Association of Queensland explained when asked if the changes were required. They said—

Not technically, no. I do think that if the law is more readily understandable by juries, if it is more readily understandable by members of the public who read the Criminal Code—because at the moment, even though it is absolutely there in the case law it would not be readily apparent to someone reading the Criminal Code. In that sense—and there has been some discussion about the educative aspect of legislation—we do not oppose it on that basis. We see that it serves a purpose. Our committee's view is that it does reflect the state of the law at the moment. It is not inappropriate for legislation to do that. We would not have said it was strictly necessary, but we support the Queensland Law Reform Commission's view that it would be useful, and on that basis, we support the bill.

Counteracting the argument that technically the amendments were not necessary were the submissions advocating that the bill amend section 348 of the Criminal Code to introduce an affirmative and communicative model of consent—that the amendments did not go far enough. For example, the Queensland Sexual Assault Network said that an affirmative model would assist in addressing incidences of freezing. Similar views were expressed by the LGBTI Legal Service, Rape and Domestic Violence Services Australia, Rape and Sexual Assault Research and Advocacy, QCOSS and the Women's Legal Service. In particular, the Women's Legal Service Queensland, in voicing a request of many, called for the Tasmanian model to be provided. They said—

I would say that the way the Tasmanian law introduces this is that it says essentially that a mistaken belief by the accused as to the existence of consent is not honest and reasonable if and then it goes on to say they did not take reasonable steps in the circumstances known to him or her at the time of the offence to ascertain that the complainant was consenting, so that is the way that it is iterated in the Tasmanian Criminal Code. What they are saying is that if the defendant has not taken reasonable steps to ascertain consent then they cannot even rely on the defence for the excuse.

I was interested to know if that model had led to clearer and more successful prosecutions. Whilst the WLSQ was not able to provide quantitative results demonstrating such, as the member for Clayfield mentioned, QCOSS subsequently provided a 2012 PhD thesis by Helen Cockburn. As the member for Clayfield said, the key finding, as presented by QCOSS was that the 'Tasmanian reforms have not lived up to their promise because judges and the legal profession have been reluctant to fully implement them'. QCOSS concluded that 'clearly, legislative reform as part of a largest suite of reforms—including judicial education—will most likely deliver better outcomes for sexual assault survivors'.

In response to calls for a more affirmative model of consent along the lines of the Tasmanian model, the Queensland Law Society highlighted that the two states have quite different laws in this space. As others have read that into *Hansard* I shall not, but I direct members of the Glass House electorate to the response by the Queensland Law Society on that. Similarly, the Department of Justice and Attorney-General explained—

The QLRC did talk about the fact that affirmative consent can be defined in a lot of different ways. The QLRC found that the elements that already exist in Queensland law provide for a model of affirmative consent. Consent as it is defined in section 348 has a couple of elements. The first one is that the person has to actually consent—their actual state of mind—and then it has to be voluntarily given. That requirement is indicative of an affirmative consent model.

It goes on. Based on these submissions and responses, the committee recommended—

… the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence undertake consultation with key stakeholder groups as a matter of urgency in regards to addressing sexual violence in Queensland, including examining the experience of women in the criminal justice system as a whole and possible future areas for reform such as attitudinal change, prevention, early intervention, service responses and legislative amendments as necessary.

It is there that I want to conclude my contribution. I do not believe that this matter ends with this legislative debate. If anything, I suspect this is only a start. There does need to be further reform. There does need to be society-wide attitudinal change. There does need to be more education, more prevention, better early intervention and better service responses. Yes, we may need further legislative amendments. This is not the end. This is a start and a positive one at that. I support the legislation.