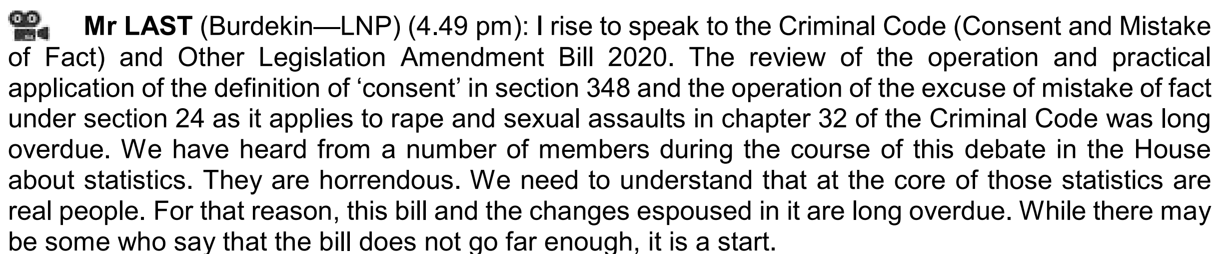
Speech By

Dale Last

MEMBER FOR BURDEKIN

Record of Proceedings, 25 March 2021

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



Mr LAST (Burdekin—LNP) (4.49 pm): I rise to speak to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. The review of the operation and practical application of the definition of 'consent' in section 348 and the operation of the excuse of mistake of fact under section 24 as it applies to rape and sexual assaults in chapter 32 of the Criminal Code was long overdue. We have heard from a number of members during the course of this debate in the House about statistics. They are horrendous. We need to understand that at the core of those statistics are real people. For that reason, this bill and the changes espoused in it are long overdue. While there may be some who say that the bill does not go far enough, it is a start.

These are serious offences. When we consider that rape attracts a penalty of life imprisonment and sexual assault attracts a penalty of 10 to 14 years imprisonment, depending on the circumstances, we need to get this absolutely right.

In his contribution the member for Clayfield talked about proving every element of the offence beyond a reasonable doubt. The ex-police officers in this place know all about that. That will still be the case after this legislation is passed today. Chapter 32, 'Rape and sexual assaults', of the Criminal Code deals with sexual offending against adults where the absence of consent is an element of the offence. Section 348, 'Meaning of consent', in chapter 32 defines 'consent'. Section 348(1) provides—

… ***consent*** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.

Section 348(2) provides a non-exhaustive list of circumstances where consent is not freely and voluntarily given.

Chapter 5, 'Criminal responsibility', sets out the limits of criminal responsibility under the Queensland Criminal Code. Under the code, unless a particular state of mind is expressed as an element of the offence itself, the state of mind of the accused is irrelevant.

The approach in the Criminal Code must be distinguished from the approach in common law jurisdictions—for example, New South Wales, Victoria and South Australia—where the accused's state of mind—that is, their intent and knowledge—must always be proven beyond a reasonable doubt by the prosecution, even if it is not expressly articulated as an element of the offence.

Chapter 5 of the Criminal Code balances the absence of an embedded mental element in each offence by providing for particular circumstances where a person is excused from criminal responsibility. Although often referred to as defences, the provisions in chapter 5 are exculpatory provisions. If they are raised on the evidence consistent with the precept of the presumption of innocence, the prosecution bears the onus of excluding their operation beyond a reasonable doubt.

Section 24, 'Mistake of fact', is contained in chapter 5 of the Criminal Code and provides—

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.

The mistaken belief must be both subjectively honest and objectively reasonable. Section 24 is available as an excuse for every criminal offence in Queensland unless its operation is expressly or impliedly excused. It is embedded in our law in this state. The law in Queensland is consistent with every other state and territory in Australia in that it places the onus of proof on the prosecution to negative mistake as to consent.

On 30 June 2020, the QLRC delivered its report *Review of consent laws and the excuse of mistake of fact*. The recommendations in that report are based on a rigorous examination of the operation of the laws of consent and excuse of mistake of fact in Queensland. I note that 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 that were referred to it at its invitation. That is important because it demonstrates that it was—and it needed to be—researched and understood. By going to that depth and undertaking that level of scrutiny, we have a better understanding of what we need to do in terms of changing the laws we are talking about today.

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. The 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 report concluded that some aspects of the existing law in Queensland would benefit from being made more explicit in the Criminal Code.

The QLRC report made five recommendations: section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that a person is not taken to give consent to an act only because at or before the time of the relevant act the person does not say or do anything to communicate that they do not consent to that act. Chapter 32 of the Criminal Code should be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) and 352(1)(a). Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that if an act is done or continues after consent to the act is withdrawn by words or by conduct then the act is done or continues without consent. The Criminal Code should be amended to provide that, for the offences in chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable but mistaken belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act. Lastly, the Criminal Code should be amended to provide that, for offences in chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable but mistaken belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance. The report also recommended that an inconsistency as to the application of the definition of 'consent' to different offences in chapter 32 of the Criminal Code be remedied. The case law on this issue has very recently been clarified by the Queensland Court of Appeal in the case of R v Sunderland.

The amendments to the Criminal Code in this bill implement the recommendations of that report. These amendments to the Criminal Code are almost entirely declaratory of the existing law of Queensland; however, much of that existing law is found in Queensland's case law—not in the words of the Criminal Code itself. The QLRC noted that the community is the ultimate user of a law and that effective communication of legislative rights and obligations is a key component of access to justice. By making the existing law clear in the Criminal Code, the bill will strengthen and modernise the law, 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.

It is important that the Criminal Code is clear and unambiguous in its statement of the law. Let me be very clear: we simply must ensure that the legislation in Queensland not only provides the best protections available today but also continues to be amended where necessary to ensure both that the best protections are available and that our legal system is best placed to provide fair outcomes for victims of these horrendous crimes.

Regarding the other amendments in this bill, as someone who was heavily involved in the establishment of the Townsville Safe Night Precinct, I welcome the framework to regularly review the effectiveness of that and other precincts. It is sad to say that, despite the efforts of many, we still see idiots acting inappropriately in and around licensed premises. It is easy to point the finger of blame at licensees but, in reality, we need to see people taking responsibility for their actions. I hope that under the framework for review this issue is considered because, just like our city cousins, people who work in and people who chose to socialise responsibly in licensed premises in rural and regional Queensland are also entitled to a safe night out.