




Speech By
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MEMBER FOR MACALISTER

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

 **Mrs McMAHON** (Macalister—ALP) (12.54 pm): I rise to support the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. I thank the committee for its work in preparing the report. I note the bill was first introduced in the last parliament when I was a member of the Legal Affairs and Community Safety Committee. I wish to speak specifically with respect to the amendments to the Criminal Code introduced in this bill. These are the amendments that address the issue of consent in relation to sexual assaults. We are experiencing an epidemic of sexual assaults and I do not use this word lightly, with over one in five women over the age of 15 experiencing sexual assault—and it is one in 22 men. If there was a disease that affected one in five people, if there was a specific tragedy that affected people at the rate of one in five, an entire country would be moved to action.

Twenty-three and a half thousand women in this country aged between 18 to 24 indicated that they had been sexually assaulted in a 12-month period prior. That is 23,500 women in just a small six-year age cohort in a previous 12-month period. I am not talking sexual harassment or discrimination or the other forms of disrespect that women live with on a daily basis, I am talking sexual assault—a deeply invasive, confronting, humiliating and traumatising event in a person's life. Can you imagine a world in which 23,500 men in just a 12-month period had been held to account for those sexual assaults? We cannot because they are not. The reporting of these incidents and the investigation and prosecution of these men—because let us recognise the fact that the overwhelming majority are—just does not happen on any scale that would give a victim the support of or confidence in the criminal justice system.


Only a small percentage of victims of sexual assault will report the incident to police. Some report it as low as 10 per cent. Of matters that are reported, only 30 per cent are likely to result in any commencement of legal action against a perpetrator. In 2018 the QLRC reported that in Queensland only 36 of those prosecuted rape and sexual assault trials resulted in a conviction. These may be gut-wrenching statistics, quite stark and dire, but that is nothing to the lived experience of women going through this system.

I have seen it firsthand. I have been the first response officer at the scene. I have been the one on the counter when the victims, both male and female, have gathered the courage to report days, weeks and months later. I have seen the good and the bad in police response. I have sat there while a detective sought to convince me that the victim was merely regretting consensual sex; senior officers who, without even meeting the victim, were convinced that a rape was reported only because the victim's boyfriend had found out she had sex with another man. As a young female police officer I found it confronting, but quite instructive, how my male colleagues responded to sexual assault, how they viewed sexual assault. I will not even go into the disdainful response to complaints of sexual assault by male victims.

While some in the House might find the statistics on under-reporting, and specifically the number of reports that are classed as withdrawn or unfounded, appalling—and it is that—I am not surprised in the least. There is a culture of disrespect and violence against women that is endemic in our community. Whilst there is a lot of work to do with the culture of disrespect against women, which is at the core of all violence against women, I understand that this is unfortunately a long road, but we do start the journey here. As legislators we can make changes in areas under our immediate purview, and that is the legislation of this state, and we can go some way toward addressing the pitiful success rate in securing convictions against offenders.

In September 2019 the then attorney-general referred to the QLRC a review of consent laws and the excuse of mistake of fact. This was in response to a number of cases which drew attention to the issue of consent and the role that the legislation had. The QLRC's own review of trials from 2018 showed that in matters where consent was contested, the conviction rate was as low as 29 per cent compared to matters where the actual act of sexual contact was contested where the conviction rate was 41 per cent. The QLRC delivered its report and it was tabled in July 2020. The report made five recommendations around amendments to the Criminal Code. In August 2020 the Attorney-General introduced a bill to the previous parliament acting on those recommendations. It was an election commitment of this government to implement the recommendations of that QLRC report.

The lapsed bill and its amendments are introduced in this bill before the House and I will turn to the recommendations implemented in this amendment bill. Before I do so, I would just like to give a bit of a primer to my fellow members in this House about how chapter 5 of the Criminal Code works, but first I will move that the debate be adjourned.

 **Mrs McMAHON** (Macalister—ALP) (3.50 pm), continuing: Before the break I was about to launch into a bit of a primer for our colleagues about the Criminal Code and how the chapters 5, 26 and 32 work together. Chapter 26 contains section 245, 'Definition of assault'. It states—

A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud ... is said to assault that other person ...

It should be noted that 'consent' in chapter 26 is not defined. Chapter 32 contains offences relating to rape and sexual assaults, and it is within chapter 32 that we see 'consent' defined. It states—

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

It then goes on to give a non-exhaustive list of the ways in which the notions of 'freely' and 'voluntarily' are negated. The current definition is, however, silent on a number of facets around consent that are regularly contested through the criminal justice system.

Last but not least is the working of chapter 5 of the Criminal Code, 'Criminal responsibility'. This is the bit in the Criminal Code which outlines what may be colloquially referred to as defences. The onus is on the prosecution in just about every criminal matter to negate each and every possible defence in chapter 5 beyond reasonable doubt. People who are not intimately familiar with the criminal prosecution system may not be aware how important this particular chapter is in relation to the success of investigations and subsequent prosecutions of every criminal charge.

The onus of proof on the prosecution to prove to a level of beyond reasonable doubt is a heavy burden indeed. It is understandable to ensure that we have a criminal justice system that ensures fair and proper hearings and trials, but it would be remiss if we did not realise the heavy burden this places on victims of chapter 32 offences and goes a long way to explain why convictions are so hard to secure. Section 24, 'Mistake of fact', states—

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 ...

How this translates to chapter 32 offences is pertinent where consent is an issue. The defendant need only raise their belief that they had consent at the time of the act to enliven this defence. Keep in mind that the burden to disprove that belief resides with the prosecution and therefore the evidence often of only the victim. The QLRC reported that in trials where mistake of fact was raised by the defence, convictions were secured in only 35 per cent of matters.

I would like to look at how the five QLRC recommendations that form the basis of the Criminal Code amendments help the operation of these sections going forward, particularly for victims of rape and sexual assault. The first is that the definition of 'consent' be expanded to include that a person is not taken to give consent to an act only because the person does not say or do anything to communicate

that the person does not consent to the act. In short, what this means in operation is that merely because a woman does not say no does not mean that she has consented. It reinforces that consent must be given. Submission or silence does not constitute consent.

The second is that the application of consent will apply to other offences in chapter 32. This is where understanding the definition of 'assault' fits in, because currently a number of sections in this chapter do not refer to consent as an element of the offence and refer only to the section 245 definition of 'assault', which, as I stated earlier, does not have 'consent' defined. To that end, the definition of 'assault' in chapter 32 is extended to include the aspects of consent made explicit in the new section 348.

The third is that the issue surrounding the withdrawal of consent is made clear—that consent initially given can be withdrawn at any time. It still amazes me that women of a range of ages still hold the misconception that once consent is given they lose the right or ability to withdraw that consent.

I absolutely understand why many submitters feel that this bill does not go as far as it should, but the QLRC had a specific remit and it has made recommendations. We commit to implementing those recommendations. I understand that a much larger conversation needs to occur. I absolutely support the need for one-stop shop services.