Speech By

Michael Berkman

MEMBER FOR MAIWAR

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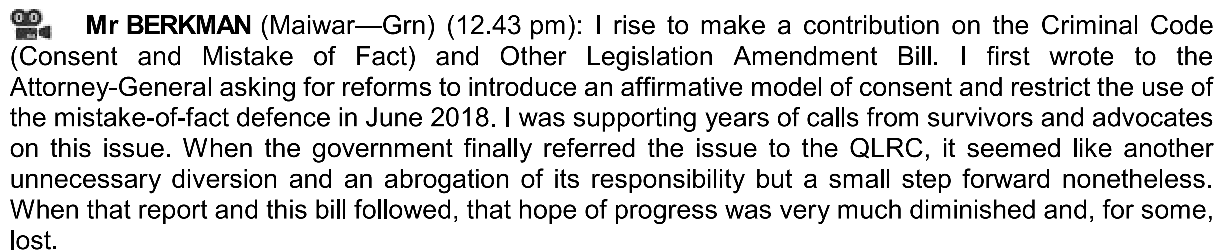
CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AND OTHER LEGISLATION AMENDMENT BILL



Mr BERKMAN (Maiwar—Grn) (12.43 pm): I rise to make a contribution on the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill. I first wrote to the Attorney-General asking for reforms to introduce an affirmative model of consent and restrict the use of the mistake-of-fact defence in June 2018. I was supporting years of calls from survivors and advocates on this issue. When the government finally referred the issue to the QLRC, it seemed like another unnecessary diversion and an abrogation of its responsibility but a small step forward nonetheless. When that report and this bill followed, that hope of progress was very much diminished and, for some, lost.

The government admits that on the issue of consent specifically this bill only codifies existing case law. Survivors have expressed so clearly the ways in which the current system is not working. They have made the case that a QLRC review and a bill were warranted to effect this change, but the government is leaving the law essentially unchanged and simply reaffirming it in legislation. Queensland's laws will remain outdated and inadequate under this bill and will continue to have a trickle-down effect on how sexual assault complaints are investigated and whether charges are laid.

Although the bill clarifies that silence alone does not amount to consent, it leaves open the possibility that passivity can amount to consent in some cases. An affirmative model of consent as outlined by my colleague the member for South Brisbane would mean consent must be clearly and positively expressed for each act through words or actions. This bill will codify case law that says a defendant's voluntary intoxication cannot be used to argue mistake of fact, but intoxication will still lower the bar for defence. This is because, while voluntary intoxication cannot be used to support the reasonableness of a mistaken belief, it can be used to argue the mistaken belief was honest.

Our current laws and the bill also recognise that consent cannot automatically be inferred from a lack of physical resistance, such as the freeze response, but defendants can still refer to these factors when relying on the mistake-of-fact defence. On these issues, the bill simply does not match our contemporary understanding of consent. The bill should go further and limit the mistake-of-fact defence so that it only operates where a defendant has taken reasonable steps to ascertain consent.

I want to address some specific comments made by the Attorney-General in her second reading speech. The Attorney-General correctly noted that the defendant need not take any steps to ascertain consent but a jury can consider any steps they did take, but she then said that that includes anything the defendant did not do or did not say. I share the concerns of advocates, including the Women's Legal Service, about the breadth of considerations that can still be relied on in arguing mistake of fact. This bill should do more to limit the continued broad application of this defence. The minister also said—

... our law on consent explicitly states that consent must be given.

On my understanding and on that of key advocates, this appears to be an oversimplification and one with grave consequences for victims/survivors of sexual assault. What the code actually says is consent means consent freely given and voluntarily given by a person with the cognitive capacity to

give consent. Under the current law, which, again, is reflected in this bill, consent cannot be inferred from silence or a lack of resistance—for example, if they freeze or are intoxicated, asleep or unconscious—but a defendant can still refer to these factors when arguing the mistake-of-fact defence.

Let us consider this in the context of a concrete example. On a date someone says that they would like to have sex. They subsequently fall asleep and wake to find the other person raping them. These laws might acknowledge that they did not consent, but they do not prevent the defendant arguing their mistaken belief that there was consent in these circumstances. This is an age-old excuse—

Ms Fentiman: But it has to be reasonable.

Mr BERKMAN: I take the interjection—'It has to be reasonable'—and how often have survivors told their stories of it being argued that it was 'reasonable' in those circumstances? The law does not work at the moment and for you to sit there and pretend as the Attorney-General—

Madam DEPUTY SPEAKER (Mrs Gerber): Pause the clock. Direct your comments through the chair please, member for Maiwar.

Mr BERKMAN: Thank you. The law is not working and to simply codify that law is unbelievably dismissive of the experience of survivors. This is an age-old excuse and it is time to get it out of the law. It is the responsibility of every person who wants to have sex to take steps to determine whether the other person is consenting. The evidence on this is already unambiguous. Stakeholders have been clear. Zig Zag Young Women's Resource Centre, for example, sums it up when it says that this bill—

> ... makes technical and inconsequential changes to existing law, and does not address the need for more substantive change to current legislation relating to consent and the mistake of fact defence ...

However, the government says that it will further delay legislating an affirmative model of consent. What they are saying is that they will ask advocates, experts and survivors to make their case for change again. It is shameful and it should not be necessary. Respect Inc. said in its submission—

> In sex work, a key aspect of consent for sexual services is payment for the services negotiated. If payment is not made or withdrawn, whether or not the sex worker is yet aware, consent is also withdrawn. When the payment and therefore consent is breached access to a person's body and sexual labour is sexual violence.

They submitted that the meaning of consent should specifically preclude circumstances where payment for sexual services is withdrawn or not given, as the fraudulent representations provision in the act may not apply. Everyone in Queensland, including sex workers, deserves protection from rape and sexual violence. Our Criminal Code should allow them to work safely and access justice if subjected to this particular type of sexual violence. Palming the issue off to the QLRC is not good enough.

I note the Youth Advocacy Centre's submission, which asked for greater consideration of alleged offences where both the defendant and the claimant were under 18 years old, given their neurodevelopmental stage can inhibit their ability to control impulses or to identify and express vocal emotions. They raised particular concerns about young people with autism spectrum disorder. As I have said many times in this House, our justice system overall must take greater account of the different developmental stages of children, starting by raising the age of criminal responsibility to at least 14. These are important considerations, which could have been incorporated into a bill that introduces an affirmative model of consent with a requirement for reasonable steps. It is inconsistent and potentially confusing for us to legislate a non-affirmative model of consent at the same time as we are finally starting to teach kids about positive consent.

To conclude on consent, this moment—what is happening both inside and outside of this chamber—is an historic opportunity to reframe and modernise Queensland's outdated sexual assault laws. Just a week on from the women's march that saw thousands of people across the country take to the streets demanding an end to rape culture, this bill seems like a missed opportunity and an insult to people who are calling for change. No-one is pretending that laws alone will end sexual violence. That requires broadscale, systemic and social education and change, and I was pleased to see the minister finally agree to look at mandatory consent training in Queensland schools, but when even our laws do not reflect best practice, when our government actively excludes affirmative consent from this bill, we are not doing our job as legislators.

There are other elements of the bill I will touch on briefly. I am very pleased to support the changes in this bill requiring the reasons behind new liquor and gambling licenses to be made public. I called for this back in 2018 following the ridiculous approval of 45 new poker machines at the Indooroopilly Pig 'N' Whistle in my electorate. Despite the government ignoring the huge community campaign to have that application rejected, I am pleased they took on board our request for greater transparency. I would still like to see further changes, including allowing communities to appeal these decisions, and ultimately a plan to phase out pokies from pubs and clubs in Queensland. After

underpayment scandals, the Indro Pig ‘N’ Whistle went up for sale and the pokies still have not been installed. I again urge the government to scrap the license, given it is clearly inappropriate and unwanted in the area.

I also strongly support the ban on inducements to open or refer a friend to open an online gambling account. I note, however, that the government rejected the recommendation, made in the same review, to restrict the opening hours of casinos. I would suggest this follows a clear and persistent pattern of this government in refusing to stand up to the biggest players in the liquor and gambling industry.

The bill makes some fairly minor changes to strengthen the government’s ID scanning scheme, including to prevent licensees from vexatiously banning investigators from the premises and to create an offence for staff members who do not comply with scanning entry requirements. The Greens have previously criticised the government’s ID scanning laws for their disproportionate impacts on smaller local venues alongside inexplicable exemptions for big casinos. I maintain that this is a sledgehammer approach that does not genuinely address alcohol fuelled violence.

I am also concerned about increasing the duration of an initial police banning notice from 10 days to up to one month. In particular, including ‘using or possessing a dangerous drug’ as an example to issue a ban is worrying. We know that excluding people from public venues, forcing them either into their home or onto the street, can be more dangerous both for themselves and for others.

Finally, I support the amendments to the Legal Profession Act to allow additional payments to be made from the Legal Practitioners’ Fidelity Guarantee Fund for programs to improve compliance and trust accounting systems.