




Speech By
Peter Russo
MEMBER FOR TOOHEY

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

 **Mr RUSSO** (Toohey—ALP) (4.33 pm): I rise in the House to support the passing of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. The Legal Affairs and Safety Committee made four recommendations. The first recommendation was that the bill be passed. The second recommendation was that, in light of the comments of the submitters, 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 with regard to addressing sexual violence in Queensland, including examining the experience of women in the criminal justice system as a whole and the possible future areas for reform such as attitudinal change, prevention, early intervention, service responses and legislative amendments as necessary.

The third recommendation was in relation to the application of section 32 of the Criminal Code as it relates to youth offenders. The fourth recommendation was in relation to amendments being made to permit the fidelity guarantee fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of misappropriations.

The previous and current consent bills are in the same form. The objectives of the bill include implementing all five recommendations of the Queensland Law Reform Commission, as detailed in its report *Review of consent laws and the excuse of mistake of fact*, by clarifying aspects of the existing law in the Criminal Code on consent and the excuse of mistake of fact. The Attorney-General stated in her introductory speech—

The bill implements all five of the commission's recommendations by amending the Criminal Code to make explicit four legal principles that can be distilled from the current case law of Queensland. Those principles are: silence alone does not amount to consent; consent initially given can be withdrawn; regard may be had to anything the defendant said or did to ascertain consent when considering whether the defendant was mistaken about whether the other person gave consent; and that a defendant's voluntary self-intoxication is not relevant to the reasonableness aspect of the excuse of mistake of fact.

The bill also implements the commission's recommendation to fix an inconsistency in the Criminal Code by clarifying that the definition of 'consent' in section 348 applies to all offences in chapter 32 including the offence of sexual assault contained in section 352(1)(a). These amendments to the code are intended to strengthen and clarify the operation of the law, ensuring a consistent and correct application of these important legal principles by judges, juries and legal practitioners. A transitional provision provides that the amendments to the code are to apply prospectively to offences in chapter 32 that are charged after the date of commencement but will be able to be applied to offences that are committed before commencement.

The bill also amends other legislation, including the Legal Profession Act 2007, to facilitate additional payments by the Queensland Law Society from the Legal Practitioners' Fidelity Guarantee Fund to claimants who have had a statutory cap applied to claims prior to 2016 and to provide clearer guidance as to when the statutory caps should be applied in the future. There are also amendments to the Interactive Gambling (Player Protection) Act, the Racing Integrity Act and the Wagering Act to prohibit inducements and wagering using free bets and to impose restrictions on direct marketing in the context of online wagering. There are also amendments to the Liquor Act, the Gaming Machine Act and

the Police Powers and Responsibilities Act as part of the government's response to the final evaluation report of the tackling alcohol fuelled violence policy. The bill also contains miscellaneous amendments to the Liquor Act and the Co-operatives National Law Act 2020.

I practised law in Queensland for nearly 25 years before being elected. My view about the consent legalisation comes from defending people over many years from all walks of life and the concern that moving towards a pure affirmation model will cause more harm than good and will do little to advance the plight of victims and the issue of under-reporting of sexual assaults. It is an issue that affects females, with Australian Bureau of Statistics figures from 2015-16 showing that 79 per cent of reported assaults were against females.

A common thread about consent in relation to sexual encounters is that there is real difference as to how males and females interpret consent. As a father and a criminal defence lawyer, I must acknowledge that the view on the consent law may be a little stilled. I remember when I was first doing my studies to complete the solicitors board exams. You were basically left to your own devices, perhaps relying on someone else doing the same subjects. I faced many challenges, but I approached my studies not really knowing what areas of the law appealed to me. In my home town of Ingham, I was working for a solicitor who had a broad practice, doing personal injury matters, estate work and conveyancing. I cannot recall anyone ever asking my principal to defend them in a court of law, but I have vague memories of him relating a criminal case he was involved in when he did his articles in Brisbane.

At the time that I was studying the Criminal Code I recall lecture notes that referred to McNaughton's legal principles and read something along these lines: 'It is better that 10 guilty men go free than one innocent man hangs.' That principle struck a chord with me and has remained with me ever since. It is a fundamental legal principle that has stood the test of time and is important to our democracy. We change this at our peril.

I am asking myself: what advice do we give our children? If we cast our minds back to our youth, the pursuit of love was something we all sought. I was taught to be respectful towards others, so I hope I never have had an issue with no means no. These are difficult situations and conversations that need to be had. There is an urgent need for the discussions or conversations to be taking place in our homes, educational institutions and boarder community. If we do not have these conversations, we run the risk of causing real harm to each other.

The rise of the #MeToo movement has led to a discussion in the community about enshrining in law a different way to interpret consent for sexual interactions. In the background to these discussions there appears to have been recorded by the Australian Institute of Criminology an increase in the reporting of sexual assaults. This is where the issue for Queensland becomes, in my view, very difficult. There seems to be evidence that would indicate that sexual assaults, although on the increase in Australia, are still going unreported.

Advocates for changing the laws of consent and mistake of fact as enshrined in our Criminal Code say the amendments do not go far enough. They point to many Court of Appeal cases that have led to the acquittal of an accused relying on the proposition of consent and mistake of fact as set out in our Criminal Code. The proponents for change point to these cases as a reason to change the law to an affirmative consent model. If I understand the proponents correctly, they say a change in the law will lead to more convictions and victims feeling safer to come forward and report sexual assaults.

I am grateful for a *Time* article by Samantha Cooney from 17 January posted online. The article is headed 'The Aziz Ansari allegation has people talking about "affirmative consent". What's that.' The article refers to an article published online which sets out the account of what an anonymous woman Grace wrote about the situation. I encourage anyone who has a genuine interest in the debate to read the full online article in the New York *Time* publication. Grace said in the article that when Ansari texted her about their evening basically saying that he had had a good time, she replied that she was uncomfortable and told Ansari he 'ignored clear non-verbal cues; you kept going with advances'. Ansari replied—

I'm so sad to hear this. All I can say is, it would never be my intention to make you or anyone feel the way you described.

What occurred between Ansari and Grace depicts the complexities of this issue and the difference between how two people can perceive a sexual encounter. This is the reason I encourage caution in the way this issue is approached. This is also why I support the passing of this legalisation as a sensible approach to a complex issue and a commitment by the government that this is the first step in a holistic review of the experiences of women in the criminal justice system. I commend the bill to the House.