Speech By

Hon. Shannon Fentiman

MEMBER FOR WATERFORD

Record of Proceedings, 24 March 2021

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

Second Reading

Hon. SM FENTIMAN (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (3.48 pm): I move—

That the bill be now read a second time.

I thank the Legal Affairs and Safety Committee for its consideration of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 and acknowledge the committee's recommendations. I formally table the government's response to the Legal Affairs and Safety Committee's report.

Tabled paper: Legal Affairs and Safety Committee: Report No. 3, 57th Parliament—Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, government response 377.

The bill will amend the Co-operatives National Law Act 2020, the Criminal Code, the Gaming Machine Act 1991, the Interactive Gambling (Player Protection) Act 1998, the Legal Profession Act 2007, the Liquor Act 1992, the Police Powers and Responsibilities Act 2000, the Racing Integrity Act 2016, the Wagering Act 1998 and the legislation mentioned in schedule 1 for particular purposes.

The government made an election commitment to reintroduce this bill and to implement all five of the recommendations made by the Queensland Law Reform Commission in its review of consent laws and excuse of mistake of fact. The QLRC found that there are benefits in amending our Criminal Code in relation to consent and mistake of fact. It will make the language of the code more accessible and it will hopefully result in more consistent and correct directions being given to juries.

The four principles of common law that the bill codifies are: silence alone does not amount to consent; consent initially given can be withdrawn; a defendant is not required to take any particular steps to ascertain consent but a jury can consider anything the defendant said or did when considering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 of course anything the defendant did not do or did not say; and voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent.

The bill also implements the Queensland Law Reform 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. Codifying existing case law in the Criminal Code will strengthen and modernise the law in relation to rape and sexual assault offences. It will also make the law more accessible for Queenslanders and facilitate a more consistent and correct application of the law by judges, legal practitioners and juries.

The Queensland Law Reform Commission's recommendations were the product of an extensive review of the operation of the existing law. The transcripts from 135 rape and sexual assault trials and 40 appellate decisions were examined. However, the Queensland Law Reform Commission's report

acknowledged that sexual offences raise complex issues that need to be addressed by changing the social practices which contribute to sexual violence, and this cannot be achieved by legislative amendment alone. This view was supported by the Queensland Law Society during the committee hearing. They said—

The solution to those problems probably lies in other areas of education, of social policy reform, of adequate resourcing across the multitude of government and not-for-profit bodies that support those people.

As I said when I reintroduced the bill late last year, the government acknowledges that there are a range of views on this bill and its scope, including stakeholders that are concerned the reforms in the bill do not go far enough in reforming the law of consent and mistake of fact. Before turning to how the government will address the barriers that so many women face in our criminal justice system, I want to take the opportunity to address some of the concerns raised by stakeholders during the committee process.

The QLRC found that the elements that already exist in Queensland law provide for a model of affirmative consent to the extent that consent is a state of mind that has to be given and a failure to verbalise or otherwise give consent is not sufficient. There are members of this House who have engaged in a public debate about this very important issue but are misinformed about how the mistake-of-fact defence operates. Let me be clear: our law on consent explicitly states that consent must be given.

The QLRC found at page 122 of its report that the Criminal Code already requires that consent be given 'by a person with the cognitive capacity to give consent'. It is a settled area of law in Queensland that a complainant who is asleep or otherwise unconscious does not have the cognitive capacity to give consent. As Justice Sofronoff, the President of the Court of Appeal, in the case of Sunderland noted, it cannot be overlooked that consent must be given. His Honour further noted in that same case—

The giving of consent, in the context of a charge of a sexual offence, involves the making of a representation by one person to another, to the effect that the first person agrees to participate in the sexual act that would otherwise be an offence. Such a representation might be made by words or actions or by a combination of both.

There are members of this House who say that the onus is on a victim to communicate their lack of consent to a sexual act. Let me be very clear: the case law in Queensland is that silence does not amount to consent. The bill now codifies this position.

In relation to the matter of affirmative consent, evidence given by the Bar Association of Queensland at the committee hearing indicated that the Queensland and Tasmanian models of consent are quite similar. The difference is really around the phrasing of 'reasonable steps'. I quote Ms Fogerty from the Law Society at the committee hearing on this point. She said—

The Tasmanian model differs from the Queensland law in a number of respects, although I think it is easy to overstate the differences. Tasmania does have provision for affirmative consent in the form of reasonable steps. The other aspect of those Tasmanian consent provisions is in relation to how intoxication may be used by a defendant. I think it is important to note though that under the Tasmania provisions a defendant can rely upon reasonable steps in the context of raising the mistake of fact defence.

One of the things that is overlooked in the current discussion is the way the Queensland provision works. There is enormous capacity for reasonable steps to be something that is taken into account. That is because of the objective test that is inherent in section 24—the requirement for a jury to look at what a reasonable person would think in the circumstances. That operates as a really effective safety valve that captures a lot of these issues in a clean and arguably more elegant way than the Tasmanian provisions, which are unwieldly and which have created issues for jury directions and issues in terms of understanding those directions. It is always in the interests of everybody in the community that laws be clear.

Unlike New South Wales and Victoria, where there is a higher threshold to secure a conviction in that the prosecution must prove intent to rape, in Queensland there is no such requirement. What is required to be proved is that a sexual act occurred and there was no consent given. The task is not as simple as comparing the offence provisions of different jurisdictions, because we know that each and every state has a fundamentally different underlying criminal law structure. We have to avoid unintended consequences in this complex area of criminal law. That is why it is so important that we examine these issues very carefully.

We know that Queensland women face barriers when reporting violence committed against them. From the time women report, and throughout their journey of the criminal justice system, we know that there are processes and procedures that add to their trauma. The Palaszczuk government's commitment to improving women's safety and experiences in the criminal justice system goes far beyond the Queensland Law Reform Commission's review and the implementation of its recommendations. Just this month, I was proud to stand with the Premier to announce a wideranging review into the experience of women across the system to be undertaken by the Women's Safety and

Justice Taskforce, led by Hon. Margaret McMurdo. In accepting recommendation 2 of the committee's report, the task force will look into possible future areas of reform including attitudinal change, prevention, service responses and, where necessary, legislative amendment.

We know that it takes so much courage and bravery for women to share their story, and we want to do everything we can to empower women by providing a safe and respectful place in which to do so. That is why the task force members will work closely alongside women with lived experience in the criminal justice system to hear their stories and to create better outcomes for Queensland women.

As a government we know that, while significant progress has been made to prevent and respond to domestic, family and sexual violence in Queensland, there is still much to do. This bill is just the first step in our government's reform agenda. The Palaszczuk government is committed to generational change. That is why we are leading an ongoing program of reform to end violence against women and to improve the criminal justice system for women.

The Queensland Law Reform Commission's report acknowledged that sexual offences raise complex issues that need to be addressed by changing the social practices which contribute to sexual violence and that this cannot be achieved by legislation alone. The Queensland Law Society, when providing its submission to the committee, emphasised the importance of education, social policy reform and the need to adequately support our frontline services. Whilst it is the responsibility of parents, carers and society more broadly to educate and support young people in addressing issues of sexual harassment, assault and consent, we also recognise that education in schools is part of the solution. We introduced compulsory respectful relationships education into state schools in response to the *Not now, not ever* report. Minister Grace recently announced that her department will be conducting a review into the Queensland Respectful Relationships program and will be working with non-government and state education sectors, P&Cs and school communities to explore whether consent and reporting are adequately covered. This is an issue that impacts all of us in different ways, but it is vital for our young people, and our young women in particular, that we get this right.

In response to recommendation 3 of the Legal Affairs and Safety Committee report, I now table an erratum to the explanatory notes to the bill which will clarify that chapter 32 of the Criminal Code is not limited in application to sexual offending against adults.

Tabled paper: Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020, erratum to explanatory notes 378.

I want to take this opportunity to thank the Youth Advocacy Centre Inc. for its advocacy in this space and for bringing this need for clarification in the explanatory notes to the government's attention. In addition and separate to the recommendation of the Legal Affairs and Safety Committee, the erratum to the explanatory notes also provides additional clarification to address concerns raised by stakeholders, including Women's Legal Service Queensland, about the use of the word 'anything' in proposed new section 348A(2), as they believe this could potentially make the position of victims worse as it will widen the current position of what is considered to be honest and reasonable to anything the defendant said or did.

I have consulted with the Director of Public Prosecutions on this issue and he has advised me that he does not share the view held by Women's Legal Service Queensland. However, to ensure that there is no misinterpretation, the erratum will further clarify that the provision will not alter the existing law. I again thank stakeholders for raising their concerns throughout the committee process. It is only with input from those members of our community who apply and witness the operation of the law on the ground that the law remains accessible to all.

By way of further addressing recommendation 3 of the Legal Affairs and Safety Committee's report, the Palaszczuk government also commits to consulting with the Youth Advocacy Centre and other relevant stakeholders to better understand their concerns regarding the application of chapter 32 of the Criminal Code to youth offenders.

The bill also amends the Legal Profession Act 2007 in relation to the Legal Practitioners' Fidelity Guarantee Fund. The fund, which is administered by the Law Society, was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor or law practice. The amendments will authorise the payment from the fund of any claim not paid in full since the commencement of the act due to the operation of the statutory caps on claims and will also provide clearer guidance to the society as to when the statutory caps should be applied in the future.

In response to a submission by the Queensland Law Society, the Legal Affairs and Safety Committee has recommended that further amendments be made to permit the fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of misappropriations. Consistent with recommendation 4 of the Legal Affairs and Safety Committee report,

I foreshadow that I will be proposing further amendments to the Legal Profession Act 2007 to permit additional payments to be made from the fund for programs to identify and prevent trust account defaults and for educational programs to improve compliance and trust accounting systems within law practices. It is hoped that these amendments, which have been developed in consultation with the Queensland Law Society, will help reduce the incidence of claims against the fund, thereby preserving the balance of the fund to meet future claims.

Additionally, the bill implements the next stage of the Palaszczuk government's legislative response to the independent evaluation of the Tackling Alcohol-Fuelled Violence Policy. The amendments will enhance the rigour of the ID-scanning and banning regime in safe night precincts; increase the minimum duration of police banning notices; require three-yearly reviews of safe night precinct boundaries; and provide greater transparency and accountability around liquor and gaming machine licensing decisions.

As part of the Legal Affairs and Safety Committee's report, comments were made regarding privacy protections associated with the tackling alcohol fuelled violence amendments. In relation to the changes to ensure that staff members comply with ID-scanning provisions, I can advise that privacy protections under the Privacy Act 1988 apply when recording, accessing or disclosing any personal information obtained from operating an ID scanner. The amendment in the bill operates within this existing framework and does not raise any new limitation on the right to privacy.

In relation to the changes regarding transparency in licensing decisions, the bill protects the privacy of applicants by ensuring any sensitive or confidential information relating to the applicant or their associates is not publicly released along with the decision. While the names of licensees and applicants are provided as part of new publishing of liquor and gaming decision amendments, it is also important to note that the identity of applicants for liquor and gaming licences is already publicly available through legislated mechanisms such as the public register of licences and the advertising of applications. Having knowledge of the person responsible for the licence allows members of the community, including those potentially impacted by the operation of licensed premises, to monitor and engage with licensees regarding complaints or issues that the licensee may be required to address under the Liquor Act and the Gaming Machine Act.

Comments were also raised in relation to the amendments implementing periodic reviews of safe night precincts. I can advise that the bill will not automatically grant extended trading hours to 3 am to licensed premises that become located within the boundary of a safe night precinct as a result of a review. Licensees wishing to operate until 3 am will need to apply to do this, subject to the ordinary requirements associated with the application process.

The bill also contains miscellaneous amendments that are proposed to support the integrity of regulatory frameworks in Queensland. The bill will provide a permanent process under the Liquor Act to exempt safe night precinct local boards and liquor accords from Commonwealth restrictions on cartel behaviour where they collectively limit alcohol supply or control price to minimise alcohol related harm, and this replaces a five-yearly application requirement to the ACCCC; provide flexibility for Queensland's exclusive sport and race wagering licensee by removing the requirement under the Wagering Act to round down race dividends for short priced favourites; and make a minor, technical amendment to the Co-operatives National Law Act 2020 to rectify an unintended omission.

The bill also seeks to codify the national consumer protection framework's ban on certain types of inducements applying to interactive wagering operators licensed in Australia whose wagering services may be accessed by Queenslanders. Specifically, the bill prohibits the offer of inducements to open, or refer a friend to open, an interactive wagering account, inducements which encourage customers not to close their interactive wagering account and free bets if customers are not able to withdraw payouts arising from the free bets at any time.

Consistent with the intent of the national consumer protection framework, the bill also requires Australian licenced interactive wagering operators to ensure that direct promotional or advertising materials are only sent to persons who provide their express consent. If a person attempts to withdraw their consent, they must not be provided with an inducement to discourage them from doing so.

Consistent with the committee's first recommendation, I commend the bill to the House.