Speech By

Hon. Shannon Fentiman

MEMBER FOR WATERFORD

Record of Proceedings, 25 March 2021

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

Hon. SM FENTIMAN (Waterford—ALP) (Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence) (4.58 pm), in reply: I thank members for their contributions to the debate on the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020. I thank the shadow Attorney-General, the member for Clayfield, for his contribution to the debate. In particular, I note the member's comments about being open to further legislative reform that is strongly supported by evidence and that delivers a better system and outcomes for victims. I thank the member for those comments.

Before commencing my reply to issues raised, I would also like to place on the record my sincere gratitude to those women who shared their very personal experiences. Making the decision to go public is not an easy one and it is an individual choice that each woman must make independently. I thank the member for Capalaba for his exceptional contribution also.

The codification of existing case law with respect to consent and mistake of fact is an important measure to ensure the law is accessible to all. The bill will assist judges to provide properly informed directions to a jury and will inform discussion and education to change attitudes and prevent sexual violence. This legislation is only one component of the work needed to eliminate sexual violence from our community and ensure access to justice for women. I have canvassed the work of the newly established Women's Safety and Justice Taskforce in my second reading speech and take this opportunity to reiterate the critical role that the task force will play in addressing these issues.

I will now address the contributions of the member for South Brisbane and the member for Maiwar and address the amendments circulated by the member for South Brisbane. The contributions made by those members and the amendments as drafted demonstrate an absolute disregard for the careful and considered work of the professional and highly regarded members of the Queensland Law Reform Commission and the dedicated specialists who have been appointed to the Women's Safety and Justice Taskforce.

I note that the member for South Brisbane tabled the open letter addressed to the Premier and myself from domestic and sexual violence organisations, most of which I have met with personally to hear their concerns, but I note that the member herself has only consulted two of those 17 organisations according to the explanatory notes attached to those amendments. In particular, there has been no consultation with Women's Legal Service Queensland and the Queensland Council of Social Service.

The member for Maiwar, who aggressively mansplained the law to me—the Attorney-General of Queensland and Minister for Women—in his contribution called for the mistake-of-fact defence to be removed from the law. However, his own party's amendments do not do that and I thank the member for Maiwar for his advice on how to consult with stakeholders. As someone who has volunteered on the management committee for the Centre Against Sexual Violence in Logan for over 10 years and held

the positions of president and secretary, I do understand the challenges faced by victims of sexual violence and it is one of the many reasons why this government was motivated to ensure a wideranging review to examine the experiences of women in the criminal justice system.

Most concerning is that in moving these amendments the member for South Brisbane attempts to steal the agency for creating solutions from the survivors of sexual violence themselves. This government wants to place the agency for creating the solutions to these issues with survivors of sexual violence by giving them the opportunity to work in partnership with the task force to present the government with holistic solutions that go beyond mere legislative change. These amendments have little to do with improving outcomes for women in the criminal justice system and have a lot to do with garnering likes on social media. Presenting the amendments in this manner and form before the House today is certainly not about developing a real policy solution to address sexual violence.

Why do I say that? The member for South Brisbane has not given any information in the material circulated about whether the member's proposed amendments are compatible with human rights. Section 13 of the Human Rights Act, which binds this parliament and all of those who serve in it, provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Through the chair, I ask the member for South Brisbane to attempt to identify the rights limited by these proposed amendments and advise the House why those limitations are reasonable and justified, because it is disappointing that the member for South Brisbane has failed to provide a statement of compatibility with human rights in relation to her amendments.

What guidance do we have in this House from the explanatory notes to these amendments? According to the explanatory notes, the implementation of these amendments would not result in any additional costs being incurred, so I would ask the member for South Brisbane to advise the House whether it is her position that these amendments, which would radically change the law of this state in relation to sexual offences, would not require any further training, resources or support for our police, judges or prosecutors.

These amendments are also apparently completely consistent with the fundamental legislative principles in the Legislative Standards Act 1992. Radically changing the operation of an excuse from criminal liability in the Criminal Code raises no relevant issues relating to a citizen's rights or liberties, according to the member for South Brisbane. Through the chair, I would also request that the member for South Brisbane enlighten the House about how she came to this conclusion.

I note that the first amendment proposed by the member for South Brisbane is the introduction of objectives and guiding principles for chapter 32 of the Criminal Code. The explanatory notes tell us that these guiding principles will provide direction to society as well as judges, prosecutors, defence lawyers, jurors, victims, perpetrators and even witnesses in court proceedings about what is acceptable conduct and we are told that this would bring Queensland in line with other jurisdictions such as Victoria. What we are not told is that they go further than the Victorian provisions without any explanation as to why. We are not told that these principles include concepts and terms that are not defined in our Criminal Code.

Curiously, one of the guiding principles stipulates that a failure to immediately report a rape or sexual assault does not discredit a complainant. However, it is unclear why this would be necessary when section 4A of the Criminal Law (Sexual Offences) Act 1978 already provides that a judge in Queensland must not warn or suggest in any way to the jury that delay in preliminary complaint makes a complainant's evidence less reliable. Can the member for South Brisbane please advise whether she considered the interaction between these provisions and any unintended consequences in drafting the amendment? Finally, there is no guidance provided in the explanatory notes to decision-makers as to how these principles should be applied to the offences in chapter 32.

The member's proposed second amendment to amend clause 8 of the bill provides that consent is voluntarily given only if each person involved in the act takes all necessary steps to ascertain consent. I would ask the member for South Brisbane to explain what the term 'necessary steps' means. How would this provision operate? What would constitute all necessary steps? How would the judiciary and jurors interpret this term because, as far as I am aware, this term has not been considered by the Queensland Law Reform Commission or any other jurisdiction in the country? Has the member for South Brisbane given any consideration to what these necessary steps will entail and the implications this will have for complainants? How will a survivor feel comfortable making a report to police if they do not even know whether an offence has been committed? Perhaps the defendant took steps but not all necessary steps. Could the member for South Brisbane please explain this to the House?

I note that the explanatory notes to the amendment indicate that the member's amendments will achieve greater consistency with the laws in other jurisdictions, including Victoria and Tasmania, but I fail to see how this will occur given that, as far as I am aware, these jurisdictions do not use the term

'necessary steps'. The explanatory notes also indicate that the proposed communicative consent model will require a person to consent either verbally or through their actions. However, proposed section 348(4) in the member for South Brisbane's amendments clearly indicates that consent cannot be implied. Would the member for South Brisbane please explain how the intention as expressed in the explanatory notes is not negated by the operation of proposed section 348(4)?

Further, the explanatory notes appear to introduce yet another term into the mix, that of 'active agreement'. The explanatory notes indicate that this term, 'active agreement', will be defined in order to limit any confusion as to what this might look like. However, there is no definition of 'active agreement' as suggested by the explanatory notes. What does the member for South Brisbane intend the definition of consent to look like? Is it 'active agreement' or is it 'necessary steps'? Under the member's proposed amendments, consent must be communicated through words alone, or can it include actions? The explanatory notes do not provide any explanation as to how the proposed provisions will operate and instead create their own confusion. There is no guidance to the judiciary, legal profession, juries or the general public regarding the interpretation of these provisions.

The member's proposed amendments will do nothing more than complicate and confuse the definition of consent in Queensland which is the exact opposite of what we are trying to achieve through the government's bill before the House. In implementing the QLRC recommendations, the bill before the House codifies the existing law to ensure the law is accessible to all, assisting judges to properly direct juries. This government has not ruled out support for an affirmative consent model in this state. As I have stated publicly on a number of occasions, this is something that the task force will consider as part of its review.

The government has listened to the experts who work in the criminal justice system every day, who have cautioned that this kind of reform needs to be considered carefully to ensure there will not be unintended consequences. Our government understands that the criminal justice system is made up of interlocking parts that need to work together, and significant law reform needs to be implemented carefully to ensure all parts of the system are resourced and prepared to deliver that reform.

In stark contrast to the government's approach on this important issue, as the explanatory notes to the member for South Brisbane's amendments indicate, the member has not consulted on these proposed amendments with legal stakeholders. The member has not consulted with the Director of Public Prosecutions or the Queensland Police Service. These are all of the bodies that the member would be relying on to implement this significant change in the law. Does the member for South Brisbane know if the Queensland Police Service has the capacity to train its thousands of members in the consequences of this new amendment on their investigations? The answer to that is no. I know this because the Commissioner of Police, Katarina Carroll, was yesterday quoted in the *Courier-Mail* as reinforcing the need for a 'considered approach' based on 'good research and best practice'.

Has the member for South Brisbane consulted with prosecutors to determine whether the form of this amendment will actually assist in increasing the rates of conviction in matters of sexual violence? Has the member for South Brisbane considered the application of the Human Rights Act 2019 and the delicate balance between a defendant's right to a fair trial and a survivor's entitlement to justice? Has the member for South Brisbane spoken to the Queensland Human Rights Commission about these matters? Again, the answer to that is obviously no. Has she consulted with culturally and linguistically diverse groups from around Queensland on how this amendment might impact those communities? The answer to all these questions is no.

Turning now to the member's third and final amendment, which purports to amend clause 9 of the bill with respect to the excuse of mistake of fact, the effective removal of the mistake-of-fact excuse has the significant potential to cause injustice, most particularly for vulnerable defendants, including those with cognitive impairments or intellectual disabilities and there is absolutely no mention of this in the explanatory notes. It appears that the member for South Brisbane, a member of a party that positions itself as human rights champions, has not assessed the compatibility of this effective removal of the mistake-of-fact excuse with the Human Rights Act 2019. The member for South Brisbane appears to not have considered whether this proposal will limit the right to equality, the right to a fair trial or rights in criminal proceedings and whether any limitation is proportionate.

The member for South Brisbane claims in the explanatory notes that these amendments are required to reduce the complexity of the current law, when in fact the proposals are so convoluted and complex that it will do nothing of the sort. The member's proposed section 348A(c) provides that mistake of fact is not available if a person does not clearly and positively express consent due to intoxication, but the member's proposed section 348(3)(b) already provides that consent must be clearly and positively expressed. The repeated use of these terms in both the definition of consent and the negation of the mistake of fact is incredibly complex. At what point should a jury be considering whether consent has been clearly and positively expressed? When they are assessing the elements of the offence or if

mistake of fact is raised? Similarly, the member's reference to a person being asleep or unconscious is also repeated in both the proposed definition of consent and the negation of the mistake-of-fact excuse. Again the question arises at what point should a jury applying these incredibly complex provisions consider whether the complainant was asleep or unconscious?

I feel it is important, in light of some of the member for South Brisbane's recent social media posts, to make it clear again that it is a well-settled area of law in Queensland that a complainant who is asleep or otherwise unconscious does not have the cognitive capacity to give consent. If the person did not have cognitive capacity there can be no consent. Survivors should feel confident reporting sexual assaults and should not believe that a sexual offence was not committed against them simply because they were asleep or otherwise unconscious. I urge the member for South Brisbane to take greater care with her use of social media on this issue. Elected members of this House have the privilege of being given a platform of authority to discuss the issues of the day that matter, but that privilege needs to be exercised responsibly, and on this issue with particular care, so as not to create unintended consequences.

The member for South Brisbane should understand the gravity of the amendments she is proposing, the risks of inflammatory social media posts and why patient, calm and careful law reform is what is required on this occasion. You cannot simply pick up legislation from another jurisdiction and drop it into Queensland law. The government understands that there are many in our community who want a stronger affirmative consent model in Queensland's Criminal Code. All members want to improve the quality of justice outcomes for women in Queensland. Preserving the rights of the accused to a fair trial and improving outcomes of victims of sexual violence should not be seen as mutually exclusive goals. This government believes that with careful, considered, evidence based law reform both ends can be achieved.

Public confidence in the criminal justice system to deliver justice fairly and accurately is a critical part of stable democracy. That is why we have established this task force, bringing together experts from a range of disciplines to make sure we get the balance right. I call on the member for South Brisbane and her party to give the agency back to the survivors to design the solutions and take a more mature and considered approach in delivering workable law reform for all Queenslanders. In conclusion, I once again thank all honourable members for their contributions during the debate. I commend the bill to the House.