Speech By

Tim Nicholls

MEMBER FOR CLAYFIELD

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

Mr NICHOLLS (Clayfield—LNP) (4.07 pm): Rape and sexual assault are abhorrent. There is no excuse for these crimes and offenders must be punished. Society, and in particular women, must feel safe from such depredations. As the Women's Legal Service says in its submission to the committee on this bill—

> Sexual violence is a violent and insidious crime that is a clear assault and takes away a woman's sense of safety, identity, control and privacy. It has severe and deleterious impacts on victims physical and mental health that can last a lifetime.

Laws have existed against rape for hundreds of years as an expression of society's condemnation of such offences, but they often have not been as effective in practice as we would have hoped and so the community rightly demands that laws dealing with rape and sexual assault are strong, clear and consistent. They must properly balance the presumption of innocence of an accused with the obligation to ensure that perpetrators are charged, tried and convicted and are not afforded excuses to avoid punishment. Those who are the victims and survivors of such crimes must have their right to sexual autonomy protected and must have confidence that the law and indeed the community have their rights and interests at the forefront of our justice system's consideration.

The bill we are discussing today attempts to address the issues of clarity and consistency. The report from the Queensland Law Reform Commission recommending the changes to be made to the Criminal Code by this bill is thorough and lengthy in its investigations and review of the empirical evidence. The commission makes five recommendations, and these are all taken up in this bill.

Four of those recommendations clarify codifying principles that can be distilled from the common law—that is, from the case law made by judges here in Queensland courts. One of the recommendations corrects an inconsistency in the application of the definition of 'consent' to the different offences in chapter 32 of the Criminal Code. This last amendment was recommended prior to a Court of Appeal decision the Attorney has already referred to in The Crown v Sunderland, a case from 2020 in the Queensland Court of Appeal. That decision, in fact, saw the court remedy of its own accord the misconceptions around the application of that definition.

Many groups with a substantial and longstanding interest in this area of our criminal law, especially those who tirelessly advocate for survivors and victims of, and work in the areas of, sexual and domestic violence have expressed disappointment with this bill. Even a short reading of the Legal Affairs and Safety Committee report No. 3 of February this year and the submissions made to the committee will highlight the concerns of those groups. Equally, the Queensland Law Society, the Bar Association and the Civil Liberties Council of Queensland and others state their support for the bill in the form that we are debating here today. Other groups have raised concerns about the effect of the proposed changes on young people, and I note the Attorney's comments in the chamber just a little while ago in respect of that, together with Indigenous people and those with a disability.

Clearly then there is room for legitimate differences of opinion on the merits of this legislation. I think in these circumstances, when considering competing interests and fundamental rights, change must be carefully considered, it must be strongly supported by the evidence and at its heart it must deliver a better system than that which it seeks to replace.

This legislation does not seek to answer all the questions we in this place and the wider community might have about the way sexual offences are reported, investigated, deterred, punished and prevented. Nor does it answer the very real and legitimate failures of our society to address the longstanding and significant attitudes to dealing with breaches of sexual autonomy, sexual violence and the actions of too many men in their dealing with women—to be frank about it, the way in which women are viewed, treated and believed in society today. In this respect I think we must acknowledge the commission's own statement on page 14 of its report where it says—

However, there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices. Sexual offences occur within a broad social context and raise complex issues that go beyond the criminal law on consent. Legislative amendment is only one means of addressing these issues.

While many may have hoped for more from this review and are critical of this bill, I do not believe fault lies at the feet of the commissioners. Indeed, if the changes advocated by many submitters were on the government's agenda, a specific direction to draw up amendments to effect an affirmative consent provision in the code could have been given to the commission. Such is the case with the government's direction on voluntary assisted dying. In that case the government has directed the commission to draft laws to give effect to a policy decision already made. In this respect it is important to note the government's direction to the commission as set out in the report—

On 2 September 2019, the Attorney-General and Minister for Justice and Leader of the House referred to the Commission for review and investigation:

the definition of consent in section 348 (Meaning of consent) in Chapter 32 (Rape and sexual assaults) of the Criminal Code and the operation of the excuse of mistake of fact under section 24 (Mistake of fact) as it applies to Chapter 32.

The terms of reference required the Commission to examine the operation and practical application of those provisions and to make recommendations on:

(a) whether there is a need for reform of:

  (i) the definition of consent in section 348;

  (ii) the excuse of mistake of fact in section 24 as it applies to rape and sexual assaults in Chapter 32 of the Criminal Code; and

(b) any other matters the Commission considers relevant having regard to the issues relating to the referral.

In doing so the government again set some parameters for the commission—

In making its recommendations, the Commission was to have regard to:

(a) the need to ensure Queensland's criminal law reflects contemporary community standards;

as it should. This is an important one—

(b) existing legal principles in relation to criminal responsibility;

This is another important one—

(c) the need for Queensland's criminal law to ensure just outcomes by balancing the interests of victims and accused persons;

(d) the experiences of sexual assault victims and survivors in the criminal justice system;

(e) the views and research of relevant experts;

That is important. It continues—

(f) recent developments, legislative reform, and research in other Australian and international jurisdictions; and

(g) any other matters that the Commission considers relevant having regard to the issues relating to the referral.

The terms of reference ask the commission to prepare, if relevant, draft legislation based on its recommendations.

The commission was required to report on the outcomes of the review to the Attorney-General by 30 June 2020 last year.

The commission has done what was asked of it in this respect. It has done so after a thorough and comprehensive review of the empirical evidence, as anyone who has read the report of the commission can attest. No doubt had it been asked to draw up an affirmative consent provision it would have done so, but in fact it was not asked to do so. In particular it was asked to ensure just outcomes by balancing the interests of victims and accused persons. This is the key to understanding the commission's recommendations.

The commission had to weigh up competing and fundamental rights, rights long established in our legal system and accepted in our society. On the one hand it had to balance the right to a fair trial, including the presumption of innocence of the accused and the so-called golden thread of the criminal

law: the obligation on the prosecution to prove every element of an offence. That had to be balanced with the fundamental right of complainants to liberty and safety and the individual rights of bodily integrity and human dignity.

It reviewed the law as it was asked and consulted widely as it was asked to do. It is unsurprising then that it returned the recommendations it did. It examined all transcripts of trials of rape and sexual assault carried out in 2018, other than those involving a complainant under 12 years old. This involved 135 trials. It undertook an analysis of relevant Queensland Court of Appeal decisions in rape and sexual assault cases occurring mainly between 2000 and 2019. The commission reviewed transcripts of a further 76 trials in which consent or mistake of fact was raised. These cases were referred to the commission by the judiciary, the Office of the Director of Public Prosecutions, Legal Aid Queensland and the Bar Association of Queensland.

It has also consulted widely with all those groups and organisations representing people with an interest in this area of the law. It received 87 submissions to its consultation paper and a consultation workshop was convened, attended by survivors of sexual violence and their supporters and advocates. One of the submissions identifies that over 35 people attended that consultation workshop.

In passing I want to acknowledge the significant time and effort many advocacy groups put into making submissions to both the commission's consultation paper and the parliament's committee process. I have read almost all of the submissions. Many are thorough and detailed. Their production required considerable time and research and I want to thank and acknowledge the authors for their effort and thoughtfulness.

The commission in its review also considered the approach taken in other jurisdictions, importantly in Tasmania and Victoria, where affirmative consent provisions are part of the law in those states. After having undertaken this quite lengthy and detailed task, the commission resolved that the existing law did not require extensive changes. I think it is important that the commission's conclusion is included in the record. It states—

Detailed examination of the existing law in this area does not generally reveal significant issues for reform to the definition of consent or the excuse of mistake of fact, as it applies to rape and sexual assault. The Commission does not recommend wholesale changes to those provisions. There is a risk that unnecessary amendments to the legislation might have unforeseen consequences for defendants, complainants or both.

One of the key strengths of the criminal law in Queensland is its combined certainty and flexibility. The Criminal Code sets out the general rules and the core elements of each offence and any excuses or defences. Their interpretation is permitted to develop on a case by case basis, having regard to the factual circumstances of each case and prevailing community attitudes and standards.

I think this is an important part of the commission's finding—

The jury system is also a significant part of this process.

The 12 women and men who are called on to make the decisions as the triers of facts in these cases are the representatives who provide the community attitudes and standards of our society. The report continues—

This inherent flexibility allows the law to continue to develop over time, while retaining the core meaning contained in the terms of the Criminal Code... The law regarding consent needs to be clear, for judges and juries as well as for the wider community. As a general aim, it is also desirable for the laws in Queensland to be reasonably consistent with those in other jurisdictions, taking into account fundamental differences between the common law and code jurisdictions... Reforms should also, where possible, be informed by empirical evidence... Given the concerns raised in submissions about ambiguity in the current provisions and having regard to approaches in other jurisdictions, the Commission sees merit in amendments that aid in providing clarity to the existing provisions.

These are important considerations. Law made on the run—law in such an important area made without the support of empirical evidence—is law that is bound to cause unintended consequences. Law made without a thorough and proper understanding of its effect and impact may well result in worse outcomes than those that are complained of at the moment.

This is a hotly contested area of the law. As the commission itself notes, being charged with this offence carries significant and substantial penalties and it is equally important that survivors are able to access a fair and free justice system in which they know that their complaint has been believed and has been proved according to the tenets of our system. Clearly the government accepts that conclusion given the bill that we are debating today. Clearly it does not believe there is the need for an explicit affirmative consent requirement in section 348. Of course, such a change would involve a fundamental rebalancing of rights and in effect a reversal of the burden of proof. Again I refer to the golden thread that someone is innocent until presumed guilty and that a prosecution must prove all elements of the offence in order to obtain a conviction.

The Tasmanian model of affirmative consent featured in many submissions made to the committee during its investigation of this bill. I note that at page 15 of its report the committee states—

When questioned on the number of successful prosecutions there have been under the Tasmanian model, WLSQ—

that is, the Women's Legal Service Queensland—

advised that it did not know but stated:

It has been law for 17 years. It is not like there has been a swathe of cases that have gone to the High Court in relation to the Tasmanian law talking about unlawful convictions. It is a solid law that has stood the test of time for 17 years.

That was said in response to a question asked during a committee hearing. Importantly, after the committee's public hearing QCOSS provided further information on the Tasmanian model, including comments from a 2012 PhD thesis by Helen Cockburn. According to QCOSS, Ms Cockburn's key finding was that the 'Tasmanian reforms have not lived up to their promise because judges and the legal profession have been reluctant to fully implement them'. The committee report further states—

QCOSS concluded that 'clearly, legislative reform as part of a larger suite of reforms—including judicial education—will most likely deliver better outcomes for sexual assault survivors'.

A few moments ago the Attorney-General referred to the comments made by the Queensland Law Society. Having heard them once we do not need to hear them again, but those comments are equally apt in respect of this matter.

More work is required to see whether an affirmative consent model is effective, that is, will it better protect, punish and deter and will it result in a better system for survivors and complainants in the legal system? It is also clear that changing the law will not of itself address the very real issues that survivors of sexual assault face when confronted by the legal process and the procedures for making a complaint and then enduring a trial that by any measure must be frightening, bewildering and confronting. This is an area where the LNP and I believe more work is needed. The treatment of survivors in the system needs to be improved. It needs to be made better. Those areas that are frightening, humiliating, confronting and challenging must be looked at. There must be a better process to give people more confidence in the system.

Given the extensive and thorough work of the commission and recognising the value of the amendments suggested, the LNP will be supporting this bill. Having said that, we remain open to the consideration of further legislative changes that, as I said in my opening remarks, are strongly supported by the evidence and that deliver a better system and outcomes than that which it seeks to replace. That must be the key to changes to this system: they must deliver a better outcome than that which they seek to replace.

This is not the end of the matter. I want to remark generally on issues that the bill brings to mind and that recent events have highlighted. In fact, we have just had a debate on some of those matters. As a society we must do more to ensure safe, rich and fulfilling lives for all of us. We need to engender more respect for each other, not less. We need to accept difference and embrace what it brings, not reject and diminish it. We need to call out behaviours and attitudes that seek to unfairly and improperly exploit differences in power and standing, and we must strive to change those behaviours and attitudes. For too long we have not done so. In particular, too many men have failed to do so when it comes to behaviour and attitudes towards women.

Passing laws in this place is important. Punishing offenders and protecting the innocent are important. In society there will always be those who prey on someone else. They must be punished and society must be protected. Much more importantly though is the opportunity being a parliamentarian gives us all to change attitudes, to demonstrate the change we want to see and to lead with our words and actions. That does not by any means suggest some sort of return to the Victorian times of Mr Darcy and Miss Bennet in *Pride and Prejudice* or a sterile environment of rigid rules and fraught interactions. It does mean that working together, having fun, embracing a relationship, enjoying someone else's comfort and physical intimacy require us to recognise that it is not fun, it is not agreeable and it is not respectful to ignore the rights and autonomy of the other person. We must continue the journey of respect and recognise that the feelings and rights of others are as important to them as our own are to us. The more we recognise that and the more we imbue it in our kids and our society, the better we all will be.

The remaining sections of the bill implement changes to the Legal Profession Act to allow the Law Society to revisit previous decisions, when it considers it appropriate to do so, to increase payments from the Legal Practitioners' Fidelity Guarantee Fund. The amendments allow for the full payment of claims since the commencement of the act in 2007 due to the operation of the previous caps set at $200,000 for any single claim and $2 million in aggregate for all claims against a single practice. The proposal has the support of the Law Society and, as the notes say, can be accommodated due to the healthy balance in the fund.

I also note the amendments proposed by the Attorney-General today. I note their purpose and the request of the Law Society and the committee to introduce those changes. I point out that university legal courses already require that students be taught about the importance of integrity and honesty

when it comes to the maintenance of solicitors' trust accounts. It is part of the law course. It is also a part of the legal practice course. Those who have a law degree and seek to be admitted must do the course so must also understand their obligations to maintain the trust account of the firm or the business that they operate.

It is also a part of the continuing legal education course that the Law Society runs. I ask, in effect, how much more needs to be done in this circumstance to ensure that solicitors who are entrusted with other people's money are educated about the need to maintain their honesty and their fidelity duty in relation to their trust accounts. It may be that legal practice has changed dramatically and that the rise of micropractices has led to more of this occurring, to more defalcations on the accounts, but by no means can any solicitor who is being admitted to practice in Queensland today be unaware of their obligations to maintain the trust account in accordance with the requirements of legislation.

It may be that the funds that are to be made available are used for more investigations and to chase down those instances where there are those who do not do the right thing—and that is a good thing—but I think I would like, in due course, further information from the Attorney about how that money is to be spent. I note that the amendment also allows the Attorney to call for a report into such matters.

More changes are made in response to the final evaluation report of the alcohol fuelled violence policy. They effect a number of changes to the ID-scanning process, the banning regime and the effectiveness of safe night precincts. They are also intended to increase transparency around liquor and gaming decisions of the OLGR. For any members who are more interested in the detail of those matters, I commend the green paper to them. I am sure they will be fully informed as a result of that.

Finally, amendments are proposed to enhance consumer protection in relation to online gaming. In particular, restrictions are being placed on inducements to open an account or to refer a friend to open an online account, together with other changes in relation to bookmakers and their activities, including taking bets off course. The LNP will also be supporting these amendments.

In conclusion, change of the criminal law simply for the purpose of change and without effecting an improvement in the outcomes will not achieve what we would all hope our laws do—that is, protect members of our community, ensure offenders are appropriately punished and ensure the law provides appropriate respect for the rights of those brought into its system, willingly or not. Ultimately, it is at the end of the line. By the time we get to the consideration of these matters, the event has already occurred. More needs to be done at that end of the process rather than at this end of the process. As I indicated, the LNP will be supporting the legislation that effect the amendments to the Criminal Code.