

Extract from Legislative Council Hansard

Thursday 18 November 2004

CRIMINAL CODE AMENDMENT (CONSENT) BILL 2003 (No. 102)

Second Reading

Mr PARKINSON (Wellington - Deputy Leader of the Government in the Council - 2R) -
Mr President, I move -

That the bill be now read the second time.

Mr President, the purpose of this bill is to make a number of amendments to the Criminal Code Act 1924 in relation to sexual assault offences, in particular, in relation to the matter of consent.

When the Criminal Code Act 1924 was amended in 1987 it was intended that the new provisions would reduce the emphasis on the issue of consent at rape trials. Research by Ms Terese Henning of the University of Tasmania Law School indicates that the reforms are not achieving their intended objective. Ms Henning concluded 'it seems that mere submission and lack of resistance are seen as constituting consent in spite of the legislative intent to promote the opposite view'. These findings were considered in the Report of the Task Force on Sexual Assault and Rape in Tasmania in 1998.

The task force in its recommendations 13, 14 and 15 proposed the amendments in relation to consent that form the basis for this bill. These provisions are based on similar provisions in the Victorian Crimes (Rape) Act which have operated in that State since 1991. There is nothing in these provisions which alters the requirement for the prosecution to prove its case or to reduce the standard of proof required in sexual assault and rape cases. The first of the proposed amendments to the Criminal Code Act 1924 is to section 2A. This section defines the concept of consent for the purposes of relevant offences in the code.

The current provision provides that consent is 'freely given' by a 'rational and sober person' and is not procured by force, fraud, threats or intimidation. This provision emphasises the capacity of the individual to make rational choice and presumes that the absence of consent exists only when a person has no choice in the matter - for example, when there is the threat of serious physical injury.

It is unclear how far circumstances or behaviours that do not deprive the complainant of the ability to refuse but which have a coercive effect are currently covered by the code. Consequently the law as it stands looks for signs of manifest dissent rather than looking for positive and genuinely mutual assent and agreement. The result is that an absence of active or sufficient resistance can still be interpreted as consent and pressure or coercive conduct intended to secure consent can be explained away as seduction.

The proposed amendment to section 2A replaces the current provision with a provision that provides that consent should be based on 'free agreement', and imports the notions of mutuality

and reciprocity into the concept of consent. Free agreement requires that there is some positive evidence of agreement rather than simply an absence of dissent. In such circumstances, silence or passivity cannot be interpreted as agreement.

The concept of 'free agreement' allows us to differentiate between submission and consent. Further, 'free agreement' is not described only in terms of the capacity to make a 'rational' choice. In this way the absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways.

Section 2A(2) lists a broad range of circumstances which vitiate consent in addition to direct physical violence or threats of violence. This is in keeping with a focus on the law on promoting freedom of choice in sexual encounters. The circumstances listed include the use of fraud to secure consent or being mistaken about the nature or purpose of a sexual act. They also provide that a person cannot 'freely agree' when they are asleep or unconscious or affected by drugs or alcohol to the extent that they are incapable of rational thought.

The list in section 2A(2) is not intended to be exhaustive but it provides some guidance as to whether a person can be taken to have freely agreed.

The next amendment deals with the defence of mistaken belief of consent on the part of the accused. While the current defence of mistaken belief requires the accused to have been 'honestly' and 'reasonably' mistaken as to the existence of consent, it is problematic because it allows an accused to base a defence on widely accepted, but untested, assumptions about the way people behave, particularly about the way women behave and about their sexual behaviour and desires.

The proposed new section 14A requires the accused to take reasonable steps to verify their presumption of consent. This recognises that not all beliefs on which an accused might rely to establish consent will in fact exculpate him/her. The new section 14A clarifies the present law by setting down particular circumstances where, as a matter of law, the accused's mistake cannot be taken as honest and reasonable in the context of sexual offences.

This section will be particularly useful in clarifying the law in relation to intoxication and the defence of 'mistake' by clearly indicating that a mistake brought on by the defendant's self-induced intoxication or recklessness is not an honest or reasonable mistake. There are also specific provisions to clarify the defence of mistake as it relates to attempted sexual offences.

These reforms are long overdue and bring Tasmania's laws on consent into line with the view that sexual relationships must be mutual and reciprocal in a civilised society. This is the only view which can be supported if we are to properly value equal rights and individual choice between sexual partners. Sex crimes leave emotional and psychological damage that lasts a lifetime. The personal trauma that survivors of sexual assault and their families experience can be made even worse if they feel the system has failed them.

According to the 1998 report of the Task Force on Sexual Assault and Rape, victims of sexual assault and rape said that the investigative and court processes left them feeling frustrated, degraded, humiliated and violated. It is difficult enough for victims to come forward in relation to these horrendous crimes; they should not also be left feeling that the system has let them down.

Mr President, since the original bill was drafted, I think it was in 2003, and since it was introduced into the lower House, the Government has listened to a number of objections, particularly the objections made in the lower House and from elsewhere, and the Government has drafted a series of amendments which it has proposed to be moved in this House, should the bill pass through the second reading stage. Those amendments, it is felt, will remove the difficulties that were foreseen in the original bill as introduced into the lower House. The amendments have come about through the work of a committee of three which was established for the purpose of drawing them. That committee comprised His Honour Mr Justice Underwood of the Supreme Court of Tasmania, Professor Warner and Ms Henning, noted legal academics from the University of Tasmania law faculty.

The Government has further listened to objections made in the most recent briefings which honourable members of this House participated in and we will further introduce amendments to satisfy the two most discussed objections, that is, those relating to the two areas of fraud, so that the amendment will now be 'the fraud of the accused'; and fear, which will now be amended to read 'reasonable fear'. Those amendments will be introduced should the bill pass through the second reading into the Committee stage. For that purpose I commend the bill to the Council.