

Extract from Legislative Council Hansard

Wednesday 24 November 2004

Criminal Code Amendment (Consent) Bill 2003 – (Reform of the Law on Rape)

[12.21 a.m.]

Mr PARKINSON (Wellington - Deputy Leader of the Government in the Council) - I thank the honourable members for their contributions. This has been a difficult debate. My own personal view of course is that it has been unnecessarily difficult and I think that it could have been made a much simpler debate if the right resolve of all players in the debate had been present.

I am suspicious of the resolve of some players and I will elaborate on that in a moment. The first point I want to make in summary to honourable members is that I stress that with the amendments it is my belief that this becomes a very simple bill. It is also my belief that with the amendments it is good legislation.

I want honourable members to think about that comment because I make it very genuinely and I cannot emphasise that point enough. Without labouring the point too much, the bill seeks to improve the current law. It seeks to make some changes to the present law on consent by providing that for consent to exist it must be communicated.

I think on any reasonable, rational judgment, honourable members would regard that as a pretty reasonable proposition: that for consent to exist it would need to be communicated. Consent cannot be assumed under the bill as amended. It cannot be assumed to exist unless the woman does or says something to indicate consent. If not, then it cannot be assumed to exist. In ordinary English language, I would imagine that honourable members unanimously would think that to be a reasonable proposition. It has been said already and I think it is genuinely agreed that there is no change in the burden or onus of proof in this legislation. The Crown still bears the onus of proving its case that the complainant - for example, the person who has been raped - did not do anything to consent to sexual intercourse.

The other thing that the bill does is that it modifies slightly an existing defence and that is the defence of honest and reasonable mistake. The bill, as amended, codifies and strengthens that existing defence, the defence of honest and reasonable mistake. The bill strengthens the position in this way that if that defence is run because of self-induced intoxication that leads to that mistake, then the bill says that it will not be regarded as honest and reasonable.

It just happens that this is the existing common law. The honourable member nods and says that is right. The existing common law on that aspect is being put into the bill as amended so there is no magic in that. The bill also says that if the accused has done nothing to determine the existence of consent then the accused cannot rely on mistake. That again is an argument that a prosecutor would run in any case where the defence of mistake was being run. The prosecutor would argue that, and it may or may not be accepted by the court because mistake was and still is and will be after this bill is passed. The defence of mistake - the determination of it - is a question of law for the judge to decide, not the jury. That does not change. So again for those who know and understand the law, this is not rocket science, this is really existing law.

So the defence of honest and reasonable mistake will not be sustained. Where the mistake arose in the three instances detailed in the bill - voluntary intoxication, the accused was reckless about whether or not there was consent or the accused ignored signs that indicated there was no consent - those are matters that the prosecutor would ordinarily run in an individual case, depending on the circumstances. They are being put in the bill by way of codification. There is nothing confusing about that.

I want to make this point, and it has already been made by the Leader, that this bill is about convicting more of the scumbags. It is about convicting more of the rapists to make it harder for the crafty rapists - and they are about - to succeed.

Another point I want to make, which I know the honourable member for Windermere will agree with, is this: police do not charge too many innocent rapists. Police do not charge too many innocent people on anything. It is an indictment against the police force for anyone to suggest that the police run around charging innocent people, and I cannot emphasise that point enough. The honourable member for Windermere, through his experience and I noted it particularly in his speech, referred to the rigorous process that complainants - people who come along and complain to police that they have been raped - are put through.

Part of the point I am making here is that you can bet your bottom dollar that a fair percentage, if not all of the people whom juries end up acquitting of rape actually were guilty in the first place but for some reason or another they have been acquitted by the jury because a doubt has been raised by the defence lawyer in the jury's mind as to the question of guilt, and there are all sorts of ways that crafty defence lawyers - genuinely crafty defence lawyers - can raise an issue of doubt.

I do not want to labour that point for too long, in fact I do not want to labour any of the points for too long, but I want honourable members who have declared that they have made up their mind on this issue to just leave their minds open for a little bit longer. There are a few other things to consider in relation to this and I will come to the points that the honourable member for Murchison wants me to come to, but just on this point, it is relevant to the stats that people have talked about; this alleged highly successful conviction rape in Tasmania I want to put to honourable members is a myth. It is actually a farce to suggest that our conviction rate is even good but here is what Justice Wright had to say when he was retiring. I am reading this from a Terese Henning report but I remember him saying it anyway so in case you do not trust Terese Henning, I will just say I do remember Justice Wright saying this:

'Mr Justice Wright, in his farewell address upon retiring from the bench of the Tasmanian Supreme Court in March 2000, made a number of critical comments about the jury system.

"I am not about to attack the jury system. Do not get me wrong."

He was, in a way, but the point he made here was:

'In particular, His Honour stated that he was fully convinced that juries return what he considered to be wrong verdicts in about twenty five percent of all cases tried.'

In 25 per cent of all cases tried, here is a judge experienced, experienced like Justice Wright, who sat there for a long time as a judge saying that in about 25 per cent of all cases tried, juries returned wrong verdicts.

'He explained that by "wrong verdict" he meant a verdict that "flies in the face of the evidence of palpably honest witnesses or unimpeachable documentary material". In addition, his Honour suggested that juries make compromises that may result in inconsistent verdicts, in order to bring a trial to a conclusion or for some other inappropriate reason' -

And here is the point -

'particularly in cases of serious sexual assault.'

So there is a problem in the current system that was picked up by that particular judge. The juries make errors, particularly in cases of serious sexual assault and of course they are rape cases. One of the reasons juries make errors is that it is so easy to convince them under the existing law that there is something wrong about this particular crown case. It is a bit suspect. Despite all the other facts that might have been there, a defence lawyer under the current law is able to easily convince a jury that there is something wrong, and I raise that element of doubt and I want honourable members to just think about that.

Just coming on to some of the issues raised by honourable members, the honourable member for Nelson queries whether or not the amendments will work. In fact he does not think they will, but I really want to ask the honourable member for Nelson to think about that comment in view of the people who were involved in drawing up the amendments, and I mean the amendments that the Government wants to put through this House. I hope the honourable member for Nelson was, in his comment, referring to the amending bill that went into the lower House. If he had said to me some weeks ago that the amending bill that went into the lower House would not work, there is no doubt about that.

Mr Wilkinson - I honestly believe that what we have at present is better than you think. You disagree with me?

Mr PARKINSON - So you are saying the amendments we proposed makes it better?

Mr Wilkinson - I believe what we have in our law now is better than what you propose, otherwise I wouldn't have picked it up.

Mr PARKINSON - I do find that strange, given the fact that -

Mr Wilkinson - I wouldn't say it if I didn't mean it.

Mr PARKINSON - I am not suggesting you are for one moment but I find it strange because when you look at the existing law and when you look at the amendments that we propose, really the only difference is the change to the definition of consent. If honourable members are not aware of what the Criminal Code is, this is the Criminal Code, all 140 pages of it. If you are worried about complicated law, here is 140 pages of complicated law that somehow got through the Parliament and is interpreted on a daily basis by judges and courts whenever issues arise.

Mr Fletcher - There's 198 pages in my copy.

Mr PARKINSON - Yours must be a smaller copy than mine - the abridged version.

Consent - I know the honourable member for Nelson read this out the other day, but the existing law in the code says:

'unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.

- (2) Without limiting the meaning that may otherwise be attributable to the expression "freely given", a consent is freely given where -
 - (a) it is not procured by force, fraud or threats of any kind;
 - (b) it is not procured by reason of a person being overborne by the nature or position of another person' -

Remember these words - 'overborne by the nature or position of another person' and 'force, fraud or threats of any kind'. Keep those words in the back of your mind for a moment.

'(c) it is not given by a person so affected by liquor or drugs, or so otherwise affected, as to be incapable of forming a rational opinion upon the matter to which the consent is given.'

Then it goes on:

- '(3) Where a person, against whom a crime is alleged to have been committed under chapters XIV and XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is prima facie evidence of the lack of consent on the part of that person'.

Just remember the existence of those words in the existing law. I will come back to those shortly.

I am not going to go on all night, by the way, in case people are thinking of their precious sleep.

Mr Fletcher - You can go on as long as you like. We're going home in about 20 minutes.

Members laughing.

Mr PARKINSON - It sounds like the former member for Westmorland on the adjournment debate.

Compare that with what the reading of the law will be in the event of our amendments going through. It will say this in the code:

'unless the contrary intention appears, "consent" means free agreement.

Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person -

- (a) does not say or do anything to communicate consent,
- (b) agrees or submits because of force, or reasonable fear of force, to him or her or another person' -

so substantially that is already there.

'agrees or submits because of a threat of any kind against him or her or against another person' -

That is existing common law. It is almost already in the existing code as well under the force section.

'agrees or submits because he or she or another person is unlawfully detained' -

Well, again, that is existing common law. If somebody is unlawfully detained and only agrees to be raped because they have been imprisoned, that is not free agreement under the existing law and it will not be consent under the law as amended if we put it through.

'agrees or submits because he or she is overcome by the nature or position of another person' -

Well, I asked you to remember those words a moment ago for a very good reason; they exist in the code already and here they are going back into the amended bill - agrees or submits because of the fraud of the accused. Again, fraud is already in the existing law. Then there is 'mistaken about the nature or purpose of the act or the identity' of the accused.

I want to dwell on that one for a moment. Where is the honourable member for Huon?

Mr Dean - Probably in bed.

Members laughing.

Mr PARKINSON - I have noticed somebody who looks like the honourable member for Huon coming back into the Chamber. When he is in his place I will recognise him. He raised the point about being confused - and I do not want to put words into his mouth, but I understood that

he was saying that he was confused about 2A(2)(f), where it says that a person does not freely agree to an act if the person is mistaken about the nature or purpose of the act or the identity of the accused. You only have to go to the clause notes. It is not rocket science, this stuff. It is, again, a matter that comes up frequently in the common law. It has come up frequently in cases in argument in court. It is explained in the clause notes: mistake about the nature or purpose of the act or the identity of the accused. This is directed at bogus medical examinations where either a real doctor is carrying out an intimate examination for a non-medical purpose or a person secures consent to an intimate examination by claiming to be a doctor.

The other case of identity which is also covered here is the classic case of being half-asleep and someone misrepresenting their identity to you by, say, claiming to a woman that they are the woman's husband. They hop into bed and it all happens and then she suddenly discovers that it is not the husband at all. There is no rocket science about that. In a case on the facts, it would be easily established in a court of law that that could be rape. I am not saying, just on that, that it was rape because there is obviously more involved in any given charge or in any given case. But it would be easy to prove and those cases have happened. That is in the bill; common law being, again, put into the bill. So I would ask the honourable member for Huon to note that.

The honourable member for Huon quoted me when I said in a briefing that the original was a mess. Please quote me when I say, and I think I also said in the briefing, words to the effect that the amendments fix it, in my opinion. So I was expressing an opinion in relation to my opinion that the original bill was a mess, as introduced into the lower House originally. But, again, my opinion, which I hope you accept with equal weight, is that it is my firm and considered belief that the amendments fix the mess by deleting some of those presumptive directions, in particular, that were going to be given to a jury which, it was being argued downstairs, reversed the onus of proof. That carried weight with me at the time. That will be deleted by amendments in this House.

The honourable member for Windermere impressed me, as he did the Leader. I want to come back to one example which I hope honourable members will listen to because it is a real-life example of an 18-year-old girl who was sexually assaulted severely and did not end up pressing charges. I know the young girl. I will try to keep that side of it separate. I know who she is. I know the case pretty completely and it was one of those typical cases involving a party drug. Kids will go along to a party and their drink may be spiked. This was a party in this girl's own home where she and some other students were sharing accommodation. The party was arranged. Her drink is spiked. She manages to go to her room and go to bed. She closes her door. It was not a house where they locked their doors. A male person ends up in bed with her and she, in a stupor, realises something is happening that should not be happening. She resists and then backs out.

Mr Wilkinson - A bit like Farmer.

Mr PARKINSON - Probably a bit like the Farmer case. She wakes up the next morning wondering what had happened, is very worried, very distressed, talks to her girlfriends about it. The silly kids say do not worry about it, still worried she talks to other friends, ends up being taken for a medical examination at a local hospital and is counselled by a great medical practitioner who in fact tells her that he deals with cases like this several times a week.

Ms Thorp - Several times a week.

Mr PARKINSON - I have to admit I do have some difficulty talking about these sorts of realities because to me it is a shocking position. We live in a society where that is the reality.

Mr Wilkinson - It is still going to happen.

Mr PARKINSON - It is still going to happen but, for heaven's sake, for how long?

Mr Martin - They deserve to be punished.

Mr Wilkinson - Of course they do. Are you trying to say that I am saying they do not deserve to be punished?

Mr PRESIDENT - Order. There should not be argument across the Chamber.

Mr PARKINSON - This brings me back to the point about statistics and it brings me back to Henning's report, 'Beyond "Beyond Reasonable Doubt": Wrong Decisions in Sexual Offences Trials'. That is by Terese Henning. It is a paper she referred to in the briefing but we did not get a copy of it. A lot of it is technical and for that reason I did not go to the trouble of handing it around to members. I could have given you the Criminal Code to read as well but it would not have helped either - all 140 pages of it. Ms Henning examined, and in fact she told us in the briefing that she examined a number of cases. She says and I quote:

'Wrong or Questionable Verdicts' -

and I am not going to go into the wrong and questionable verdicts but just some of the statistics -

'The following discussion draws upon the findings of a Tasmanian study conducted between 1977 and 1999 which examined' -

55 trials.

Every trial between 1995 and 1999 she examined - that is, trials of serious sexual cases. What she found was that of the 55 trials, in 23 or 42 per cent examined the accused was convicted of all charges. What does that mean? Fifty-eight per cent got off. Where is the great statistic that people brag about, about our existing code if in 42 per cent of the trials the accused were convicted of all sexual offences charged? In a further eight trials, 14.5 per cent that is, the accused were convicted of some of the sexual offences charged. This gives a total of 56 per cent where the accused were convicted of some or all of the offences tried.

So that gets it up to 56 per cent where they were convicted of some or all. It is still pretty low, I reckon, when you are talking about rape. In 16 trials, 29 per cent were full acquittals - that is, they got off - and in six trials, 11 per cent were hung verdicts. In case you are confused about that, that is where the jury could not come to a decision, not where they hung the jury. I am just trying to explain the detail.

Mr Finch - Are you saying they should have been?

Mr PARKINSON - I am sure Terese Henning thinks they should have been.

The point I want to make - and I cannot emphasise it too much - is we have a crook society; we have a society where too many people are getting off rape and serious sexual offences. It annoys me, Mr President, when I hear submissions being made in this Chamber that say, 'The existing law is so good we have to keep it. It shouldn't be changed'. The existing law is terrible! That is the point I want to make.

Mr Finch - No, the point you're making is that because they are charged with rape they're guilty. That's what you're saying.

Mr PARKINSON - Well, I will try to convince you of that. Go back to the reality that you have several a week being interviewed by one doctor - and I did not continue the story. In the case that I was familiar with, having been examined and having had explained to her the process that she would have to go through to finally obtain a conviction, she said no, that she could not handle it. I need not go into the results of the full medical examination.

Ms Thorp - Excuse me, how many rape cases did you say there were between those two dates?

Mr PARKINSON - Fifty five - between 1997 and 1999.

Ms Thorp - So 55 in about two or three years and yet one medical practitioner is reporting at least five assaults a week.

Mr PARKINSON - Addressing the honourable member for Rosevears' point, you have all these particular young people who find themselves in that situation, having been raped or seriously sexually assaulted, who do not complain.

Farmer is being heralded by the honourable member for Nelson as this tremendously successful case. Yes, he was convicted, but you talk to any of the police and they will tell you how many offences they had against him and you compare that with the number that he was prosecuted for and it is minuscule.

Mr Martin - How long did he get away with it?

Mr PARKINSON - He got away with it for years either because people were not complaining or the police did not have quite enough evidence. Finally, it was a female police officer who got him. It took a female police officer to have the dedication to get that bloke, and he has only been convicted on a very small number of the crimes he committed. Okay, he is in jail, he has been convicted. You might say that is okay, it does not matter. Well, it matters to the people he raped. Our society is not all that conducive to encouraging rape victims to come forward. It is a terrible process that they have to go through. The honourable member for Windermere knows a lot more about the process than I. He mentioned it in his speech and I am not going to dwell on it because he already has, but I know he agrees with me that it is an ordeal that people go through.

Here we are, in this bill, hoping to tweak the definition of 'consent' so that you get this concept written into law where it must be free agreement. It amazes me that anybody would object to it, given that the aim is to slog a few more of the scumbags.

The honourable member for Mersey wants the law to be 'practical and implementable', that was the quote I wrote down. I can assure you, as much as I possibly can, I am so confident about this being implementable because I know who has drawn the amendments and it came out in the briefing who was involved on a committee of three who drew the amendments.

The separation of powers is a great convention that is written into the Federal Constitution. One of those committee members is already a bit embarrassed that his name has been bandied around as being the author. There is no doubt that he was part of it. I do not want to dwell on the point because I do not want to embarrass the man any further. When that man says that it will work, I am confident that it will work and I would like the honourable member for Mersey to share that confidence.

The member for Murchison raised the presumption of innocence. We all share that. Ellis's letter: I read this letter because I was given a copy of it by my learned friend or by my colleague these days -

Mr Wilkinson - Are you trying to say I'm not - a slip of the tongue?

Mr PARKINSON - the honourable member for Nelson. In another place he would have been my learned friend but he cannot be my learned friend anymore. I was amazed when I read the letter because I kept saying to myself, reading criticism after criticism - and I must admit I read it quickly the first time - 'But that is existing law, what is he criticising?' I want to come back to that because the first point that the honourable member for Murchison raised was the one where, by way of criticism, he refers to section 51(1) of the Criminal Code, talking about:

'There seems to have been an assumption this would only apply to sexual cases. That is not so. For instance, a surgical operation is an assault, saved only from being a criminal assault by the good faith of the surgeon and the consent of the patient. That principle is embodied in s 51(1) of the Criminal Code. But this bill seeks to apply an artificial definition to consent, so that if a patient gives consent "because he or she is overborne" -

I asked you to remember those words when I read them out of the existing Criminal Code, the existing law.

If we go to section 51(1) in the Criminal Code, the section he refers to, it says:

'Surgical operations

51.(1) It is lawful for a person to perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of such operation is reasonable, having regard to all the circumstances.'

And it goes on.

Ellis is quite right - assuming this letter is Ellis's, and I will come to that point in a moment - in making the point about section 51(1) but to use that as a criticism against the bill is, in my view, a nonsense when the existing law, the existing code, says that there is no consent if it is

procured by reason of a person being overborne. That is the very example that he uses to criticise the bill that we are bringing in, but it is existing law. He has to be criticising an existing law.

I made the point when the honourable member for Nelson was reading that example out himself. I think I said the man must have been too busy and I used another term flippantly, which I will not repeat. To raise that objection, the man could not have, in my view, been adequately concentrating on the existing law because it is there already.

Moving down to the one of force, consider proposed 2A(2)(a) in this example.

'A man and a woman (let's say husband and wife - prior familiarity makes no difference in this example) are out together. He gets abusive and aggressive towards a much smaller man. Fearing he will hurt that person she says, "Let's go home and have sex", which they do. Under this Bill, that would be rape.'

I say, 'Give me a break!' It would only be rape, firstly if the bloke was charged by police - and I doubt very much on those bare facts that he ever would be, and then only if all the facts came out in a court of law and he was convicted of the crime. That example, to me, as a criticism of the bill, is a plain nonsense and unprofessional. I will go so far as to say that. I could not believe, when I continued to read the letter, how unprofessional I thought these examples were. He refers to the 'overborne' example. My adviser reminds me that 'overborne by the nature or position of another person' is already in the Criminal Code. My adviser makes the point that we are not aware of any prosecutions of surgeons because of it. I think we can take that as read.

The definition of 'overborne' needs to be quickly referred to. The dictionary definition:

'overbear ... (overborne) ... to overcome. 3. to prevail over or overrule ... 4. to treat in a domineering way.'

It needs to be borne in mind that that definition is there, it is accepted.

There was another example there. As I read these examples I thought, 'How petty'.

'If sexual intercourse is preceded by "I love you" or "I'm not seeing anyone else" or "You're the most gorgeous woman I've ever seen", when these are not entirely true, rape? I don't see why it wouldn't be if proposed s 2A(2)(e) was enacted.'

It is a nonsensical comment.

Regarding the other one that I think the honourable member for Murchison referred to, that is grievous bodily harm, the alleged Ellis - let us assume it was him writing it; there is a paragraph this big on page 3 - spent quite some time indicating how utterly unnecessary this is, but give me a break! You only have to go to the code where the grievous bodily harm stuff is in the current definition of 'consent' under the existing section 2A. It says:

'Where a person against whom a crime is alleged to have been committed under chapters XIV and XX suffers grievous bodily harm, that is prima facie evidence of absence of consent.'

It is there in the existing law and he is criticising the bill because it is there. I do not know what the man is trying to say, if this is an Ellis's letter. It is very unprofessional. He then whips into the proposed 'mistake' insertion of XIV(a) which he says is 'both unnecessary and unwise'. He says it represents 'current law and does not need enacting'. I do not know what that objection means. The point I was about to make was that it is current law anyway, so what is he criticising the bill for?

It is getting late but I want to make this point about the Ellis letter. I thought that was a strange legal opinion. I played some role in a letter that went from the minister to Mr Ellis which was faxed to him on 22 November. I am going to table it.

'In the Legislative Council debate ... Jim Wilkinson referred to a letter that you had written to the Tasmanian Bar Association detailing concerns you had with the Government's amendment.

The Government would appreciate a copy of this letter so it can respond to the issues you have raised.

I look forward to your earliest reply.'

That is signed 'Judy Jackson'. I am tabling that. I want to table the reply, dated 22 November 2004. There are some confusing aspects of this reply but it says this:

'Dear Attorney-General,' -

And it is signed by Tim Ellis. This letter is not, by the way, signed by Tim Ellis.

Mr Wilkinson - You know that doesn't happen, though, don't you, because you got a copy of it. Only the original is signed.

Mr PARKINSON - Mr Ellis says:

'I have your fax of 22 November 2004. I have not written any letter about the Criminal Code Amendment (Consent) Bill 2004.'

Now, that is as plain as the nose on your face. I will repeat it:

'I have not written any letter about the Criminal Code Amendment (Consent) Bill 2004. You made sure I never saw it.'

I do not know what that means. 'You made sure I never saw it'. He goes on:

'The honourable Mr Wilkinson' -

Mr PRESIDENT - Order. The honourable member for Nelson on a point of personal explanation.

Mr WILKINSON - I think it is worth mentioning, Mr President, on a point of personal explanation, that first, a letter that is written by a person - and it was written to the President of the

Tasmanian Bar Association - would have been written and signed. As anybody who has been involved in the law would know, a copy then goes on the file and a copy is not signed because you have the signed copy that goes and the secretary puts the copy on file. I have here, which I will table, a letter from Mr Ellis, signed by Mr Ellis, dated 5 April 2004:

'Mr Jim Wilkinson MLC
c/- Legislative Council
Parliament House
HOBART Tasmania 7000

Dear Jim

Criminal Code Amendment (Consent) Bill

Thank you for your letter of 1 April 2004 and enclose a copy of my letter of 24 March 2004 to the President of the Tasmanian Bar Association, which I understood he would probably distribute to members in due course.'

I table that letter, signed T J Ellis SC, Director of Public Prosecutions.

My point of personal explanation is this. Regarding any endeavour to say that this letter - because it is 24 March - to the President of the Tasmanian Bar Association was not written by Mr Tim Ellis, I would urge honourable members to look at this letter which is tabled. It was written to me, signed by Tim Ellis, explaining about the letter of 24 March 2004 sent to the Tasmanian Bar Association and that was the letter that I quoted from, signed by Tim Ellis. I table that letter.

Mr PARKINSON - I thank the honourable member for tabling that letter because I was about to table it myself. I also have a copy of that letter. I go on:

'The Honourable Mr Wilkinson MLC had some discussion with me after it had been given to the Legislative Council. That was the first I saw of it, no doubt as you instructed.

As Attorney-General, would it not be appropriate for you to use the honorific SC the Chief Justice gave me?'

Yours sincerely' -

It is signed, 'Tim Ellis'. I will table that.

I make two points here. I have already made the point that I regarded the letter which we will refer to as 'the Tim Ellis letter' as being very shabby indeed, using criticism of the existing law to try to debunk a bill that was coming into the Parliament.

Mr Fletcher - You'd lost a bit of credibility. You were denying just a few minutes ago that the letter was from Ellis. You had in your possession all the time the letter to Mr Wilkinson, which confirms it. So there's a doubt about the credibility of what you're telling us at the moment.

Mr PARKINSON - Be fair, I am raising the issue -

Mr Fletcher - During your interchanges with me you were saying, 'This is not an Ellis letter. Are you sure this is an Ellis letter?'

Mr PARKINSON - Well, I am still not sure. When I read the letter signed by -

Mr Wilkinson - Speak to him, please ring him. Have a look at my letter.

Mr Fletcher - He said he's got a copy of the letter you have tabled.

Mr PARKINSON - Okay.

Mr Fletcher - Has he got a copy or hasn't he?

Mr PARKINSON - If you are still convinced that it is an Ellis letter, written by Ellis, then why the denial?

Mr Wilkinson - Why the letter to me signed, though? Please, look at that and be honest about it. Look at that letter which was sent to me. You can see it. It is signed by him.

Mr PARKINSON - Yes, you have tabled it -

Mr Wilkinson - Well, isn't that proof that that was written to me?

Mr PARKINSON - as I was about to.

Mr Martin - Well, what about the other one?

Mr Wilkinson - Well, have a look at that. Don't try to throw smokescreens into it.

Members interjecting.

Mr PARKINSON - We are dealing with photocopies, that is one thing. The Ellis letter appears to me to bear the same signature as the Ellis letter. The Ellis letter written to you and the Ellis letter written to the Attorney-General appear to me - and I am not a handwriting expert - to carry the signature of the same Tim Ellis.

The point I want to make is that even if we accept that this is a Tim Ellis letter, what game is the Director of Public Prosecutions playing? I want to address that point for a moment. It is my perception - and you may not agree with me - that there is an anti-Attorney-General campaign being waged by Tim Ellis. I gained that perception in particular from an article I read in the press of recent times where he criticised another bill - I think it was the Family Violence Bill, from memory. I gleaned that again from terminology used in this letter in relation to his honorific and in relation to some of the other comments there that I just do not understand. I gleaned from comments that have been made by Mr Ellis that there is a problem between him and the Attorney-General. I do not know the reason for it. He spends some time trying to debunk a bill in a very unprofessional, nonsensical way by criticising the existing law.

Mr Fletcher - But other members of the law fraternity don't agree with you; they believe there is substance.

Mr PARKINSON - I think other members of the law fraternity, in particular Mr Daley who came for a briefing the other day - he is the only other member of the law fraternity, apart from my colleague, the member for Nelson, who I have discussed the bill with.

Mr Wilkinson - And you've got the letter from the Law Society.

Mr PARKINSON - I think he was criticising the bill because he found it confusing. I do not know how many serious sexual trials Mr Daley is involved in. That is another point I want to make quickly: I am pretty sure that in recent years Mr Ellis has not been involved in many, if any, sexual trials either because they have all been handled by Michael Stoddart, the senior prosecutor in the prosecuting division, who has been involved with pretty well all of the serious sexual cases in the Supreme Court.

Mr Wilkinson - Wasn't he involved with Farmer? I can't be sure about that, but I think he was. He certainly was involved with the appeal.

Mr PARKINSON - I do not know what 'involved' means, but I do not think he ran the trial. But, anyway, for all of those reasons I would invite honourable members not to attach too much weight to the Ellis letter, even if you accept, despite his denial in writing, that he wrote it, even if you accept that it was an opinion written by him, although it was unsigned by him but appeared to again be his because there was another covering letter to Jim Wilkinson.

Mr Wilkinson - Please be fair. You know that it would not be signed, don't you, because you know as well as anything - be fair about it - that you do not sign the letter you keep on your file. You know that.

Mr PARKINSON - So you are telling me it was a file copy?

Mr Wilkinson - I would imagine so, because the only signature would be on a letter to the Bar Association. You know that.

Mr PARKINSON - Mr President, that may be an explanation, but again that does not explain -

Mr Wilkinson - It happens in every legal practice.

Mr PARKINSON - a written denial -

Ms Thorp - No, it doesn't explain a written denial.

Mr Wilkinson - It could be a mistake. It is my letter.

Mr PARKINSON - and I invite honourable members to assume, as I do, that it debases this opinion.

Hobart Community Legal Service has recently written to the Leader about this bill, and I just want to read this letter. It says:

'The Hobart Community Legal Service ... is writing to urge you to support the proposed amendment to the Criminal Code Act 1924 (Tas).

Sexual assault laws right round Australia are failing victims with a plethora of studies demonstrating that one in three and as few as one in ten women report the crime. It is our belief that the proposed amendment - from a "freely given" concept of consent to one of "free agreement" - will better address the alarming shortfall of the current legal system.'

In other words, they are hopeful, as I am, that it will result in more people coming forward and more convictions.

'In the law of rape, the concept of "consent" is central. In every rape trial the prosecution must ...'

And it goes on. So there is the Hobart Community Legal Service urging our support and, rather than stand here reading it, because of the time I will table that letter as well.

Honourable members I have just a final few comments before I sit down. You want to go, and I am conscious of that. This is complicated legislation but, for heaven's sake, accept that the Criminal Code is a complicated bill. It is complicated law. I could pull out any one of dozens of clauses in the Criminal Code and read them to you and convince you that they were confusing. I could do it very easily because the language is confusing, but you know our courts daily, and particularly our Criminal Courts, deal with confusing legislation and they have to interpret the law, they have to interpret the word of the law that Parliament makes before them and apply it, and they do. They do a terrific job. But just because you find that the wording of something that comes before you in this House is confusing, please do not assume it will not work. I have been assured by one of the greatest lawyers of all time that Tasmania has produced - I have been indirectly assured, it has not been a personal assurance to me - that this will work and because of that I have every confidence that this, if it goes through, will work, it will result in more guilty people being caught and convicted, and it will improve those statistics even more.

Mr President, I have made all the points I want to make. I commend the bill to honourable members. I reiterate once again that I am grateful to honourable members for the way that you have all considered the provisions of this bill, the paperwork that has been before you and, regardless of the outcome of any vote on this legislation, I congratulate honourable members for that and the way you have dealt with this.

The Council divided -

AYES 9

Mr Aird
Mr Dean
Mrs Jamieson
Mr Martin
Mr Parkinson (Teller)
Mrs Rattray-Wagner
Ms Ritchie

NOES 5

Mr Finch
Mr Fletcher
Mr Hall (Teller)
Mr Harriss
Mr Wilkinson

Mrs Smith
Ms Thorp

Second reading so agreed to.

ADJOURNMENT

Mr AIRD (Derwent - Leader of the Government in the Council) - Mr President, I move -

That the Council do now adjourn.

I want to remind honourable members that we have a briefing at 9.15 a.m. tomorrow in committee room 1 relating to the Family Violence Bill.

Mr Fletcher - Can you give an indication whether you are planning to sit on Friday or next week?

Mr AIRD - I had another look at the Notice Paper. There are some bills that are not very contentious and I think that if we are going sit beyond tomorrow, we will be sitting on Friday, not next week. I do not think anyone is interested in sitting next week.

The Council adjourned at 1.25 a.m.