

Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Erratum to Explanatory Notes

Title of the Bill

Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Reason for the Erratum

On 26 November 2020, the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill) was introduced to Parliament. The Bill was subsequently referred to the Legal Affairs and Safety Committee (the Committee) with a report back date of 12 February 2021.

On 12 February 2021, the Committee tabled its report (No.3) in relation to the Bill (the Report). Recommendation 3 of the Report recommended that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence give consideration to the application of Chapter 32 of the Criminal Code as it relates to youth offenders.

Part of the Government response to address the Committee's recommendation, involved a commitment to tabling an Erratum to the Explanatory Notes to the Bill to clarify that Chapter 32 of the Criminal Code is not limited in application to sexual offending against adults.

In addition to the erratum in relation to recommendation 3 of the Report, a further erratum is made to provide additional clarification to address concerns raised by stakeholders in relation to the application of clause 9, new section 348A(2), and the meaning of the word 'anything'. The erratum will clarify that the provision will not alter the existing law.

Explanatory Notes

Policy objectives and the reasons for them

Amendments to the Criminal Code

On page one of the Explanatory Notes under the heading 'Amendments to the Criminal Code' replace the word 'adults' with 'any person' in the third paragraph.

The replacement paragraph should read:

Chapter 32 (Rape and Sexual Assaults) of the Criminal Code deals with sexual offending against any person where the absence of consent is an element of the offence.

Achievement of policy objectives

Amendments to the Criminal Code

On page nine of the Explanatory Notes under the heading ‘Creating new section 348A of the Criminal Code to provide that when deciding whether a person was acting under an honest and reasonable, but mistaken, belief that another person gave consent to an act, regard can be had to anything the person said or did to ascertain consent and in deciding whether the belief was reasonable, regard cannot be had to voluntary intoxication of the defendant’, insert the following:

- a) at line five of paragraph two, after the words ‘What the amendment provides for’, insert the following words: ‘, which does not change the existing law,’;
- b) at line ten of paragraph two, after the words ‘towards the actions of a defendant’, insert the following words: ‘and away from the defendant’s consideration of, or reasoning in response to, things or events which the defendant hears, observes or perceives’.

The replacement content should read:

This amendment in the Bill is not intended to shift the burden of proof onto a defendant. It will remain for the prosecution at all times to prove beyond a reasonable doubt each element of the offence and negative the excuse of mistake where it is raised on the evidence. The amendment also does not mean that a person is required by law to take any particular step or steps to ascertain consent. What the amendment provides for, which does not change the existing law, is that anything said or done by a defendant to ascertain consent can be taken into account along with any other relevant circumstances in determining whether a defendant acted under an honest and reasonable, but mistaken belief about consent. However, if a jury is directed in terms of the proposed new section 348A, it will to an extent properly tilt their focus towards the actions of a defendant and away from the defendant’s consideration of, or reasoning in response to, things or events which the defendant hears, observes or perceives. This tilt in focus is consistent with the type of affirmative model of consent which already exists in the Criminal Code by requiring consent to be given.