

31st January, 2020

The Secretary Queensland Law Reform Commission
PO Box 13313
George Street Post Shop QLD 4003
Email: lawreform.commission@justice.qld.gov.au

Dear Commission Director David Groth and Assistant Director Cathy Green,

RE: Submission to Queensland Law Reform Commission: Review of consent laws and the excuse of mistake of fact

The Queensland Sexual Assault Network (QSAN) is a state-wide network comprised of 23 non-government services. These services provide 25 specialist sexual assault support and prevention programs throughout Queensland. QSAN is committed to working collaboratively towards ensuring all Queenslanders who experience sexual violence recently or historically, regardless of ability, age, gender, sexual orientation, or cultural background receive a high quality response in line with best practice, client centred principles. QSAN also provides specialised knowledge and state-wide consultation on issues of sexual violence and sexual assault service provision.

QSAN welcomes the review of the Queensland consent laws and excuse of mistake of fact in relation to rape and sexual assault cases. It is clear that the current Queensland laws pertaining to sexual assault and rape cases are not effective in advocating for victims of sexual assault or protecting the community from perpetrators of sexual violence. This is evidenced in the Prevent. Support. Believe. Queensland's Framework to address Sexual Violence¹ which states that 87% of women who experienced sexual assault by a male since the age of 15 did not report their most recent incident to police. Of the women who did report, only 27% reported their perpetrator was charged; even fewer reports result in conviction.

“In Queensland an estimated 30,000 sexual assaults occur each year, yet in 2017, just 4751 sex crimes were officially reported to police. Around half that number proceeded to trial (2446 cases) but of them, only 835 resulted in a guilty verdict. Of the 835 perpetrators found guilty of sex offences in Queensland in 2017, roughly half — 44 per cent — were released straight back on to the streets with a mere slap on the wrist, such as a fine, a community service order or a suspended sentence....Perpetrators who did go to jail also received very brief sentences.”

¹ Department of Child Safety, Youth and Women, Queensland Government (2019). Prevent. Support. Believe. Queensland's Framework to address Sexual Violence, p.6.

Despite the low conviction rates of perpetrators of sexual abuse, research shows us that women and children rarely make false allegations of rape and sexual assault².

We believe there is a need to change the current laws on consent and mistake of fact (as it relates to sexual offences) in Queensland.

We submit that the following changes should be made to Queensland law:

1. Section 348 of the Criminal Code 1899 (Qld) should be amended to introduce the affirmative consent model into Queensland legislation that includes the concept of a 'voluntary agreement' between two parties.
2. Section 348 of the Criminal Code 1899 (Qld) should be amended to establish a comprehensive definition of consent that includes:
 - a non-exhaustive list of examples of scenarios where consent is not to be considered a voluntary agreement, to assist with understanding by professionals in the system, including police and the community at large.
 - These examples be extended to include the following scenarios where consent is not a free and voluntary agreement;
 - a. Where the person is asleep or unconscious when any part of the sexual act occurs, where the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual act, where the person fails to use a condom as agreed or sabotages the condom, where the person agrees.
 - b. Where the person (victim) agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from a serious disease.
 - c. Where the person consent to a sexual act under a mistake belief induced by the other person that there will be a monetary exchange in relation to the sexual act.
3. A new and discrete mistake of fact defence should be included in Chapter 32 of the Queensland Criminal Code 1899 (Qld) that requires a defendant to prove that the defendant took reasonable steps to ascertain consent, that the defendant's mistaken belief was not due to self-induced intoxication and they were not reckless as to whether or not the complainant consented before being able to reply on the defence.
4. That domestic violence be expressly required to be considered in sexual violence offences, where it is relevant.

² Joint report to the Director of Public Prosecutions by Alison Levitt QC, Principal Legal Advisor, and the Crown Prosecution Service Equality and Diversity Unit (2013). Charing Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations.

In addition:

5. We agree with amendments to make jury directions clear and understandable and not overly legalistic, confusing and technical.
6. We agree with the need for the Criminal Code to introduce a 'statement of objectives' or 'guiding principles' which the court should have regard in interpreting sexual violence offences and that attempts to counter 'rape myths'.
7. There should be an extensive community education campaign supporting the changes to the law that specifically includes professionals in the criminal justice system including the police and enhances their understanding of trauma to assist better responses.
8. That a broader community awareness campaign take place that for example, informs the community about the legal changes, counter rape myths and victim blaming, and promotes respectful relationships.

BACKGROUND

The definition of consent (s348 Queensland Criminal Code) and the current operation of mistake of fact (s24 Queensland criminal Code) have significant negative impacts on the reporting, investigation, charge and prosecution of rape and sexual assault, and result in injustice to many sexual assault survivors.

Section 348 (Meaning of consent) and the operation of s24 (Mistake of fact) should be amended to better reflect the modern understanding of the circumstances and facts surrounding sexual assault and rape.

The current definition of consent for Chapter 32 offences does not adequately address all instances where consent may not be present and in our view this has led to injustices.

There is consistent research that shows traumatic events, particularly instances of sexual assault and rape, can illicit an involuntary 'freeze' or immobility response to fear which prevents the victim from physically or verbally resisting the attacker. Studies dating back to 1993 show a consistent reporting of a 'freeze' response in at least 37 percent of sexual assault and rape survivors who were surveyed.³

Another concern regarding the prosecution of Chapter 32 offences is that the general defence of mistake of fact (s24 Criminal Code 1899 (Qld)) is inadequate when applied to Chapter 32 offences. Currently, once mistake of fact is raised on the evidence it is for the prosecution to negative the excuse, that is, to establish beyond reasonable doubt that the defendant did not have a mistaken belief or that if the defendant did, the belief was not honest or not reasonable. These are questions of fact for the jury to determine.⁴

Placing the onus of proof on the prosecution raises serious concerns because:

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the complainant;
- the defendant is in a better position than the prosecution to provide proof of whether they had an honest and reasonable belief there was consent;
- reversing the onus will lead to more clearly articulated claims of mistake of fact, which is fairer to all concerned including the jury;

³ Jennifer Heidt, Brian Marx and John Forsyth, 'Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape-induced paralysis' *Behaviour Research and Therapy* (2005) 43(9): 1157-71); Grace Galliano, Linda Noble, Carol Puechl and Linda Travis, *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of Immobility Response and its Correlates* (Report March 1993) 107-114; Avigail Moor, Enav Ben-Meir, Dikla Golan Shapire and Moshe Farchi, 'Rape: A Trauma of Paralysing Dehumanisation' *Journal of Aggression, Maltreatment and Trauma* (2013) 22(10): 1051-1069.

⁴ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Consultation Paper, December 2019) 43-44.

- reversing the onus will enhance the capacity of the trial judge to prevent unmeritorious claims being raised such as stereotypes and myths regarding rape and sexual assault victims.

Based on these reasons there is a strong argument that the burden of proof should shift to the defendant.

Although this raises concern regarding the presumption of innocence, such a reversal would not be unique to the Criminal Code 1899 (Qld). In the case of reform of the provocation defence to a murder charge⁵ similar concerns were determined to justify the reversal of the onus of proof.⁶

In addition, the current state of law in sections 348 and 24 of the Criminal Code 1899 (Qld) facilitates the perpetuation of stereotypes, myths and biases that influence decision making by police and prosecution services regarding investigation and charge and jury opinion on the presence of consent and mistake of fact.

MYTHS, BIASES, STEREOTYPES AND OTHER ISSUES

Rape myths can be defined as

*pervasive stereotypes that somehow shift the blame for the incident onto the complainant because of her actions such as drinking, voluntarily going somewhere alone with a man not well known to her, or being dressed or acting provocatively as in some way contributing to or even causing the offender's behaviour.*⁷

The most recent national survey of community attitudes towards violence against women found the prevalence of various preconceptions about sexual assault offending⁸, including:

- 42% of people agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'.⁹
- 31% agreed that 'a lot of the times women who say they were raped had led the man on then had regrets'.¹⁰
- 16% agreed that many of the allegations of sexual assault made by women are false.¹¹

⁵ s269 *Criminal Code 1899* (Qld).

⁶ Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010, 3.

⁷ Rebecca Scott, Heather Douglas, and Caitlin Goss, *Prosecution of Rape and Sexual Assault in Queensland: Report on a Pilot Study* (Report, February 2017) 4.

⁸ K Webster, K Diemer, N Honey, S Mannix, J Mickle, J Morgan, A Parkes, V Politoff, A Powell, J Stubbs and A Ward, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research Report, March 2018) 1-185.

⁹ Webster & colleagues, 2018:48-50.

¹⁰ Webster & colleagues, 2018: 86.

¹¹ Webster & colleagues, 2018:48-50.

- 11% ‘thought it likely that a woman who waited weeks or months to report sexual assault was lying’.¹²
- 7% agreed that if ‘a woman doesn’t physically resist - even if protesting verbally - then it isn’t really rape’.¹³

Implementation of an Affirmative Consent Model

To address these issues surrounding the inadequacy of s348 and s24 an affirmative consent model, which has been adopted by other common law jurisdictions, should be implemented into the Criminal Code.

The affirmative consent model can be defined and characterised as:

- A knowing, voluntary, and mutual decision by all participants to engage in sexual activity which is maintained or re-affirmed at every stage of the activity.
- An acknowledgment that consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- That silence or lack of resistance, of itself, does not demonstrate consent.
- In simple terms, it is a clear and unequivocal ‘yes’ (through words or actions) and highlights that it is the responsibility of each person involved in the sexual activity to ensure the affirmative consent of the other to engage in the sexual activity.¹⁴

PROPOSED AMENDMENTS TO S348 (MEANING OF CONSENT)

The QSAN believes that the definition of consent in s348 of the Criminal Code 1899 (Qld) needs to be amended. We believe that Queensland legislation regarding consent should reflect an affirmative consent model. Such a model would be more in line with modern understandings regarding expectations about sexual relations and the facts and circumstances surrounding rape and sexual assault.

Inclusion of ‘agreement’

We submit that consent should be defined as a ‘free and voluntary agreement’ in section 348 Criminal Code 1899 (Qld) to clarify that consent requires positive communication for consent to be present.

The 2018 proposal by the Canadian Senate¹⁵ to amend the Canadian *Criminal Code and the Department of Justice Act* through Bill C-51 should also be included in the proposed reformed

¹² Webster & colleagues, 2018: 84.

¹³ Webster & colleagues, 2018:48.

¹⁴ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Consultation Paper, December 2019) [88] 21.

s348 Criminal Code 1899 (Qld) for clarification of when the complainant cannot be found to have consented:

(b) the complainant is incapable of consenting to the activity in question for any reason, including, but not limited to, the fact that they are

(i) unable to understand the nature, circumstances, risks and consequences of the sexual activity in question,

(ii) unable to understand that they have the choice to engage in the sexual activity in question or not, or

(iii) unable to affirmatively express agreement to the sexual activity in question by words or by active conduct¹⁶

Inclusion of list of examples where consent is not present

We then propose that to provide further clarity and a comprehensive definition, a list of non-exhaustive examples of where consent is not present should be included. The kinds of examples we recommend are already found in the Criminal Code 1899 (Qld) and Criminal Code 1924 (Tas). This list of examples could be structured in a similar manner to the examples identified in section 8(5) of the Domestic and Family Violence Protection Act 2012 (Qld).

A person does not freely and voluntarily agree to an act if the person –

(a) does not say or do anything to communicate consent; or

(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or

(c) agrees or submits because of a threat of any kind against him or her or against another person; or

(d) agrees or submits because of intimidation; or

(e) agrees or submits because he or she or another person is unlawfully detained; or

(f) agrees or submits because he or she is overborne by the nature or position of another person; or

(g) agrees or submits because of the fraud of the accused about the nature or purpose of the act, or the accused's identity; or

(h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or

Stealthingly / contraceptive sabotage:

We submit as considered on page 30 of the QLRC Consultation Paper that an example (or subsection) should be included in s348 Criminal Code 1899 (Qld) identifying that a *person does not*

¹⁵ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' 1st Session, 42nd Parliament (Web Page, 30 October 2018)
<https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33>

¹⁶ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' 1st Session, 42nd Parliament (Web Page, 30 October 2018)
<https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33>

freely agree to an act where the other person fails to use a condom as agreed or sabotages the condom.

Harm or threats of harm to an animal:

We submit that a *person does not freely agree to an act if the person agrees or submits because of force, or a reasonable fear of force, to an animal;*

We note that the Victorian legislation (section 36(2) Crimes Act 1958 (Vic)) includes this example but we believe the example involving an animal should be separated out from force of reasonable fear of force to another person.

Evidence provision

Drawing on the proposal by the Canadian Senate¹⁷ to amend the Canadian *Criminal Code and the Department of Justice Act* through Bill C-51, we propose that the following provision should be included as a sub-section in a remodelled section 348 Criminal Code 1899 (Qld):

*for greater certainty, capacity to consent at the time of the sexual activity that forms the subject-matter of the charge cannot be inferred from evidence on capacity to consent at the time of another sexual activity.*¹⁸

Withdrawal of consent

We propose that an express provision providing that consent can be withdrawn at any time should also be included as a sub-section of the proposed section 348 Criminal Code 1899 (Qld). This would not be unique to Queensland and is already included in South Australian legislation.¹⁹

Application of consent definition to sexual assault

We propose that it is expressly legislated that the definition of consent found in the proposed section 348 is directly applicable to s352 (sexual assaults) and all other Chapter 32 offences.

Grievous bodily harm

We propose that a separate provision for when a person suffers grievous bodily harm as a result of or in connection with a Chapter 32 offence should be included. The s2A(3) of the Criminal Code Act 1924 (Tas) provides a model that we believe addresses the concern appropriately:

*(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX [ie Chapter 32 Criminal Code 1899 (Qld)] , suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.*²⁰

¹⁷ Senate of Canada, 'Bill to Amend – Third Reading – Motion in Amendment Adopted – Debate Continued' 1st Session, 42nd Parliament (Web Page, 30 October 2018)

<https://sencanada.ca/en/content/sen/chamber/421/debates/241db_2018-10-30-e?language=e#33>

¹⁸ Senate of Canada, 12.

¹⁹ s47 *Criminal Law Consolidation Act 1935 (SA)*

²⁰ s2A(3) *Criminal Code Act 1924 (Tas)*

PROPOSED AMENDMENT TO INCLUDE A NEW DISCRETE DEFENCE OF MISTAKE OF FACT FOR RAPE AND SEXUAL ASSAULT AND OTHER CHAPTER 32 OFFENCES

Separate defence for mistake of fact in relation to rape and sexual assault and other Chapter 32 (Criminal Code 1899 (Qld)) offences

We propose and support the introduction of a separate and unique mistake of fact provision for Chapter 32 offences. This change will address problems highlighted above in relation to how the current onus is unsuitable in relations to Chapter 32 offences. Additionally, it will further strengthen the presence of the affirmative consent model in Queensland's legislation.

Section 14A in the *Criminal Code Act 1924* (Tas) (mistake as to consent in certain sexual offences) is the recommended form for such a provision.

14A. *Mistake as to consent in certain sexual offences*

(1) *In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –*

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

Introduction of reverse onus of proof

We propose that the onus of proof should be reversed, for mistake of fact relating to rape, sexual assault and other chapter 32 offences, meaning that the defendant must prove that they held an honest and reasonable, but mistaken belief that the complainant was consenting.

Mistake of fact currently requires the prosecution to disprove, beyond reasonable doubt, that the mistaken belief held by the defendant was honest and reasonable.²¹ As outlined above, the defendant is in a better position to prove they held an honest and reasonable, but mistaken belief for similar reasons outlined in the explanatory notes amending provocation (s 304).²²

Further, by reversing the onus of proof, the perpetuation of stereotypes, myths and biases regarding sexual offences may be lessened, leading to fairer and more just outcomes for rape and sexual assault survivors.

²¹ R v Lafaele [2018] QCA 42, [40-41] (North J) referring to Loveday v Ayre and Ayre: Exparte Ayre [1995] St R Qd 264, 267-68.

²² Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2010, 3.

Objective test for what constitutes reasonable in determining whether there was an honest and reasonable belief of consent

We are concerned about the current interpretation of ‘reasonable’ in the context of the mistake defence under section 24 Criminal Code 1899 (Qld) . Currently what is ‘reasonable’ is not a purely objective assessment in the sense of what a ‘theoretical ordinary, reasonable person would or should’ have done.²³ Rather, the personal circumstances of the defendant must be considered, with the understanding that the defendant’s belief cannot be assessed separately from the relevant information on which it was based.²⁴

This interpretation may enable unjust outcomes for rape and sexual assault survivors, and contribute to the stereotypes and myths about rape and sexual assault. A purely objective approach may be considered more appropriate for a mistake of fact defence developed specifically for operation with Chapter 32 Criminal Code 1899 (Qld) offences.

It is noted, however, that a theoretically objective test may also have unintended consequences on particularly vulnerable classes of defendants such as those with intellectual impairments. However this concern may be mitigated by introducing a new form of the mistake of fact defence as suggested above, for application to Chapter 32 offences, including the reverse onus of proof and the requirements for the defendant to show they took ‘reasonable steps’ to ascertain consent, was not reckless when ascertaining consent, and was not making the mistaken belief based on self-induced intoxication.

OTHER MATTERS

Guiding principles.

We recommend that Chapter 32 should also include guiding principles to assist in interpreting the legislation and in discouraging the perpetuation of rape myths and stereotypes. A good example of guiding principles can be found at page 71 of the QLRC Consultation Paper. Specifically the Consultation Paper refers to the guidelines suggested by reviews undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC) in their Joint Report on Family Violence in 2010 and the Victorian Law Reform Commission. We think this is a good approach and should be included at the beginning of Chapter 32.

²³ *R v Wilson* [2009] 1 Qd 476, 482 [20] (McMurdo P).

²⁴ *R v Mrzljak* [2004] QCA 420 [90] (Holmes J).

We thank you for the opportunity to make this submission. QSAN also supports the individual network services who are making submissions to the Queensland Law Reform Commission in relation to the review.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'M Clarke', written in a cursive style.

Miranda Clarke
QSAN Secretariat
On behalf of the Queensland Sexual Assault Network