

QSAN position paper: QLRC review of consent laws and the excuse of mistake of fact

9th September 2020

1 Background

1a Queensland Sexual Assault Network Inc. (QSAN)

QSAN is a network of non-Government services funded to provide specialist sexual assault counselling, support and prevention programs in Queensland. QSAN is the peak body for sexual violence prevention and support organisations in Queensland. QSAN is committed to working collaboratively towards ensuring all Queenslanders who experience sexual violence recently or historically, regardless of age, gender, sexual orientation, cultural background receive a high quality response in line with best practice, client-centred principles (www.qsan.org.au).

1b Queensland Law Reform Commissions (QLRC) Review of consent laws and the excuse of mistake of fact

On 2 September 2019, the Attorney-General and Minister for Justice and Leader of the House referred '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 as it applies to Chapter 32' to the QLRC for review and investigation. After a period of consultation and reviewing submissions, in June 2020 the QLRC delivered their report with 5 recommendations. In August 2020, the Queensland government committed to implementing the recommendations, introduced the Bill into parliament and referred it to the Legal Affairs and Community Safety Committee for consideration. On 13 August 2020, the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill) was introduced to parliament and referred to the Legal Affairs and Community Safety Committee (the committee) for detailed consideration.

2 QSAN Recommendations

QSAN believes that the opportunity has been missed to broadly assess the operation and practical application of current legislation that would improve the safety of women, encourage them to report to police and engage with the criminal justice system. Furthermore, that the recommendations do not address the failings of legislation and the criminal justice system that were actively raised in submissions from women's services and in consultation with victim/survivors and advocates.

QSAN aligns with Women’s Legal Service Queensland (WLSQ) and Rape and Sexual Assault Research and Advocacy’s (RASARA) recommendations for amending the QLRC’s draft Criminal Code (Consent and Mistake of Fact) Amendment Bill 2020. ***(Amendment to the draft Bill are in bold italics.)***

We propose:

- **THAT ANY REFORM MAKES QUEENSLAND SAFER FOR THE VICTIMS OF SEXUAL AND DOMESTIC VIOLENCE AND HOLDS OFFENDERS ACCOUNTABLE**
- **THAT THE PASSAGE OF THE BILL BE SLOWED/HALTED TO ALLOW TIME TO UNDERTAKE A BROADER REVIEW**
- **THAT A BROAD-BASED REVIEW BE UNDERTAKEN**
That this broad-based review positions the experiences of victim/survivors of sexual violence at the centre, from barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial.

- **THAT AN AFFIRMATIVE MODEL OF CONSENT IS ADOPTED**
Amendment of s 348 (Meaning of consent)

Section 348 –

Insert-

(3) A person does not consent to an act if the person does not say or do anything to communicate consent to the act.

(4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

[Note: This amendment would strengthen the QLRC’s recommendation to clarify that a person does not consent where they do nothing to indicate consent. This would adopt the current legal position in Victoria. The QLRC’s current recommendation leaves it open that passivity can amount to consent in some cases.]

- **THAT SPECIFIC PROVISIONS ARE INTRODUCED TO TAKE INTO ACCOUNT CONSENT IN THE CONTEXT OF DOMESTIC VIOLENCE**
- **THAT MISTAKE OF FACT IS FURTHER CLARIFIED**

Insertion of new s 348A

After section 348—

insert—

Section 348A Mistake of fact in relation to consent

(1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.

(2) A mistaken belief by the person as to the existence of consent is not honest if the person did not take positive and reasonable steps, by words or conduct, in the circumstances known to the person at the time of the act, to ascertain that the other person was giving consent to the act.

(3) In deciding whether a belief of the person was honest and reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance

[Note: This amendment would strengthen the QLRC's recommendation in two ways. First, it would impose a reasonable steps requirement on the mistake of fact excuse, as in Tasmania. Second, it would state that a defendant's drunkenness cannot be used to establish either the honesty or the reasonableness of a mistaken belief in consent.]

- **THAT GUIDING PRINCIPLES ARE INCLUDED**

Insertion of Guiding Principles into Chapter 32

That Chapter 32 of the Criminal Code 1899 (Qld) include guiding principles to assist in interpreting the legislation and in discouraging the perpetuation of rape myths and stereotypes. QSAN believes the guidelines suggested by 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 are best practice examples.

3 Discussion of concerns and analysis of QLRC's review of consent laws and the excuse of mistake of fact

QSAN offers the following critique of the QLRC's report and its specific recommendations:

Proposed amendments to the definition of consent s348 Criminal Code 1899 (Qld)

Recommendations 1 to 3 fail to protect victims of rape and sexual assault by:

1) Still allowing passivity to amount to consent

The QLRC rejected the proposal that Queensland law reflect that of Victoria and Tasmania, where there is no consent when a person 'does not say or do anything to communicate consent to the act'.¹

The QLRC acknowledges that victims may 'freeze' in traumatic situations such as sexual assault and rape, preventing them from being able to verbally communicate or physically resist.² The QLRC

¹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020), 94 [5.90].

² Ibid 67.

presented research demonstrating 37 percent of sexual assault and rape survivors surveyed reported a 'freeze' response.³

2) Making technical and inconsequential changes to the definition of consent

An amendment to the Queensland definition of consent in line with Tasmania and Victoria was rejected by the QLRC due to the possibility that it would not allow the context of the relationship between the two parties to be considered in determining whether there was consent.

The QLRC's emphasis on the context of a relationship between parties in determining the presence of consent may fail to protect the overwhelming number of victims who are raped by someone they know, such as existing sexual partners.

In 77 percent of cases the perpetrator was known to the victim and 31.48 percent of victims experienced sexual violence at the hands of an intimate partner.

Recommendation two of the report will make no substantive change to the definition of consent.⁴ It is a technical reform to resolve an interpretive problem in the law.

3) Puts the onus on the victim to withdraw consent even when the sexual encounter changes in nature such as becoming violent

The recommendation puts the onus on the victim to verbally withdraw consent after the sexual encounter has begun consensually. This is particularly problematic when the sexual encounter changes in nature - where a condom is removed without the consent of the other person; where the situation becomes violent e.g. strangulation or a physical assault which may render the victim unable to use their voice.

In an affirmative consent model, consent would need to be maintained or reaffirmed at every stage of the activity.⁵ This would require that permission was sought when the other party wanted to change the nature of the sexual act.

Proposed amendments to mistake of fact (s 24 Criminal Code 1899 (Qld))

Recommendations 4 and 5 fail to protect victims of rape and sexual assault by:

4) Not requiring the defendant to take reasonable and positive steps to ensure the other person is consenting

The fourth recommendation falls significantly short of requiring defendants to show they took positive steps to ascertain consent - a requirement which currently exists in Tasmania.⁶ Furthermore, under the QLRC's proposed amendment, defendants could identify **any** words or actions they used to determine consent, **no matter how unreasonable**, to support their defence of mistake of fact.

³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 93 [5.85], discussing J Heidt, B Marx and J Forsyth, 'Tonic immobility and childhood sexual abuse: a preliminary report evaluating the sequela of rape-induced paralysis' (2005) 43(9) *Behaviour Research and Therapy* 1157; G Galliano et al, 'Victim reactions during rape/sexual assault: a preliminary study of immobility response and its correlates' (1993) 8(1) *Journal of Interpersonal Violence* 109; A Moor et al, 'Rape: A Trauma of Paralyzing Dehumanisation' (2013) 22(10) *Journal of Aggression, Maltreatment and Trauma* 1051.

⁴ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020), 105.

⁵ *Ibid* 80 [5.13].

⁶ *Criminal Code Act 1924* (Tas) s 14A.

A representation of consent may be made by “remaining silent and doing nothing”, particularly when “evaluated against a pattern of past behaviour”.⁷ This problematic rule is also reflected in the current operation of mistake of fact, where the factual issue about whether the accused believed the complainant had freely and voluntarily given consent can be proven by “an omission to act” in some circumstances.⁸ This is particularly concerning as there is no requirement that the defendant take any reasonable and positive steps to ensure consent, and consent itself can be established by remaining silent, thus discounting the above evidence regarding the common ‘freeze response’ experienced by victims.

In the QLRC’s proposed amendment it is stated that juries *may* consider the words and conduct the defendant used to determine whether the other person was consenting.

To better improve the law surrounding Mistake of Fact, we propose that s 348A should be amended to include:

(2) A mistaken belief by the person as to the existence of consent is not honest or reasonable if the person did not take positive and reasonable steps, by words or conduct, in the circumstances known to the person at the time of the act, to ascertain that the other person was giving consent to the act.

The fifth QLRC recommendation clarifies that a defendant cannot rely on their voluntary intoxication to argue a mistake about consent was reasonable.⁹ This recommendation should be accepted however would be strengthened by the inclusion of the reasonable steps requirement as seen above.

Failure to introduce guiding principles to counteract rape myths and false preconceptions

The QLRC has failed to introduce guiding principles, the objective of which was to counter myths and false preconception surrounding rape. The Victorian Government’s guiding principles found in section 37B of the *Crimes Act 1958* (Vic) include statements such as that ‘sexual offenders are commonly known to their victims’.¹⁰

The QLRC has selectively gathered evidence regarding the high prevalence of rape myths and stereotypes held by the Australian public therefore incorrectly dismissing the need for guiding principles. Even though the QLRC themselves reported that:

⁷ R v Makary [2018] QCA 258, 273 [50] (Sofronoff P); Demagogue Pty Ltd v Ramensky (1992) 39FCR 31 at 32; Hardman v Booth (1863) 1 H & C 803.

⁸ R v Makary [2018] QCA 258, 273 [54] (Sofronoff P).

⁹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 201.

¹⁰ *Crimes Act 1958* (Vic) s 37B(d).

- 31% agreed with the myth that “a lot of the time women who say they were raped had led the man on and then had regrets”;¹¹
- 42% agreed with the myth that it is “common for sexual assault accusations to be used as a way of getting back at men”¹²
- 1 in 3 Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger¹³

The QLRC summary of the data stated that the data suggests that false preconceptions about rape are ‘low and is in decline’. This is a misleading claim as the decline is not linear and there remains a concerning number of Australian people who believe in ‘rape myths’.¹⁴

The QLRC also failed to mention that in the same report they drew data from it was reported that

- ‘33% of Australians incorrectly believe that ‘rape results from men being unable to control their need for sex’,¹⁵ and
- ‘28% incorrectly believe that, when sexually aroused, ‘men may be unaware a woman does not want to have sex.’¹⁶

The QLRC was correct in finding that there is insufficient research to determine what impact false preconceptions have on jury members. However, guiding principles are important for influencing persons at every stage of the justice system, from the police decision to investigate and charge, to the Office of the Director of Public Prosecutions decision to prosecute as well as at trial.

In addition, a 2002 study within Queensland, found that convictions by a jury were more likely when the defendant and complainant were strangers and less likely when they had a prior relationship.¹⁷ This underlying assumption is troublesome considering that as mentioned above ‘1 in 3 Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger’.¹⁸ The QLRC failed to mention this study despite its relevance.

¹¹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 quoting Kim Webster et al, *Australians’ attitudes to violence against women and gender equality* (Report, 2018) 7.

¹² Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, *Australians’ attitudes to violence against women and gender equality* (Report, 2018) 12.

¹³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, *Australians’ attitudes to violence against women and gender equality* (Report, 2018) 6.

¹⁴ Rape & Sexual Assault Research & Advocacy ‘Breaking: Queensland Law Reform Commission fails to make substantive recommendations to improve rape law’, (Blog Post, 2020) < <https://rasara.org/qlrc>>.

¹⁵ Kim Webster et al, *Australians’ attitudes to violence against women and gender equality* (Report, 2018) 89.

¹⁶ *Ibid.*

¹⁷ Julie Stubbs, ‘Sexual Assault, Criminal Justice and Law and Order’ (2003) (14) *Women Against Violence: An Australian Feminist Journal* 14, 19.

¹⁸ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 205 citing Kim Webster et al, *Australians’ attitudes to violence against women and gender equality* (Report, 2018) 6.

To support the argument that jurors are not heavily influenced by false preconceptions on rape and sexual assault the QLRC relies on unpublished opinions of jurors in England, Wales and Northern Ireland.¹⁹ The QLRC has therefore relied on non-peer reviewed evidence of attitudes and beliefs of individuals outside of Australia and ignored research conducted within Queensland itself.

Insufficient research which fails to give weight to the experience of victims and survivors

The QLRC met with survivors²⁰ and organisations working with survivors of sexual violence and received multiple submissions from these individuals and groups.

Despite citing the submissions and opinions of victims and survivors and their advocates, the QLRC recommendations have disregarded their concerns.

Furthermore, on pages 91-94, the QLRC cites multiple academic studies evidencing that it is common for victims to freeze in response to rape. However, it fails to mention these studies in their justification for not introducing the affirmative consent model. Instead the QLRC places greater emphasis on the few opinions of opposing submission and pre-existing case law.

Furthermore, the scope of the inquiry is too narrow as it only focuses on the application of the current law at the trial stage²¹ of the criminal justice system. The narrow scope of the QLRC report does not take into account the role of the law at the earlier stages of the justice process including investigation, arrest, charge and prosecutorial decisions.

Significantly, police data shows that 40 percent of sexual assault reports in Queensland were 'unfounded' or withdrawn in 2018.²² Furthermore, it is estimated that 75% of sexual assault incidents are never reported.²³ Therefore, it is inadequate to purely investigate the application of the law at the trial stage as this fails to include the systematic issues at every stage of the criminal justice process.

¹⁹ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 207.

²⁰ Ibid 3.

²¹ Ibid.

²² Inga Ting, Nathanael Scott and Alex Palmer, 'Rough justice: How police are failing survivors of sexual assault', *ABC NEWS* (Online, 28 January 2020) <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364?nw=0>.

²³ Department of Child Safety, Youth and Women, 'Sexual Violence in Queensland and Australia – key facts', *Sexual Violence Prevention* (QSAN Fact Sheet), <https://qsan.org.au/wp-content/uploads/2019/03/Statistics-on-sexual-violence-in-Queensland.pdf>.