CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL 2023

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Committee Secretary
Legal Affairs and Safety Committee
House
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Dear Madam/Sir

Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Kindly accept this submission in relation to the above Bill

The QCCL is an organisation of volunteers. We have limited time and resources to make submissions. This submission concentrates on two aspects of the bill. The fact that we do not comment on any other aspect of the bill should not be taken that we approve of any other aspect of the bill.

Affirmative consent

Our first comment is to express our surprise that some two years after implementing the recommendations of a comprehensive review of the law of consent and mistake[1] as it applies to sexual assault the government has chosen to introduce new legislation.

It is our position that the Commission's thorough and comprehensive review of the Law resulted in a number of important changes to the law. Those changes followed the concept of "no means no". Nothing has happened between the passage of those amendments and the current time to indicate that there is a need to further change the law.

Affirmative consent means a requirement that "a person should actively seek the consent of their prospective sexual partner, and only act in accordance with a consent which is wilfully and enthusiastically given."[2]

In California it has been defined to mean, "affirmative, conscious and voluntary agreement to engage in sexual activity...Lack of protest or resistance does not mean consent, nor does silence mean consent."[3]

It is our submission that no matter what its moral virtues may be this concept is not an appropriate one to be translated into the law because of the potential to criminalise consensual sexual conduct.

As the Commission said at paragraph 5.15 "It has been argued, however, that 'moral and legal assessments are not identical'. There is a difference between 'virtue ethics and moral

[1] Queensland Law Reform Commission *Review of Consent Laws and the Excuse of Mistake of Fact* Report 78 2020 ("the Commission")
[2] A Dyer *Yes! to Communication About Consent; No! To Affirmative Consent: A Reply To Anna Kerr* 2019 7 Griffith Journal of Law & Human Dignity 17 at page 36
[3] quoted in Cathy Young *"Campus Rape: The Problem With "Yes Means Yes".* Time 29 August 2014

duties' which focus on ideal standards of behaviour, and the standards set by the criminal law which determine criminal responsibility."

The first reason for this is what we know about current behaviour as between men and women in a sexual context.

Aya Gruber quotes the following summary of the research:

> Surveying the literature, sociologists Terry Humphreys and Melanie Brousseau observe:
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> "Numerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be nonverbal instead of verbal." While the science does indicate that people will be clearer as sexual contact becomes more intimate, agreement even to penetration is not likely to be a verbal ask-and-answer. Sexual consent signaling is, in fact, often entirely passive: "[M]any men and women passively indicate their consent to sexual intercourse by not resisting, such as allowing themselves to be undressed by their partner, not saying no, or not stopping their partner's advances.[4]
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> The social science literature on sexual consent also reveals significant and troubling gender differentials, at least within the United States. Young people continue to adhere to "traditional" sexual scripts in which men initiate sex and women act as "gatekeepers". Relatedly, studies document that women are keenly aware of the social costs of breaking from the traditional script and engaging in the "wrong" kind of sexual communication. It is thus not surprising that the phenomenon of token resistance, that is, communicating refusal when one is willing, continues to be part of the consent performance landscape.[5]

The implication of the concept is that the existence of a long-term relationship between the parties is to be ignored in determining whether there has been consent. So, for example a couple in a long-term relationship have sex every Friday night after dinner, they need something more than the relationship and its understandings to establish consent. However, the proposed statute does not make it clear what that is.

As seen from the definition above, the concept requires "enthusiasm" . Whilst this is not explicitly reflected in the terms of the draft statute this is the idea that lives behind it. However, this requirement is not required in any other circumstance where consent is required. People may be motivated to consent by many different reasons.

I may be an NRL fan, and my partner follows the AFL which I despise but for relationship harmony I agree to go to watch a game of AFL. There are many such examples in life, and no one suggests that that consent is somehow vitiated by the fact that it is not enthusiastic and that in fact it is extremely reluctant.

On this question, Gruber quotes the following scientific evidence:

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[4] *Consent Confusion* (2016) 38 Cardozo Law Review 415 at page 442
[5] Ibid at page 443

> Studies show that people of both sexes-especially young people-have strong incentive to eschew direct expression of sexual desire to avoid awkwardness and embarrassment and "save face" in the event of rejection. In addition, one might wonder why harsh criminal sanctions are necessary to compel people to do that which, according to proponents, is already easy to do [6]

Maybe the world would be a better place if all sex was as enthusiastically participated in as the proponents of affirmative consent desire. However, the question is whether the criminal law ought to incarcerate people because they have sex with a person who does so reluctantly with the object of remodeling behaviour to achieve this objective.

Two responses are usually made to this argument.

The first is that sexual penetration and going to the AFL are very different things. This is no doubt true.

To begin with of course we note that agreements are also quite often made reluctantly with no enthusiasm whatsoever. For example, it is often said in the law that a good deal is one where both parties come away from a settlement conference disappointed.

In our submission it has not been shown why we need to depart from commonly accepted concepts of consent, particularly when moving away from such concepts is going to result in people being criminalised for otherwise ordinary conduct.

The point that is often made in this context is the well-established fact that many women when confronted with the possibility of sexual assault freeze. However, it is our submission that the changes made after the Commission's Report by providing that the fact that a person does nothing is not an indication, by itself, of consent adequately addresses this concern.

As Halley points out "a legal standard requiring the expression of agreement inevitably makes sexual penetration impermissible in situations where passionate desire is subjectively present but not overtly communicated"[7]

Many proponents of this approach argue that it will undermine female passivity in sexual relationships. But other feminist such as Halley argue that it will have the exact opposite effect. Halley argues that this approach is modelled on an exclusively heterosexual understanding in which the male is the aggressor, and the female is the passive recipient of the male approach[8]

As we have previously submitted it is our view that this approach has no regard whatsoever to the many varieties and flavours of human sexual experience and the effect of this law would be to cast it into a straight jacket.

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[6] at page 448
[7] Janet Halley "*The Move to Affirmative Consent*" 42 Signs: Journal of Women in Culture and Society 257 at 263
[8] Ibid 276

Of course, the answer to many of these criticisms is that the purpose of the law is to change behaviour. No doubt, the law can change behaviour[9]. Liberating changes like the laws which made homosexuality legal have significantly improved behaviour by allowing homosexuals to come out and to exist increasingly freely in the community.[10]

The problem with the laws under discussion is that despite the fact that some models of them have been tried in various jurisdictions for some years there is no evidence that they have in fact changed behaviour. We know that our criminal justice system is applied disproportionately against various marginalised groups in our community. The consequence of that is it these laws will be applied to those groups and other groups in our community will not feel the impact of them at all.

There are ultimately limits to the extent to which the law can be used to bring about cultural change particularly when the pursuit of that objective is likely to have an adverse impact on individual liberty. It is our submission that the government would be more likely to achieve its entirely legitimate objectives if it focused its efforts on education at an early stage about what equal relationships look like.

We turn now to the particular provisions of the draft law.

Firstly, proposed section 348 which replaces the current definition of consent with one which says that consent “means free and voluntary agreement”. For the reasons set out above we oppose this change. It is our position, as it was of the Commission, that the current definition is perfectly adequate.

We agree with the view of the Commission expressed at paras 5.76 and 5.77 of its Report

> 5.76 In cases of rape and sexual assault, if the defendant does not deny penetration or the action constituting the assault, the primary issue will be whether the complainant gave consent. Absence of consent is proved by asking the complainant whether the complainant consented to the sexual act on the occasion in question. This focus on the complainant's state of mind is the means by which control over sexual autonomy is respected. Any approach that shifts the focus away from the complainant's state of mind is undesirable.
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> 5.77 On balance, the Commission is of the view that an amendment introducing the word ‘agreement' or ‘agrees' into the definition of consent in section 348 should not be made. Reform of this nature may introduce uncertainty as to the meaning of the definition. It remains the case that it is the complainant's consent that is relevant.

We turn to proposed section 348AA(1). This is not acceptable. Under this provision the fact that the person does nothing or communicates nothing cannot be considered consent. It is our position that the current law is correct where it provides that doing or saying of nothing cannot *by itself* constitute consent.

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[9] at least in relation to children see Brian Barry *Political Argument* (A Reissue with a New Introduction) University of California Press 1990 pages 55 and 79-80

[10] However, the circumstances in which the criminal law can change behaviour may be quite narrow - Don Weatherburn *Law and Order in Australia - Rhetoric and Reality* The Federation Press 2004 chpt 3

In relation to the balance of the section, in our submission to the Commission we supported a change to the law to include a non - exhaustive list of factual situations which define when a person has not consented to sexual activity. As recommended by the Scottish Law Commission[11] the situations should include the following:

(a) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;
(b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;
(c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;
(d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;
(e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;
(f) where the person agreed to the act because the accused impersonated someone who was known to the person;
(g) where the only expression of agreement to the act was made by someone other than the person.

To the extent the proposed provision reflects that proposal we support it.

Proposed section 348A (2) states the law as it currently is and is supported by us.

Finally, we turn to section 348A (3). Under this provision the person who fails to take steps before a sexual act to say or do anything to find out whether the other person has consented will not have an honest and reasonable belief for the purpose of section 24 that the person has consented. Again, we oppose this amendment. It is our view that the law as it currently stands following the amendments proposed by the Commission which requires the jury to take into account whether the person took steps to ascertain whether the other party was consenting is appropriate. It allows the tribunal of fact to assess on the facts of each case whether the accused person has taken reasonable steps.

Coercive Control

Again, the issue is how do we meet the legitimate aims of this legislation whilst protecting the fundament liberty rights at stake in the criminal justice process.

We submit that to achieve laws that meet both objectives the following changes need to be made to the proposed laws:

1. It should be amended to require that the person engages in a *persistent* pattern of behaviour.
2. It should be a requirement that the victim is actually caused to fear serious harm or at least harm. This is because the gravitas of the offence is in fact the causing of fear. This also addresses the concern of some that what was in the context of an ongoing relationship seen as perfectly acceptable, becomes seen in retrospect as something different.

[11] *Report on Rape and Other Sexual Offences* December 2007 pages 25-38

3. The Bill requires one instance, in our submission it should be three instances. We propose this requirement because in many circumstances the conduct in question will be otherwise lawful.
4. We object to the provision which says that the prosecution is not required to particularise any act of domestic violence. The experience in the United Kingdom, is that the lack of such particulars makes it from a defence perspective near impossible to respond to such a charge.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
27 October 2023