Queensland Government

Department of Justice and Attorney-General
Office of the Director-General

In reply please quote: 589341/7, 5445855

Your reference: A628578

1 William Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone 13 74 68 (13 QGOV)
www.justice.qld.gov.au

ABN 13 846 673 994

10 DEC 2020

Mr Peter Russo MP
Chair
Legal Affairs and Safety Committee
lasc@parliament.qld.gov.au

Dear Mr Russo

Thank you for your letter dated 30 November 2020 regarding the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill).

I am pleased to offer the assistance of the Department of Justice and Attorney-General (DJAG) in the Legal Affairs and Safety Committee's (the Committee) consideration of the Bill.

As requested, please find **enclosed** a Parliamentary Committee Briefing Note to assist the Committee's inquiry process. The briefing note provides details of the purpose of, and proposals in the Bill.

In terms of the public briefing scheduled for Wednesday, 16 December 2020 at Parliament House in Brisbane, I confirm the following officers will be in attendance to brief the Committee about the Bill:

- Ms Victoria Thomson, Deputy Director-General, Liquor, Gaming and Fair Trading, DJAG;
- Mr Ross Barnett, Queensland Racing Integrity Commissioner;
- Ms Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services (SPLS), DJAG;
- Mr David McKarzel, Executive Director, Office of Regulatory Policy, DJAG;
- Ms Sarah Kay, Director, SPLS, DJAG;
- Ms Imelda Bradley, Director, SPLS, DJAG; and
- Inspector Simon James, Manager, Drug and Alcohol Coordination Unit, Organisational Capability Command, Queensland Police Service.

In addition, the following officers will also be in attendance at the hearing:

- Ms Kate McMahon, Acting Principal Legal Officer, SPLS;
- Mr Adam Savage, Acting Senior Legal Officer, SPLS;
- Mr Brad Tamer, Racing Analyst, Queensland Racing Integrity Commission; and
- Ms Sandra Gordon, Principal Policy Officer, Queensland Racing Integrity Commission.

As previously advised, the contact for DJAG with respect to the Bill is [redacted] who can be contacted on [redacted]

Yours sincerely

David Mackie
Director-General

Enc.

Legal Affairs and Safety Committee Briefing Note

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

Background and Policy Intent

Amendments to the Criminal Code

On 30 June 2020, the Queensland Law Reform Commission (the QLRC) delivered its report 'Review of consent laws and the excuse of mistake of fact' (the QLRC report).

The QLRC report can be publicly accessed by using the following links:

https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T1217.pdf

https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf

The amendments to the Criminal Code in the Bill are identical to the amendments recommended by the QLRC and set out at Appendix G of the report with the exception of the transitional provision at clause 10 of the Bill.

The policy objective of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill) as it amends the Criminal Code is to implement the recommendations of the QLRC report.

The QLRC report made these five recommendations:

> 5-1 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.
>
> 5-2 Chapter 32 of the Criminal Code should be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault).
>
> 5-3 Section 348 of the Criminal Code should be amended to include a new subsection to expressly provide that, 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.
>
> 7-1 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act.
>
> 7-2 The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.

The Bill implements all five of these recommendations by amending the Criminal Code.

Four of the recommendations relate to principles that can be distilled from the current case law in Queensland but are not currently explicitly spelled out in the Criminal Code. The Bill amends the Criminal Code to make these principles of case law explicit. Those principles are:

1. silence alone does not amount to consent;

2. consent initially given can be withdrawn;

3. a defendant is not required to take any particular 'steps' to ascertain consent but the jury can consider anything the defendant said or did when considering whether they were mistaken about consent; and

4. the voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent, though it can be relevant to the honesty of that belief.

The Bill (clauses 8 and 9) inserts these principles into the Criminal Code.

The remaining operative clauses (clauses 6 and 7) fix an anomaly in the Criminal Code whereby the definition of consent differs for some sexual offences.

The QLRC report is informed by an extensive evidence base which is referenced in the explanatory notes. The approach taken by the QLRC in extensively examining trial transcripts avoids the pitfalls and biases that apply to consideration of only an appellate law evidence base.

As stated by the QLRC in its report:

> *Media discussion of cases may focus on limited aspects of a case, including the outcome of any appeal. In an appeal, the court is limited to the issue or issues raised in the appeal and is focused on the question of whether there was an error of law or other defect in the trial that resulted in a miscarriage of justice. The verdict in a criminal trial is reached by the jury, as the trier of fact, after hearing and considering all of the evidence given in the trial. It is for the jury to determine what parts of the evidence it accepts, and to apply the trial judge's directions on the law to that evidence. It is not possible to know with certainty what view a jury took of the evidence or how it arrived at its verdict. The full context of a criminal trial may not be apparent from an appeal decision*[1]

Subsequent to the delivery of the QLRC's report, in the recent decision of *R v Sunderland* [2020] QCA 156 (the Sunderland decision) the Queensland Court of Appeal reiterated the importance of clear and correct instructions and guidance to juries about the of law on consent[2] and it is intended the proposed amendments will assist Courts in this regard.

The QLRC report noted that legislation is only one aspect of the criminal justice system's response to sexual offending. The amendments to the Criminal Code in the Bill complement *Prevent. Support. Believe.* Queensland's Framework to address Sexual Violence which includes a range of strategies under the priority areas of prevention, support and healing, and accountability and justice to provide a whole-of-government response to sexual violence.

---

[1] Page 5, paragraph 1.25

[2] *R v Sunderland* [2020] QCA 15 at [45]

A targeted education program supporting the amendments will be developed by officers from across Government.

The QLRC considered many different options for reform. Where the QLRC did not recommend a particular option for reform, the QLRC report sets out the reasons why at length. **Attachment 1** to this brief is a detailed summary of the various options considered by the QLRC where reform was not recommended with references to the report noted.

The Government has acknowledged that further work is required across government to examine the experience of women in the criminal justice system, with a view of reducing the high attrition rates of sexual assault complaints.

In addition to the amendments in the Bill, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, in her Explanatory Speech when re-introducing the Bill, committed to consult broadly with key stakeholders to examine the experience of women in the criminal justice system as a whole, to identify possible future areas for reform including attitudinal change, prevention, early intervention, service responses and legislative amendment where necessary.

This work will build on efforts already underway including the Government's sexual violence prevention framework *"Prevent. Support. Believe. Queensland's Framework to address Sexual Violence"* which states the Government will continue to review and evaluate justice processes and relevant laws in Queensland to ensure that victims of sexual violence are supported and perpetrators are held accountable.

Implementation of TAFV Policy and supporting amendments to the police banning framework

The Government has an ongoing commitment to creating a safer night-time environment, cultural change around drinking practices in entertainment precincts and a balanced regulatory framework via its *Tackling Alcohol-Fuelled Violence Policy* (TAFV Policy). To ensure the effectiveness of the TAFV Policy, an independent evaluation of the Policy was legislatively required to be undertaken.

The evaluation was undertaken by the *Queensland Alcohol-related violence and Night-Time Economy Monitoring* (QUANTEM) Project. QUANTEM's final evaluation report (evaluation report) found the TAFV Policy has made modest but promising reductions in some indicators of alcohol-related harm State-wide. However, the evaluation report recommended 38 enhancements to the TAFV Policy to reduce the high levels of consumption, harm and alcohol-related violence in Queensland, particularly in and around licensed premises.

On 26 July 2019, the Government publicly released the evaluation report and its interim Government response to the report, which supported seven recommendations in-principle and accepted 21 recommendations for further consideration. Ten recommendations were not supported.

Relevant stakeholders have been consulted and expressed general support for the Government's proposed response; in particular, the further measures to be introduced to enhance the ID scanning regime. Accordingly, a first tranche of legislative amendments responding to the evaluation report were progressed in the second half of 2019.

This Bill will give effect to the second legislative component of the Government's response to the recommendations of the evaluation report. It does this by amending the *Liquor Act 1992* (Liquor Act), *Gaming Machine Act 1991* (Gaming Machine Act) and the *Police Powers and Responsibilities Act 2000* (PPRA).

The Bill will provide greater rigour around the ID scanning regime and enhance the effectiveness of police banning notices (PBNs). According to the evaluation report, the ID scanning network has been effective in reducing anti-social behaviour in and around late-trading premises and has been associated with some reductions in harm. The report recommended retaining mandatory networked ID scanning with amendments.

The Government's interim response to the evaluation report included consideration of implementing measures to improve the safety of the night-time economy by enhancing means of policing and enforcing compliance. Specific measures recommended by the evaluation report include extending the duration of PBNs from 10 days to up to one month to ensure they can function as a genuine deterrent.

Banning notices are designed to minimise alcohol and drug-related violence, disturbances and public disorder, protecting the safety and reasonable enjoyment of others. This is achieved by excluding violent, offensive, threatening or disorderly individuals who present an unacceptable risk to public safety from certain licensed premises, events at which alcohol is being sold or a safe night precinct.

In addition to extending the duration of initial PBNs from 10 days to up to one month, there are also a number of complementary amendments which will address practical issues with the current PBN provisions, which impact frontline police. These minor amendments, although not specifically recommended by the evaluation report, are consistent with the policy objective of the recommendation to create a safer night-time environment, through enhancing the operation and effectiveness of the PBN framework.

The Bill will also ensure the ongoing effectiveness of safe night precincts by requiring reviews of safe night precinct boundaries to be undertaken on a periodic basis, to ensure that resources are targeted towards need and relevant venues are included within safe night precinct boundaries.

Further, the Bill will provide increased transparency around liquor and gaming machine decisions by requiring the publishing of relevant information about decisions of substantive public interest.

Miscellaneous amendments to liquor, gaming and fair trading legislation

Wagering inducement restrictions

The borderless nature of the internet presents challenges in providing consistent and effective protections across jurisdictions for interactive wagering consumers. In response to this, on 26 November 2018, relevant Ministers from the Commonwealth and each State and Territory committed to a *National Consumer Protection Framework for online wagering in Australia* (NCPF).

The NCPF includes 10 overarching consumer protection measures. This includes restrictions on the wagering inducements that interactive wagering operators can provide to customers. In particular:

- the offer of any credit, voucher, reward or other benefit as an incentive to open an account or refer another person to open an account is prohibited;
- winnings from a complimentary betting credit or token (i.e. a 'bonus bet') must be able to be withdrawn without being subject to any turnover requirements;
- direct marketing may only be sent to customers who provide their express consent to receive this material;
- a customer must be able to unsubscribe from receiving direct marketing materials and, in the case of direct marketing materials sent electronically, the link to unsubscribe must be functional

and easily accessible; and

- no further direct marketing materials may be sent to a customer from the time their unsubscribe request is received.

Wagering operators Australia-wide are generally restricted in offering wagering inducements due to the implementation of the NCPF in each jurisdiction. However, differing approaches adopted in each jurisdiction have the potential to lead to coverage gaps, which may result in exposure of Queenslanders to continuing offers of inappropriate wagering inducements. Accordingly, the Bill amends the *Interactive Gambling (Player Protection) Act 1998* (Interactive Gambling Act) and the *Wagering Act 1998* (Wagering Act) to codify the NCPF restrictions on wagering inducements and to protect Queensland punters, regardless of the jurisdiction in which the wagering operator is licensed. Amendments around wagering inducements are also made to the *Racing Integrity Act 2016* (Racing Integrity Act) to ensure punters who bet in an interactive capacity through on-course bookmakers are protected from account opening inducements.

Exemption from cartel provisions for liquor accords and safe night precinct local boards

In 2017, the Australian Competition and Consumer Commission (ACCC) Deputy Chair wrote to the former Queensland Commissioner for Liquor and Gaming (the Commissioner), to request that consideration be given to providing a legislative exemption for Queensland liquor accords from the cartel provisions contained in section 51 of the *Competition and Consumer Act 2010* (Cth). The Bill will provide a legislative exemption that will replace the current process in which the Office of Liquor and Gaming Regulation must seek regular authorisation from the ACCC for liquor accords and safe night precinct local boards that wish to collectively limit alcohol supply or control price as a harm minimisation measure.

Provide for discretionary minimum dividends under the Wagering Act

The Bill also provides for the validity of discretionary minimum dividends declared by the exclusive Queensland sport and race wagering licensee under existing provisions of the Wagering Rule 2010. Section 164 of the Wagering Act currently requires the wagering licensee to round dividends down to the nearest 5 cents, regardless of any declared minimum dividend. The Bill proposes that if this rounding requirement would result in a dividend that is lower than a declared minimum dividend, the wagering provider must pay the declared minimum dividend. The amendment will be beneficial to punters, while also making Queensland's wagering licensee more competitive with corporate bookmakers licensed in other jurisdictions.

Clarifying 'designated authority' for the Co-operatives National Law

An objective of the Bill is to also rectify an unintended omission in the *Co-operatives National Law Act 2020* (Co-operatives National Law Act) by clarifying that the chief executive is the 'designated authority' for the operation of certain provisions of the *Corporations Act 2001* (Cth), which are modified and applied as part of the Co-operatives National Law Act.

Legal Profession Act Amendments

The Legal Practitioners' Fidelity Guarantee Fund (the Fund) was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor law practice. The Queensland Law Society (QLS) administers the Fund pursuant to part 3.6 of the *Legal Profession Act 2007* (LPA).

Section 396(1) of the LPA provides that a regulation may:

- fix the maximum amounts, or the method of calculating maximum amounts, that may be paid from the Fund for individual claims or classes of individual claims; and
- fix the maximum aggregate amount, or the method of calculating the maximum aggregate amount, that may be paid from the Fund for all claims in relation to individual law practices or classes of law practices.

Section 76 of the *Legal Profession Regulation 2017* provides that the maximum amount that may be paid from the Fund for a single claim is $200,000 and the maximum aggregate amount that may be paid from the Fund for all claims made in relation to a single law practice is $2 million (the statutory caps).

Section 396(2) of the LPA prohibits payment from the Fund of amounts in excess of the statutory caps. However, section 396(4) of the LPA provides that the QLS may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the Fund and the circumstances of the particular case.

The statutory caps under section 396 of the LPA were introduced as protection against an extraordinary claim against the Fund which, if paid in full, would result in the Fund being exhausted to the detriment of subsequent claims.

For a period, the QLS applied the caps to all claims. As a result of this approach, a number of claimants did not have their claims against the Fund paid in full.

On 24 November 2016, the QLS adopted a new policy in relation to the statutory caps which has the effect of persuading the QLS Council to determine any application to exceed the statutory caps in favour of an applicant unless there are strong policy reasons to the contrary.

Given that the Fund currently has a substantial balance, the QLS is supportive of legislative amendments to facilitate additional payments being made to claimants who had the statutory cap applied to their claims prior to 2016.

The intent of the amendments to the LPA is to authorise the full payment of any claim not paid in full since the commencement of the LPA due to the operation of the statutory caps, and provide clearer guidance to the QLS as to when the statutory caps should be applied in the future.

The current law on mistake and consent

Consent

Section 347 and 348 of the Criminal Code provide the definition of consent for relevant offences in Chapter 32 of the Criminal Code.

The definition of consent in section 348 provides that consent is freely and voluntarily given by a person with the cognitive capacity to give it.

The Queensland Court of Appeal has determined that this definition contains two elements. The first element is that 'there must in fact be "consent" as a state of mind'. The second element is that 'consent must also be "given" in the terms required by the section".[3]

[3] *R v Makary* [2018] QCA 258 at [49] and recently cited and confirmed in *R v Sunderland* [2020] QCA 15 at [43]-[44]; see also *R v FAV* [2019] QCA 299 at [6], [47]

This latter element is described as 'a representation by some means about one's actual mental state when the mental state consists of a willingness to engage in an act'.[4] A representation may be seen usually by a person's words or actions, but may, in some circumstances be made by silence and doing nothing. Consent may be manifested subtly or by nuance when evaluated against a pattern of past behaviour.[5]

Section 348(2) of the Criminal Code provides a non-exhaustive list for when consent is deemed not to be freely and voluntarily given. Consent is negated where it is obtained by: (i) force; threat or intimidation; (ii) fear of bodily harm; (iii) exercise of authority; (iv) false or fraudulent representations about the nature or purpose of the act; or, (v) a mistaken belief induced by the accused that they were the person's sexual partner.

Mistake of Fact

Unless expressly or impliedly excluded by statute, mistake of fact is available as an excuse to all Queensland criminal offences, barring regulatory offences.

Under section 24(1) of the Criminal Code, a 'person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist'.

If mistake of fact is raised on the evidence, it must be disproved by the prosecution. In the context of a rape charge, it is for the prosecution to prove, beyond reasonable doubt, that the defendant did not honestly or reasonably hold a belief that the complainant gave consent to the relevant sexual act.[6]

Whether the mistaken belief was 'honest' requires a subjective assessment. The question is whether the defendant actually believed the complainant gave consent.

Whether the mistaken belief was 'reasonable' requires an objective assessment. The relevant question is whether the defendant had reasonable grounds for believing the complainant gave consent.

Personal attributes of the defendant, including intellectual impairment or language difficulties, may be relevant in so far as they determine how that belief was arrived at.[7]

The Queensland Court of Appeal has held this is relevant because it leads to the formation of a belief as to the presence of consent 'on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.'[8]

Amendments in the Bill

Amendments to the Criminal Code

Silence alone does not amount to consent (Clause 8, new section 348(3))

---

[4] *R v Makary* [2018] QCA 258 at [50]
[5] *R v Makary* [2018] QCA 258 at [50]
[6] *R v Cutts* [2005] QCA 306 at [4] and [74]; *R v Makary* [2018] QCA 258 at [90].
[7] *R v Mrzljak* [2004] QCA 420; *R v Dunrobin* [2008] QCA 116.
[8] *R v Mrzljak* [2004] QCA 420 at [90].

Clause 8 of the Bill inserts new subsection 348(3) in the Criminal Code giving effect to recommendation 5-1 of the QLRC report.

Case law in Queensland already provides that consent must be given or communicated; and that a failure to manifest an absence of consent by words or actions is not sufficient by itself to prove that consent was given.[9]

As was recently affirmed by the Court of Appeal in *R v Sunderland*, 'in cases where the complainant has communicated neither consent nor dissent by words or actions, the inaction cannot be considered in a vacuum. It too must be considered with all of the relevant circumstances surrounding the sexual act.' Relevant circumstances can include both past and present matters, and evidence of relationship and previous interactions. At law, mere submission to a sexual act, even where feelings of repugnancy result, is different from an absence of consent.

This proposed amendment captures the current case law and explicitly provides for it in legislation. Where the application of the Criminal Code, through case law, has evolved, it is sometimes appropriate to amend the Criminal Code to reflect that position. It serves to provide clarity and assists judges to direct the jury.[10]

Withdrawal of consent (clause 8)

Clause 8 of the Bill inserts new subsection 348(4) in the Criminal Code implementing recommendation 5-3 of the QLRC's report.

Offences of rape and sexual assault include, as a key element, that a sexual act is done without consent.

Section 348 of the Criminal Code does not include any express provision dealing with the withdrawal of consent. However, case law in Queensland confirms that the offence of rape can arise from a point in time after consent is initially given, has been withdrawn and the withdrawal has been communicated by the complainant.[11] The proposed amendment at Clause 8 makes plain and clear this aspect of the law.

Broadly respondents to the QLRC's Consultation Paper supported an amendment that made some express provision for withdrawal of consent. Those respondents who did not support it, did so on the basis that it was unnecessary to make explicit provision for withdrawal of consent, it already being a part of case law. However, the QLRC considered it desirable that the provisions of Chapter 32 in the Criminal Code be clear and unambiguous and recommended that there should be explicit provisions dealing with the withdrawal of consent. [12]

The proposed amendment requires that the withdrawal of consent be communicated by 'words or conduct'. That is distinct from the communication of an initial consent which must be 'given' or communicated and there are no requirements about how that consent is given or how a representation is made.

---

[9] *R v Makary* [2018] QCA 258 at [49] and recently cited and confirmed in *R v Sunderland* [2020] QCA 15 at [43]-[44]; see also *R v FAV* [2019] QCA 299 at [6], [47]

[10] QLRC report at page 94, paragraph 5.91

[11] *R v OU* [2017] QCA 266 , *R v Johnson* [2015] QCA 270 at [56]-[58]

[12] QLRC report at page 104, paragraph 5.136

The reasoning for this element in the QLRC report is: "As a matter of fairness, it is necessary that the other person is made aware that consent is withdrawn and given the opportunity to respond to that withdrawal by ceasing to engage in the relevant act."[13]

Specific considerations that relate to a consideration of the excuse of mistake (Clause 9, new section 348A)

This aspect of the Bill will implement recommendations 7-1 and 7-2 of the QLRC report.

Currently there is no explicit reference in the Criminal Code to what use if any the jury can make of any 'steps' taken by a defendant to ascertain consent. Whilst section 24 makes no express provision as to what use the jury should make of any 'steps', where the excuse of mistake of fact is raised, a jury can nonetheless take account of any steps that were taken, or the absence of any steps that were taken depending on the facts of the case. Proposed new section 348A codifies this existing law.

The QLRC considered the use of the term 'steps' to problematic based on the experience in New South Wales.[14] The amendment is instead phrased in terms of anything a defendant 'said or did' to ascertain consent, as recommend by the QLRC.

In Queensland, voluntary intoxication of a defendant is not relevant in determining whether a defendant's mistaken belief that the complainant gave consent was reasonable. It can be relevant to a consideration of whether the mistaken belief was honest. Cases for this proposition date back to as far as 1993.

The review of the 2018 trials conducted by the QLRC suggested that the issue here is to some extent one of the existing law not always being properly communicated to the jury, rather than some need for substantive change in the law. The QLRC found that:

> *In 28 of the 2018 trials, mistake of fact was left to the jury to consider where there was evidence of voluntary intoxication by the defendant. In eight of those trials the jury was not directed that the evidence of the defendant's voluntary intoxication was irrelevant to the reasonableness of the defendant's belief. Two cases in the Court of Appeal raised a legal point about the inadequate directions by a trial judge as to the relevance of voluntary intoxication to the assessments of the honesty and reasonableness of a defendant's belief as to the giving of consent.*[15]

It is intended that by stating the law explicitly in the Criminal Code it will encourage more consistency in trial directions to juries.

Making the definition of consent consistent for all offences in Chapter 32 (Clauses 6 and 7)

Clauses 5 and 6 in the Bill implement recommendation 5-2 of the QLRC's report.

---

[13] QLRC report at page 104, paragraph 5.144
[14] QLRC report at page 188-189, paragraphs 7.104 -7.108
[15] QLRC report at page 194, paragraph 7.133.

The effect of clauses 6 and 7 of the Bill will be that the definition of consent will be the same for all sexual offences that are in chapter 32 of the Criminal Code. The offences in chapter 32 are rape, attempted rape, assault with intent to commit rape and sexual assault.

As set out in the explanatory notes to the Bill, the definition of consent has historically been interpreted by Queensland Courts to be different for some offences in Chapter 32 of the Criminal Code than for other offences in the same chapter.[16]

This historical inconsistency was considered by the Court of Appeal in R v Sunderland.17 The effect of that decision is that the definition of consent is the same for an offence of sexual assault as it is for an offence of rape. At the time that the QLRC delivered its report the decision in Sunderland had not yet been delivered.[18]

Transitional arrangement for the Criminal Code amendments

Clause 10 of the Bill contains a transitional provision for the operation of the amendments to the Criminal Code. This will be the only difference in the amendments to the Criminal Code in the Bill and the draft Bill that was attached to the QLRC's report.

All of the amendments in the Bill clarify the existing law, however, making that law explicit in the Criminal Code may change the way that legal representatives approach a given case and the forensic decisions in that case. For that reason and out of fairness, the transitional provision provides for the amendments to apply from the point of charge. The QLRC did not consider this issue in its report.

Implementation of TAFV Policy and supporting amendments to the police banning framework

To implement legislative responses to particular recommendations of the TAFV Policy evaluation report, the Bill amends relevant provisions of the Liquor Act, Gaming Machine Act and PPRA to:

- create a vexatious ban offence to prevent licensees from banning an investigator from entering the licensee's licensed premises (unless relating to an investigator's behaviour as a patron of the licensed premises) (clause 37);
- create an offence to ensure a staff member responsible for controlling entry to a regulated premises complies with the ID scanning entry requirements for each patron the staff member allows entry to the premises (clauses 28 to 34 and 36);
- require an approved ID scanning operator to remove licensee bans 30 days after a licence transfer, unless otherwise requested by the new licensee (clauses 40 and 43);
- provide the Commissioner with discretion to notify only affected (rather than all) licensees when an approved operator has been directed to address ID scanning system errors and malfunctions (clause 35);
- increase the duration of an initial PBN from 10 days to up to one month to lengthen the time that the respondent is banned from the places or events stated in the PBN (clause 50);
- require three-yearly reviews of safe night precincts to ensure a precinct continues to achieve the purposes outlined in the relevant Part of the Liquor Act (clauses 44 and 45);

---

[16] Explanatory notes at page 7 and QLRC report at page 94, paragraph 5.93 to page 99, paragraphs 5.110

[17] *R v Sunderland* [2020] QCA 15

[18] It was delivered on 24 July 2020.

- require relevant information for significant liquor and gaming machine decisions, including details of the application and a summary of reasoning, to be published online if community comments, representations, submissions or objections were received (clauses 18, 19, 39, 41 and 42); and
- require the Commissioner to notify objectors and persons that made representations on a gaming machine application of significant community impact of the decision made on the application (clauses 12 to 17).

To further support the intent of the TAFV Policy recommendation to enhance the effectiveness of the police banning framework, Part 8 of the Bill (clauses 46 to 61) amends the PPRA to:

- improve procedural fairness for the respondent of an initial PBN notice by increasing the period within which the respondent can apply for an internal review from 5 days to 15 days, commensurate with the tripling of the banning period of an initial PBN;
- provide a power for a police officer, of at least the rank of senior sergeant, to cancel an extended PBN;
- remove the prescriptive and impractical requirement that a photograph of the respondent for a banning order must only be of the respondent's face, neck and hair and instead allow the photograph to be of the person generally but limiting the purpose of taking the photograph to attaching an image to a banning order for the respondent;
- enable police to serve a PBN on a person electronically by sending the notice to a unique electronic address voluntarily nominated by the person; and
- provide broad examples of the behaviours for which an initial PBN can be given to aid interpretation and enhance the consistency of police decision-making in issuing initial PBNs.

Miscellaneous amendments to liquor, gaming and fair trading legislation

Part 10 (clauses 68-70) of the Bill amends the Wagering Act to restrict the inducements that can be offered by a Queensland licence operator, or another person acting for a Queensland licence operator. These amendments:

- prohibit a licence operator or person acting for a licence operator from offering (or causing to be offered) any credit, voucher, reward or other benefit to a person who is in Queensland as an incentive:
  - to open, or refer another person to open, an interactive wagering account with the licence operator; or
  - not to close an interactive wagering account with the licence operator;
- prohibit a licence operator or person acting for a licence operator from offering a free bet to an interactive wagering customer who is in Queensland and has an interactive wagering account with the licence operator, unless the interactive wagering customer can withdraw any payouts arising from the free bet at any time;
- prohibit a licence operator or person acting for a licence operator from sending promotional or advertising material by direct means to a person who is in Queensland without their express and informed consent;
- ensure that a licence operator or person acting for a licence operator must provide a person with a means to easily withdraw consent to receiving promotional or advertising material directly at any time;

- prohibit a licence operator or person acting for a licence operator from offering (or causing to be offered) any credit, voucher, reward or other benefit as an incentive for a person not to withdraw consent;
- ensure that a licence operator or person acting for a licence operator that sends promotional or advertising material electronically must provide a mechanism, such as electronic link, to allow a person to easily withdraw consent from promotional and advertising material; and
- ensure that a licence operator must, when receiving a bet made from an interactive wagering account, take reasonable steps to identify the location of the person making the bet.

Part 5 (clauses 20 to 23) and Part 9 (clauses 62 to 66) of the Bill amend the Interactive Gambling Act and Racing Integrity Act respectively to apply similar wagering inducement restrictions to interactive wagering operators located interstate and racing bookmakers taking bets through a telecommunications system (or persons acting on their behalf). The Bill includes an additional amendment to the Racing Integrity Act to prohibit the offer of an inducement to make bets, or refer another person to make bets, through the racing bookmaker's telecommunications system. This additional amendment is complementary to the NCPF inducement bans and unique to the legislative framework for racing bookmakers under the Racing Integrity Act.

Other amendments to various liquor, gaming and fair trading legislation are also included in the Bill to implement stakeholder-driven initiatives and rectify an unintended error by:

- providing a new process for exempting safe night precinct local boards and liquor accords from Commonwealth restrictions on cartel behaviour, where they collectively limit alcohol supply or control price as a harm minimisation measure (clause 38);
- providing flexibility for Queensland's only licensed wagering operator by removing the requirement to round down race dividends for short priced favourites (clause 71); and
- rectifying an unintended omission to the Co-operatives National Law Act by clarifying that the chief executive is the 'designated authority' for the operation of certain provisions of the *Corporations Act 2001* (Cth), which are modified and applied as part of the Co-operatives National Law Act (clause 4).

Amendments to the Legal Profession Act 2007

The amendments to the LPA provide:

- that the statutory caps are only to be applied to a claim where, despite measures the QLS may take under section 368 (Contribution to fidelity fund) and 369 (Levy for benefit of fidelity fund), the QLS believes that payment of the claim in full is likely to result in the Fund being insufficient to meet its ascertained and contingent liabilities; and
- for the QLS to make additional payments to claimants who were not paid in full due to the operation of the statutory caps.

Fundamental legislative principles

Potential breaches of Fundamental Legislative Principles (FLPs) raised by the amendments are considered justified. The FLP issues and justification are outlined in detail in pages 13 to 21 of the Explanatory Notes to the Bill.

Human rights

The amendments are considered compatible with human rights. The human rights issues and justification are outlined in detail in the Statement of Compatibility for the Bill.

Attachment 1 to Brief to the Committee on the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
Whether section 348(2) of the Criminal Code should be amended to provide that a person does not consent if that person is asleep, unconscious or affected by alcohol or another drug.	Chapter 6, pages 117 to 122, paragraphs 6.32 to paragraphs 6.54	Generally, in respect of section 348(2), the current position leaves it open for the trier of fact to determine, on a case by case basis, whether consent was not freely and voluntarily given. The current law already operates to allow the jury to consider evidence about whether a complainant is asleep, unconscious or intoxicated because of the requirement for there to be a 'cognitive capacity' to give consent. The current law operates to address these situations making amendment unnecessary. An amendment would risk introducing confusion and ambiguity into a settled area of law.
Whether section 348(2) of the Criminal Code should be amended to provide that a person does not consent if that consent is obtained by a mistaken belief induced by the defendant that there will be money exchanged for the sexual act;	Chapter 6, pages 122 to 134, paragraphs 6.55 to 6.104	There are other offences in the Criminal Code which could provide protection against false or fraudulent representations about payment, for instance, procuring sexual acts by coercion pursuant to sections 218 (Procuring sexual acts by coercion) or 408C (Fraud). This issue potentially raises broader policy issues relating to the regulation and protection of sex workers, in addition to issues surrounding their perceived treatment within the criminal justice system, which are a distinct issue.

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
Whether section 348(2) of the Criminal Code should be amended to provide that a person does not consent if that consent is obtained but the defendant fails to use a condom as agreed or sabotages a condom.	Chapter 6, pages 134 to 144, paragraphs 6.105 to 6.143	There may well be merit in considering whether the concerning practice of sabotaging or removal of a condom without the other party's consent should be an offence in its own right but the QLRC did not recommend an amendment to section 348(2) of the Criminal Code to include it as a specific circumstance.
Whether section 348(2) of the Criminal Code should be amended to provide an express provision that a person does not consent if that consent is obtained by a mistaken belief, induced by the defendant, that the defendant does not suffer from a serious disease.	Chapter 6, pages 145 to 156, paragraphs 6.144 to paragraph 6.182	There are offences in the Criminal Code that already deal with the intentional transmission of serious diseases. There are also compelling reasons why people who suffer from serious diseases, such as HIV, are better dealt with under the existing public health legal framework than by way of criminal intervention.
Whether section 348(2) of the Criminal Code should be amended to provide that a person does not consent if that consent is obtained in circumstances of domestic and other violence.	Chapter 6, pages 156 to 167, paragraphs 6.183 to paragraphs 6.226	The current law already permits the reception of evidence of domestic violence in a relationship where it is relevant; for example, where there is conduct which might go to whether consent was given freely or voluntarily or which might be capable of explaining aspects of the complainant's evidence that the jury might otherwise have considered unlikely (case examples are provided in the report). Therefore, this type of amendment is unnecessary.

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
Whether the excuse of mistake of fact should be rendered wholly inapplicable to sexual offences	Chapter 7, Page 171 to 172, paragraphs 7.10 to 7.16	The QLRC report points out that the difficulty with this approach arises because of the way that the Criminal Code deals with issues of intent. In Queensland, there is no requirement in the proof of sexual offences for any knowledge or intent on the part of a defendant. A defendant's state of mind is only considered by application of the test to determine whether there was a mistake of fact. If the excuse of mistake of fact is rendered inapplicable to sexual offences, convictions would result where the prosecution could provide that the relevant act took place without consent of the complainant. The defendant's state of mind as to that consent would be irrelevant. This is different to other jurisdictions where some element of knowledge on the part of the accused is an element of the offence itself. For that reason, interjurisdictional comparisons on this issue, particularly to jurisdictions where the criminal law is not codified, are often unhelpful. Mistake of fact is an excuse available to all offences across the statute book. To exclude Chapter 32 offences from the potential operation of the excuse of mistake of fact would discriminate against defendants charged with those offences, as against defendants charged with other serious offences, even unlawful killing.
Whether the onus of proof for mistake of fact should be reversed with respect to sexual offences so that a defendant must prove the excuse	Chapter 7, pages 172 to 180, paragraph 7.17 to 7.61	The initial evidential onus of raising the excuse of mistake of fact is on the defendant (although it can be raised on evidence that comes from either the prosecution or defence case). In sexual offences, this will mean some evidence of a defendant's belief as to the giving of consent by the complainant. However, once there is evidence that raises the excuse, it is the prosecution who must negative the operation of the excuse.

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
		A reversal of the onus of proof would represent a significant incursion into the presumption of innocence. The presumption of innocence is protected by fundamental legislative principle, is a long-standing principle of the common law and is statutorily protected by section 32(1) of the *Human Rights Act 2019.* A reversal of the onus of proof increases the prospect of wrongful conviction. A conviction for a sexual offence commonly results in lengthy terms of imprisonment, the prospect of post-sentence detention or supervision and social stigma. The QLRC report notes that reversing the onus is a reform that has not been adopted in any other Australian jurisdiction, or Canada or the United Kingdom. QLRC found there is no adequate justification for reversing the onus of proof it in Queensland.
Amending the excuse of mistake of fact with respect to sexual offences to include a purely objective test of reasonableness	Chapter 7, Page 180 to 182, paragraphs 7.62 to 7.71	If this course were adopted then a defendant's intellectual disability, mental illness or language difficulties would be excluded from the jury's consideration. A purely objective test might have unintended consequences for these particularly vulnerable classes of defendant. They could be convicted of serious sexual offences, because they were being held to a standard of reasonableness of a person without their disadvantages. The QLRC report found that section 24 as currently framed already requires a jury to consider both the subjective honesty and the objective reasonableness of a defendant's belief, such that it strikes an appropriate balance between social harm and fairness to a defendant.

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
Excluding the excuse of mistake of fact if the defendant was reckless to the absence of consent	Chapter 7, pages 194 to 201, paragraph 7.137 to 7.166	In some Australian jurisdictions there is a requirement to prove that the defendant had knowledge that a complainant was not consenting or was reckless as to an absence of consent. The concept is phrased in those jurisdictions variously as 'recklessness', 'reckless indifference' or 'wilful blindness'. Proponents of this reform submitted to the QLRC that the application of the excuse of mistake of fact should be qualified so that it does not apply if the defendant was reckless as to whether or not the complainant gave consent. Some of these respondents suggested a provision based on section 14A of the Criminal Code (Tas). In aid of an amendment of this nature some respondents further supported the inclusion of a definition of 'recklessness' in the Criminal Code consistent with the terms of section 47 of the Criminal Law Consolidation Act 1935 (SA). That definition captures both advertent and inadvertent forms of recklessness. In Queensland there is no requirement to prove knowledge on the part of the defendant or any form of recklessness. The only elements of the offence are that the relevant sexual act took place and that it occurred without consent. Where an excuse of mistake of fact as to consent is raised on the evidence, the concept of 'recklessness' is accommodated within the question of whether the defendant acted under an honest and reasonable, but mistaken, belief that the complainant gave consent. A defendant who is reckless as to consent either holds no belief at all or their belief is that the complainant might not be consenting. Criminal liability on the basis of recklessness is also largely foreign to the Queensland Criminal Code.

Option for reform	Reference in QLRC report	High level summary of QLRC reasons for rejecting the option
		The QLRC considered that this might overly complicate the jury's considerations and make the exercise of directing a jury even more fraught. The likely outcome of this scenario is an increase in the number of retrials.
Inclusion of a set of guiding principles similar to those in Victoria	Chapter 8, Pages 222 to 228, paragraphs 8.78 to 8.102	Introduction of these provisions would create interpretive difficulties and might introduce irrelevant considerations into the jury's function. General contextual information or aims may be unhelpful in illuminating the expression of the elements of an offence.