

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

Submission by Legal Aid Queensland

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

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Legal Affairs and Community Safety Committee on the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020* (the Bill).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Criminal Law Services division provides legal advice and representation to clients charged with the full range of criminal offences, including sexual offences. This submission has been prepared by the Criminal Law Practice of Legal Aid Queensland, which includes the Public Defender and Criminal Law Services division. This submission is informed by the knowledge and experience of the practitioners who work within the Criminal Law Services division.

This submission is with respect to Part 3 of the Bill only.

Clauses

Clause 8

As submitted in response to the Queensland Law Reform Commission’s (QLRC) discussion paper on 3 February 2020, the Criminal Law Practice at Legal Aid Queensland does not consider that any amendment to section 348 of the Criminal Code is required. The Criminal Law Practice has no issues regarding how the current provisions operate. In the Criminal Law Practice’s experience, there is no common outcome or pattern of outcomes either way in the application of the excuse in combination with the definition of consent that would warrant a change in the legislation.

The question of consent is one that turns on the facts of each case and is a question for the jury. As identified by the QLRC in its *Review of consent laws and the excuse of mistake of fact* report, in the decision of *R v Makary*,¹ in quoting the 1996 case of *R v Shaw*²

*“A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it.”*³

That has been the starting point for over two decades. It is then a matter for the jury to consider silence in the context of all the facts in the case if the evidentiary onus is overcome to allow the excuse under section 24 to be left to the jury. The amendment could be seen to deem an affirmative consent model.

Alternative drafting

Although the Criminal Law Practice does not support amendments to section 348, if clause 8 is to be introduced, it is recommended that the wording of that clause be modified. As stated in the Explanatory Notes to the Bill, the Criminal Code should be clear and unambiguous.⁴ The proposed wording of clause 8 may be confusing to a jury, resulting in a risk of an unsafe verdict. Possible alternatives could be:

*A person who does not say or do anything to communicate a lack of consent does not necessarily, by reason only of that fact, give consent to the act.*⁵

or

Depending on the facts of the case, a person does not necessarily give consent only because the person did not say or do anything to communicate that they did not consent to the act.

These alternatives reduce the use of double negatives and give effect to the intention for clear and unambiguous language. It may be easier for a jury member to understand and consider the issue of consent in the context of actions, or lack of actions, having regard to all the circumstances of the case.

Clause 9

The Criminal Law Practice does not support amendments regarding the defendant's intoxication as the law as it applies in Queensland regarding the honesty and reasonableness of the belief already allows for this. The cases of *R v Hopper*,⁶ *R v Duckworth*⁷ and *R v O'Loughlin*⁸ demonstrate this.

¹ [2018] QCA 258; [2019] 2 Qd R 528.

² [1996] 1 Qd R 641.

³ *Ibid*, 646 (Davies and McPherson JJA); see also *R v Makary* [2018] QCA 258, [49]–[50] (Sofronoff P)

⁴ Explanatory Notes, Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld) 3.

⁵ This was stated in the Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* Report (2020) 79 [5.7].

⁶ [1993] QCA 561.

⁷ [2016] QCA 30.

⁸ [2011] QCA 123.