



17 September 2020

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email: lacsc@parliament.qld.gov.au

Dear Committee Secretary

**Re: *Criminal Code (Consent and Mistake of Fact)*
*and Other Legislation Amendment Bill 2020 (Qld)***

Introduction

1. Rape & Domestic Violence Services Australia ("RDVSA") thanks the Legal Affairs and Community Safety Committee ("the Committee") for the opportunity to comment on the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld)* ("the Bill").
2. RDVSA is a non-government organisation that provides a range of specialist trauma counselling services to people who have been impacted by sexual, domestic or family violence¹ and their supporters. Our services include being a referral option for Queensland Police when they attend domestic violence incidents. In the 2018/19 year, RDVSA provided 1,645 occasions of service to those who had experienced domestic violence in Queensland and were referred to us by Queensland Police. Other services offered include NSW Rape Crisis counselling service for people in NSW who have been impacted by sexual violence and their professional or non-professional supporters and Sexual Assault Counselling Australia for people accessing the National Redress Scheme resulting from the Royal Commission into Institutional Responses to

¹ Generally, RDVSA prefers the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. However, in this submission, RDVSA will sometimes use the terms victim and complainant when referring to data or other material.

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Counselling Services

24/7 NSW Rape Crisis 1800 424 017

CBA Domestic &

Family Violence Line 1800 222 387

Sexual Assault

Counselling Australia 1800 211 028

rape-dvservices.org.au

Child Sexual Abuse. Our services operate from NSW; however, they are available for individuals around Australia who may have experienced sexual, domestic or family violence.

3. This submission is made only in relation to the proposed amendments to the *Criminal Code* ("the Code") in Part 3 of the Bill.

The Queensland Law Reform Commission's Report

4. The Bill adopts the five recommendations made by the Queensland Law Reform Commission ("the QLRC") in *Report No 78: Review of consent laws and the excuse of mistake of fact* ("the QLRC Report") tabled in Parliament on 31 July 2020. The publication of this report followed the release of a Consultation Paper by the QLRC in December 2019. RDVSA made a preliminary submission to the QLRC in September 2019, followed by a submission in January 2020 on the Consultation Paper. In this response, RDVSA made 23 recommendations (**Annexure A**).
5. The Bill does not venture beyond the QLRC recommendations, despite the QLRC considering (and rejecting) a number of options advanced by respondents for amending the legislation. When introducing the Bill, the Hon YM D'Ath, Attorney-General and Minister for Justice, gave little explanation for the government's wholesale adoption of the QLRC's recommendations beyond stating, "The rigorous approach of the QLRC gives the Palaszczuk government confidence in accepting and implementing all of the QLRC report's five recommendations."² Our submission will therefore proceed on the basis that, in confining itself to the QLRC's five recommendations, the government accepts the QLRC's reasoning and conclusions.
6. The most striking feature of Part 3 of the Bill is what it omits. It fails to go beyond a negligible tinkering with the legislation concerning consent and the excuse of mistake of fact in Queensland.
7. According to the Australian Bureau of Statistics, there were 4,859 victims of sexual assault³ recorded in Queensland in 2019. This is a victimisation rate of 95 victims per 100,000 persons.⁴ However, this figure only represents the reported offences. The 2016 Personal Safety Survey estimated that 1 in 6 women (17%) and 1 in 25 men (4.3%) have experienced sexual assault since the age of 15.⁵
8. Sexual offences continue to be highly under-reported throughout Australia and the rates of conviction for adult sexual offences continue to lag behind rates of conviction for most other serious offences.⁶ Many of these reports do not result in prosecution

² The Hon YM D'Ath, Explanatory Speech, *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020*, *Hansard*, Legislative Assembly, 13 August 2020, p.2072.

³ The term "sexual assault" in this context is understood to refer to sexual offences, rather than limited to the non-penetrative offence of "sexual assault" in s.352 of the *Criminal Code*.

⁴ Australian Bureau of Statistics (2020) cat. no. 4510.0 - Recorded Crime – Victims, Queensland: <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2019~Main%20Features~Queensland~5>

⁵ Australian Bureau of Statistics (2017) cat. no. 4906, Personal Safety, Australia.

⁶ Jacqueline Fitzgerald, (2006), 'The attrition of sexual offences from the NSW criminal justice system' *Contemporary Issues in Crime and Justice No 92*, NSW Bureau of Crime Statistics and Research; Australian Law

or are withdrawn at some stage in the proceedings. The proportion of defendants pleading guilty to sexual assault is low relative to other offence types and sexual assault prosecutions that proceed to a contested trial have lower conviction rates than most other categories of serious crime.

9. The terms of reference for this matter include having regard to the need to ensure Queensland's criminal law reflects contemporary community standards; the need for Queensland's criminal law to ensure just outcomes by balancing the interests of victims and accused persons, the experiences of sexual assault victims and survivors in the criminal justice system; and recent developments, legislative reforms, and research in other Australian and international jurisdictions. However, this Bill does little more than make modest changes to the law concerning consent and the excuse of mistake of fact. In this sense, the Bill constitutes a missed opportunity for Queensland.

Meaning of consent

Clause 8: proposed sub-sections 348(3) and (4)

10. RDVSA supports the policy underlying proposed s.348(3)⁷ in that a failure to say or do anything should not in itself constitute an indication of consent. However, the QLRC itself observed that Queensland law, as interpreted by the courts, already recognises that a person who does not say or do anything to communicate absence of consent is not, by reason only of that fact, to be taken to have consented.⁸ Such a provision would arguably be unnecessary if an affirmative model of consent was introduced (discussed below).
11. RDVSA also supports the policy underlying the introduction of a specific provision regarding the withdrawal of consent in proposed s.348(4)⁹. However, as the QLRC again observed, Queensland courts have already recognised that rape may arise in circumstances involving the withdrawal of consent.¹⁰
12. These proposed amendments do little to address concerns about how consent is understood in the context of proceedings for sexual offences.

An affirmative model of consent

13. RDVSA maintains that an affirmative and communicative model of consent should be introduced.
14. Perpetrators of sexual assault are known to the victim in the vast majority of cases, with estimates around 75%.¹¹ The issue at trial often revolves around consent, rather

Reform Commission Report 114 and NSW Law Reform Commission Report 128 (2010) *Family Violence – A National Legal Response*, [26.11]-[26.17], [26.50]-[26.55].

⁷ Part 3 of the Bill, clause 8, based on QLRC recommendation 5-1.

⁸ QLRC Report, [5.7], [5.91].

⁹ Part 3 of the Bill, clause 8, based on QLRC recommendation 5-3; RDVSA recommendation 3.

¹⁰ QLRC Report, [5.112]-[5.115], [5.135]-[5.136].

¹¹ Australian Bureau of Statistics (2017) cat. no. 4906, *Personal Safety*, Australia (77%); Australian Bureau of Statistics (2020) cat. no. 4510.0 - *Recorded Crime – Victims*, Queensland:

than whether or not sexual activity took place. The Australian and NSW Law Reform Commissions went so far as to say, “In adult sexual assault trials, it is *common* for the defendant to admit sexual activity but assert that it was consensual.”¹² The QLRC’s own analysis of 135 trials that were completed in the 2018 calendar year revealed that 41% involved an admission of sexual contact or penetration but a denial of absence of consent.¹³ Only 29% of these cases resulted in conviction.¹⁴

15. Consent should be defined by reference to a free and voluntary agreement. It should never be presumed. The United Nations recommends a definition that requires the existence of an “unequivocal and voluntary agreement” and “proof by the accused of steps taken to ascertain whether the complainant / survivor was consenting.”¹⁵
16. The QLRC rejected submissions to amend the definition of consent in s.348 to incorporate the term “agreement” on the basis that s.348 already requires that consent be “given” and that any focus on an “agreement” would undermine reliance on the complainant’s account that consent had not been given.¹⁶ To the contrary, an “agreement” means that the burden is not solely on one party (the complainant) to demonstrate that consent has been “given” but rather, that both participants are responsible for ensuring that the activity is agreed. Five out of the six other jurisdictions in Australia where there is a statutory definition of consent include a reference to an agreement.¹⁷
17. The QLRC’s resistance to the term “agreement” and its failure to recommend steps towards the adoption of an affirmative and communicative model of consent is difficult to reconcile with the QLRC’s assertion that its “starting point on the question of reform in this review is the protection of sexual autonomy.”¹⁸

<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4510.0~2019~Main%20Features~Queensland~5> (73%).

¹² Australian Law Reform Commission Report 114, NSW Law Reform Commission Report 128, *Family Violence – A National Legal Response: Final Report*, Volume 2, October 2010, [25.73] (emphasis added).

¹³ QLRC Report, [3.22], Table 1. These trials excluded matters involving a complainant under the age of 12 years (see [1.23]), suggesting that an even higher proportion of cases involving a complainant aged 16 years or over may have involved a denial of absence of consent.

¹⁴ QLRC Report, [3.26], Table 2.

¹⁵ United Nations Entity for Gender Equality and the Empowerment of Women, *Handbook for Legislation on Violence Against Women*, 2012, p 24 [3.4.3.1].

¹⁶ QLRC Report, [5.75]-[5.77].

¹⁷ *Crimes Act 1900* (NSW), s.61HE(2); *Criminal Code* (NT), s.192(1); *Criminal Law Consolidation Act 1935* (SA), s.46(2); *Criminal Code* (Tas), s.21A(1); *Crimes Act 1958* (Vic), s.36(1). There is currently no statutory definition of consent in the Australian Capital Territory (ACT). The ACT is awaiting the release of the NSW Law Reform Commission’s report on its review of consent. The ACT Government has indicated an intention to enact a definition of consent based on a concept of free and voluntary agreement: see response to recommendation 4, *Government Response to the Standing Committee on Justice and Community Safety, Report on Inquiry into the Crimes (Consent) Amendment Bill 2018*, Legislative Assembly for the Australian Capital Territory, 2019: https://www.parliament.act.gov.au/_data/assets/pdf_file/0004/1322509/9th-JAC-03-Report-On-Inquiry-into-The-Crimes-Consent-Amendment-Bill-2018.pdf

¹⁸ QLRC Report, [4.117].

Circumstances where there is no consent

18. Section 348(2) of the Code currently provides that a person's consent to an act is not freely and voluntarily given if it is obtained:

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

19. The QLRC declined to recommend any addition to this list of circumstances, an approach which is reflected in the Bill. The justification generally given by the QLRC in declining to recommend the inclusion of further circumstances – that they are already recognised under the law as it is interpreted by the courts¹⁹ – is difficult to reconcile with their approach with respect to the five recommendations made. Even the QLRC acknowledges that these recommendations essentially re-state the existing law as it is currently understood.

20. The non-exhaustive list in s.348(2) should be amended to expand the list of circumstances in which consent is negated.

The person does not do or say anything to communicate consent

21. In accordance with an affirmative model of consent, RDVSA recommends a provision that consent is absent when a person does not do or say anything to indicate consent to sexual activity.²⁰ Tasmania and Victoria both have legislation providing that a person does not consent to sexual activity if the person "does not do or say anything to communicate consent."²¹ As part of its review into consent in relation to sexual offences, the NSW Law Reform Commission ("the NSW LRC") has included a similar provision in its draft proposals.²²

The person is asleep or unconscious

22. Section 348(2) should be amended to include the circumstance where the person is asleep or unconscious.²³ The fact that this circumstance may already be covered by the requirement that the person has the cognitive capacity to consent under s.348(1) is not a compelling reason not to include it in s.348(2); nor is it likely to introduce confusion or ambiguity into this area of the law.²⁴ This circumstance is expressly

¹⁹ See for example, QLRC Report, [6.30]-[6.31], [6.52]-[6.54].

²⁰ RDVSA recommendation 7.

²¹ *Criminal Code* (Tas), s.2A(2)(a); *Crimes Act 1958* (Vic), s.36(2)(l).

²² NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, proposal 6.1.

²³ RDVSA recommendation 5.

²⁴ cf QLRC, [6.52]-[6.54].

recognised in five of the seven other jurisdictions: New South Wales, the Northern Territory, South Australia, Tasmania and Victoria.²⁵

The person is so affected by alcohol or other drug as to be incapable of consenting

23. Similarly, s.348(2) should be amended to include the circumstance where the person was so affected by alcohol or other drug as to be incapable of consenting.²⁶ This circumstance is recognised in six of the seven other jurisdictions: the Australian Capital Territory, New South Wales, the Northern Territory, South Australia, Tasmania and Victoria.²⁷

Force, threats, intimidation and fear

24. Sexual violence often arises in the context of domestic and family violence. More than a third (34% or 1,671 victims) of sexual assaults recorded in Queensland in 2019 arose within a domestic or family relationship.²⁸

25. Section 348(2)(a)-(c) currently provides that consent is not freely and voluntarily given if it is obtained by force, threat, intimidation or fear of bodily harm. The QLRC does not recommend any amendment to these provisions – including any amendment recognising a history of domestic and family violence – on the basis that the legislation is sufficiently broad to permit for evidence to be led concerning a history of abuse. However, in one case cited by the QLRC it was recognised that, although the evidence of prior abuse was admissible, it was an “exceptional” case and that “great care must be taken by counsel and by the trial judge to ensure the jury understands the limits of its use.”²⁹

26. The NSW LRC is proposing a provision to the effect that consent is absent where a person participates in sexual activity “because of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs” or “because of coercion, blackmail or intimidation occurring at any time.”³⁰ Legislation to this effect would go some way towards recognising the varying forms of coercion and the cumulative effects of coercion in sexual offending, particularly in the context of domestic and family violence.³¹

²⁵ *Crimes Act 1900* (NSW), s.61HE(5)(b); *Criminal Code* (NT), s.192(2)(c); *Criminal Law Consolidation Act 1935* (SA), s.46(3)(c); *Criminal Code* (Tas), s.2A(2)(h); *Crimes Act 1958* (Vic), s.36(2)(d).

²⁶ RDVSA recommendation 6.

²⁷ *Crimes Act 1900* (ACT), s.67(1)(e); *Crimes Act 1900* (NSW), s.61HE(8)(a); *Criminal Code* (NT), s.192(2)(c); *Criminal Law Consolidation Act 1935* (SA), s.46(3)(d); *Criminal Code* (Tas), s.2A(2)(h); *Crimes Act 1958* (Vic), s.36(2)(e).

²⁸ The term “sexual assault” in this context is understood to refer to sexual offences, rather than limited to the non-penetrative offence of “sexual assault” in s.352 of the *Criminal Code*.

²⁹ *R v McMullen* [2011] QCA 153 at [85], referred to in QLRC Report, [6.221].

³⁰ NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, proposal 6.5.

³¹ RDVSA recommendations 10-11.

The person is unlawfully detained

27. Section 348(2) should be amended to include the circumstance where the person is unlawfully detained.³² This circumstance is recognised in six of the seven other jurisdictions: the Australian Capital Territory, New South Wales, the Northern Territory, South Australia, Tasmania and Victoria.³³

Fraudulent representation

28. Section 348(2) should be amended to include the circumstance where there is a fraudulent misrepresentation, including a false representation that the person will be paid for sexual activity.³⁴ Section 348(2) currently includes the circumstance where there is a “false or fraudulent representation about the nature or purpose of the act.” However, as recognised by the QLRC,³⁵ the non-payment for sexual services does not comfortably fall within the “nature or purpose” of the sexual activity.

29. A broader reference to fraudulent activity would provide clarity in this regard. In Western Australia, consent is not freely given if it is obtained by “any fraudulent means”,³⁶ while in Tasmania, consent is negated if the complainant “agrees or submits because of the fraud of the accused.”³⁷ The Australian Capital Territory refers to “a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person.”³⁸

30. The NSW LRC proposes an additional circumstance in which a person does not consent in cases where a person “is fraudulently induced to participate in the sexual activity.”³⁹ This proposal is designed to address a gap in the law in NSW which currently only refers to fraudulently induced mistaken beliefs about the nature of sexual activity.⁴⁰ The NSW LRC recognised that the proposed provision may include the circumstance where the accused person dishonestly represented that they will pay the complainant for sexual activity, not intending to do so.⁴¹

The excuse of honest and reasonable mistake

Clause 9: proposed new section 348A

31. Section 24(1) of the Code provides that 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

³² RDVSA recommendation 9.

³³ *Crimes Act 1900* (ACT), s.67(1)(j); *Crimes Act 1900* (NSW), s.61HE(5)(d); *Criminal Code* (NT), s192(2)(b); *Criminal Law Consolidation Act 1935* (SA), s.46(3)(b); *Criminal Code* (Tas), s.2A(2)(d); *Crimes Act 1958* (Vic), s.36(2)(c).

³⁴ RDVSA recommendation 9.

³⁵ QLRC Report [6.100]-[6.102].

³⁶ *Criminal Code* (WA), s.319(2)(a).

³⁷ *Criminal Code* (Tas), s.2A(2)(f).

³⁸ *Crimes Act 1900* (ACT), s.67(1)(g).

³⁹ NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, proposal 6.9.

⁴⁰ *Crimes Act 1900* (NSW), s.61HE(6)(d), NSWLRC Draft proposals, [6.49].

⁴¹ NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, [6.51].

if the real state of things had been such as the person believed to exist.” Section 24(2) allows for the operation of the excuse to be excluded.

32. In accordance with the QLRC’s recommendations, the Bill would amend the excuse of mistake of fact in relation to consent in two respects for the purpose of deciding whether a person’s belief was honest and reasonable. First, anything the person said or did to ascertain whether the other person was consenting may be considered (proposed s.348A(2))⁴². The QLRC acknowledges that this reflects the existing law in Queensland.⁴³ Furthermore, simply requiring that the trier of fact have regard to anything the defendant said or did to ascertain whether the other person was consenting achieves little in the absence of an affirmative model of consent, ie. if consent is effectively presumed.
33. Second, self-induced intoxication is not to be taken into account (proposed s.348A(3))⁴⁴. RDVSA supports this proposed amendment.⁴⁵ Again, the QLRC acknowledged that an express provision was unnecessary.⁴⁶
34. Apart from those two minor proposed amendments, the Bill does not amend the excuse of honest and reasonable mistake of fact in s.24 of the Code in its application to offences in Chapter 32 (Rape and sexual assaults). The failure of the QLRC to recommend any substantive change to the operation of s.24 as it applies to sexual offences – and the reflection of this omission in the Bill – is disappointing given that dissatisfaction with the way the excuse has been raised in sexual proceedings was a key impetus for the referral of terms of reference to the QLRC for its review and investigation.⁴⁷ Proposed s.348A does little, if anything, to address these concerns.
35. The QLRC deals with the question of community attitudes and understandings of sexual violence in Chapter 8 on “Other matters”, including expert evidence, the need for a statement of objectives and guiding principles, and education. However, community attitudes and understandings of sexual violence are critical issues to be considered in the formulation of the definition of consent and the fault element for sexual offences – particular in determining whether a mistake was “reasonable”. While s.24 is an excuse of general application, it produces unjust outcomes in the case of sexual offences because it disregards particular dimensions of sexual offences that distinguish them from other crimes against the person. These include the fact that sexual offences often occur in private without evidence of physical force or harm; the impact on those who experience sexual violence, making it difficult to come forward; the relationship between the victim and the accused; and the association of sexual

⁴² Based on QLRC recommendation 7-1.

⁴³ QLRC Report, [7.77], [7.101], [7.108].

⁴⁴ Based on QLRC recommendation 7-2.

⁴⁵ RDVSA recommendation 14.

⁴⁶ QLRC Report, [7.116]-[7.119], [7.132]-[7.133].

⁴⁷ See for example, Hayley Gleeson, “Mistake of fact defence: The legal loophole stopping Queensland rape complainants from getting justice”, *ABC News*, 13 May 2019: <https://www.abc.net.au/news/2019-05-13/bri-lee-mistake-of-fact-campaign-queensland-sexual-consent/11095306>; John Robertson, “Queensland rape laws ‘a hangover from old attitudes’, former judge says”, *ABC News*, 20 March 2019: <https://www.abc.net.au/news/2019-03-20/sexual-consent-laws-queensland/10905688>

violence with stereotypical beliefs and attitudes about how a “genuine victim” would behave.⁴⁸ These factors are reflected in the low conviction rates for sexual offences, particularly where the fault element concerning consent is the key issue.

36. RDVSA disagrees with the QLRC’s suggestion that false preconceptions about sexual violence in the community are “low” and “in decline”.⁴⁹ In 2017, ANROWS published a report about the attitudes of Australians to violence against women and gender equality.⁵⁰ The report was based on responses of more than 17,500 Australians aged 16 years or over who participated in a telephone survey regarding their knowledge of violence against women and their attitudes towards this violence and gender equality. There were a number of findings of concern:

- 7% of respondents were unaware that a woman’s physical resistance is not required to satisfy a claim of sexual violence and a further 4% say they do not know,⁵¹
- one in six (16%) believe that many allegations of sexual assault are false and a further 9% say they do not know,⁵²
- nearly one in five (19%) are unaware that non-consensual sex in marriage is against the law, while 12% say they do not think it is illegal and 7% say they do not know,⁵³
- nearly one in five (18%) disagree that women are more likely to be sexually assaulted by a man known to them than by a stranger,⁵⁴
- 11% agree that women who wait weeks or months to report sexual assault are probably lying,⁵⁵
- 42% agree that it is common for sexual assault accusations to be made as a form of revenge.⁵⁶

37. There was also a high level of support for propositions that attribute responsibility to women for men’s sexual aggression.⁵⁷ This report does little to allay concerns about community attitudes regarding sexual violence.

38. It is alarming that the QLRC relies on research concerning jurors in England, Wales and Northern Ireland that is yet to be published and has not been peer-reviewed.⁵⁸ This research is difficult to reconcile with the British YouGov study to explore the

⁴⁸ Australian Law Reform Commission Report 114, NSW Law Reform Commission Report 128, *Family Violence – A National Legal Response: Final Report*, Volume 2, October 2010, [24.66]-[24.74]; New Zealand Law Commission, *Report 136: The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, December 2015, [1.8]-[1.34].

⁴⁹ QLRC Report, [8.5].

⁵⁰ K Webster and others, *Australians’ attitudes to violence against women and gender equality: findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)*, Research Report 03/2018, Australia’s National Research Organisation for Women’s Safety (“ANROWS”) (2017).

⁵¹ ANROWS, p 48.

⁵² ANROWS, p 48.

⁵³ ANROWS, p 51.

⁵⁴ ANROWS, p 52.

⁵⁵ ANROWS, p 84.

⁵⁶ ANROWS, p 86.

⁵⁷ ANROWS, p 89.

⁵⁸ QLRC Report, [8.9], [8.17]-[8.20].

public's perception of sexual violence against women and girls commissioned in 2018 by the End Violence Against Women Coalition.⁵⁹ The study comprised an online survey and online focus groups (two with women and one with men). The participants represented a wide range of demographics and were from different locations, working status, marital status, and held various views which had been identified in the quantitative survey.

39. The survey results were explored in more detail during the focus groups and the overall findings showed that:

- one third (33%) of people think it isn't usually rape if a woman is pressured into having sex but there is no physical violence,
- one third of men think if a woman has flirted on a date it generally wouldn't count as rape, even if she hasn't explicitly consented to sex (compared with 21% of women),
- one third of men believe a woman can't change her mind after sex has started,
- almost a quarter (24%) think that sex without consent in long-term relationships is usually not rape,
- around one in 10 people aren't sure or think it usually or definitely isn't rape if a man has sex with a woman who is very drunk or asleep.

40. Myths and misconceptions regarding sexual violence are still very common. The QLRC attributes disproportionate value to the unpublished UK research on the basis that it involved actual jurors, as opposed to mock jurors or opinion polls, which involve volunteers. The ANROWS report identified a number of consequences associated with erroneous community views about the veracity of sexual assault complainants, including negatively influencing the responses of police, prosecutors, judicial personnel and juries.⁶⁰ If myths about sexual assault exist in the general community, "it is a reasonable assumption that they would also be evident within the courtroom."⁶¹ There is a well-established body of literature providing evidence of these attitudes and their influence. Mock jury research reveals that the assessment of a complainant's credibility can be adversely affected by inaccurate pre-existing attitudes about how a "real" victim would react.⁶²

⁵⁹ YouGov (2018) Attitudes to sexual consent: Research for the End Violence Against Women Coalition: <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf>

⁶⁰ ANROWS, p 50; see also Kimberly Peterson, 'Victim of villain?: The effects of rape culture and rape myths on justice for rape victims' (2019) 53 *Valparaiso University Law Review* 467, 489-490

⁶¹ Rachael Bain, 'Jury Directions under the Abusive Behaviour and Sexual Harm (Scotland) act 2016: A Long-Needed Success for Tackling Rape Myths or Another Measure Falling Short' (2018) 8 *Aberdeen Student Review* 39, 45; see also at 58; NSW Law Reform Commission (2019) *Consent in relation to sexual offences: Draft proposals* (October 2019) at [8.2]; Natalie Taylor (2007) 'Juror attitudes and biases in sexual assault cases', *Trends and Issues in crime and criminal justice no. 344*, Australian Institute of Criminology, 2.

⁶² See for example, Isla Callander, 'Jury Directions in Rape Trials in Scotland' (2016) 20 *Edinburgh Law Review* 76, 77; Kimberly Peterson, 'Victim of villain?: The effects of rape culture and rape myths on justice for rape victims' (2019) 53 *Valparaiso University Law Review* 467, 485-486; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: exploring jurors' assessments of complainant credibility' (2009) 49(2) *British Journal of Criminology* 202; ⁶² Louise Ellison and Vanessa E Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *British Journal of Criminology* 363; NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, [8.2].

41. In its examination of the excuse of mistake of fact in Chapter 7 of its report, the QLRC considered the following options:

- (i) Rendering s.24 inapplicable to Chapter 32 offences with no alternative. This was rejected.⁶³
- (ii) Reversing the onus of proof for honest and reasonable mistake. This was rejected.⁶⁴
- (iii) Introducing a purely objective standard to assess whether a mistake was reasonable. This was rejected.⁶⁵
- (iv) Requiring consideration of any steps taken by the defendant to ascertain whether the complainant was consenting. The QLRC did not accept this proposal in its terms, instead recommending that consideration be given to what, if anything, the defendant said or did to ascertain that the complainant consented.⁶⁶
- (v) Excluding self-induced intoxication from consideration of whether the defendant had an honest and reasonable mistake. This was accepted.⁶⁷
- (vi) Introducing a fault element in circumstances where the defendant was reckless as to whether or not the complainant consented. This was rejected.⁶⁸

42. Significantly, the QLRC did not adequately explore the option of ameliorating the operation of s.24 in the case of sexual offences by providing that a mistaken belief by the defendant as to the existence of consent is not honest or reasonable in certain specified circumstances. As an example, legislation in Tasmania (also a “Code” State) provides that a mistaken belief as to the existence of consent is not honest and reasonable in certain circumstances, including where the defendant did not take reasonable steps to ascertain whether the complainant was consenting.⁶⁹ While the QLRC referred to the Tasmanian provision, it did so only in the context of considering recklessness.

43. In determining whether there is an honest and reasonable mistake of consent with respect to Chapter 32 offences, the trier of fact should have regard to any relevant circumstances in an amended s.348(2), which should include the circumstances advanced above, ie:

- where the person does not say or do anything to communicate consent
- where the person is asleep or unconscious
- where the person is so affected by alcohol or other drugs as to be incapable of consenting
- cases of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct occurs
- cases of coercion, blackmail or intimidation occurring at any time
- where the person is unlawfully detained
- cases involving fraudulent representations.

⁶³ QLRC Report, [7.10]-[7.16].

⁶⁴ QLRC Report, [7.17]-[7.61].

⁶⁵ QLRC Report, [7.62]-[7.71].

⁶⁶ QLRC Report, [7.72]-[7.108], recommendation 7-1.

⁶⁷ QLRC Report, [7.109]-[7.136].

⁶⁸ QLRC Report, [7.137]-[7.166].

⁶⁹ *Criminal Code* (Tas), s.14A(1)(c).

Other matters

Objectives and guiding principles

44. RDVSA supports the inclusion of objectives and guiding principles to govern the interpretation and application of Chapter 32 of the Code.⁷⁰ The NSW LRC has proposed the inclusion of the following “interpretative principles” in the *Crimes Act 1900* (NSW):⁷¹

- (a) every person has a fundamental right to choose whether or not to participate in sexual activity,
- (b) a person’s consent to a sexual activity should never be presumed,
- (c) sexual activity should involve ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

45. The NSW LRC proposal is based on the Victorian legislation, which sets out the following objectives:⁷²

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity,
- (b) to protect children and persons with a cognitive impairment or mental illness from sexual exploitation.

46. Victoria sets out the following guiding principles:⁷³

- (a) there is a high incidence of sexual violence within society,
- (b) sexual offences are significantly under-reported,
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment or mental illness,
- (d) sexual offenders are commonly known to their victims,
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.

47. The inclusion of guiding principles and objects was also recommended by the Australian and NSW Law Reform Commissions in the context of sexual violence occurring in domestic and family relationships.⁷⁴

48. The QLRC was unpersuaded that a statement of objectives or guiding principles would assist juries in evaluating factual issues in criminal proceedings and expressed

⁷⁰ RDVSA recommendation 16.

⁷¹ NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, proposal 4.1.

⁷² *Crimes Act 1958* (Vic), s.37A.

⁷³ *Crimes Act 1958* (Vic), s.37B.

⁷⁴ Australian Law Reform Commission Report 114, NSW Law Reform Commission Report 128, *Family Violence – A National Legal Response: Final Report*, Volume 2, October 2010, recommendations 25-8 and 25-9.

the view that they might create ambiguity.⁷⁵ However, an objectives clause and guiding principles may assist in the development of directions or the reception of expert evidence (discussed below) and serve an educative purpose. Such provisions are not unknown in Queensland. For example, the *Domestic and Family Violence Protection Act 2012* (Qld) set out both the objects of the Act⁷⁶ and principles for its administration.⁷⁷ While the focus of this legislation is on civil proceedings for protection orders, it includes criminal offences for breaching orders and police notices.⁷⁸

Judicial directions and expert evidence

49. The QLRC declined to recommend changes to the law to deal with false preconceptions about sexual violence, having concluded that such preconceptions are not commonly held by jurors, and that they do not affect jury deliberations or verdicts.⁷⁹ For the reasons indicated above (at [36]-[40]), RDVSA does not agree with these conclusions.

50. RDVSA supports the development of judicial directions and the admission of expert evidence to address myths and misconceptions in sexual offence proceedings.⁸⁰ There has been growing support for these initiatives, including recommendations by the Australian and NSW Law Reform Commissions⁸¹ and the New Zealand Law Commission.⁸²

Conclusion

51. In conclusion, while RDVSA does not oppose the individual clauses of Part 3 of the Bill, we urge the government not to confine itself to the QLRC's recommendations. To do so would be to squander the opportunity to make substantive, necessary and long overdue changes to the law regarding consent to sexual activity.

52. In particular, RDVSA supports:

- (1) an affirmative model of consent;
- (2) additions to the non-exhaustive list in s.348(2) of the Code of circumstances where there is no consent, to include:

⁷⁵ QLRC Report, [8.98]-[8.102].

⁷⁶ *Domestic and Family Violence Protection Act 2012* (Qld), s.3: which are (a) to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives; (b) to prevent or reduce domestic violence and the exposure of children to domestic violence; and (c) to ensure that people who commit domestic violence are held accountable for their actions.

⁷⁷ *Domestic and Family Violence Protection Act 2012* (Qld), s.4.

⁷⁸ *Domestic and Family Violence Protection Act 2012* (Qld), Part 7: Offences.

⁷⁹ QLRC Report, [8.30]-[8.31].

⁸⁰ RDVSA recommendations 17 and 23.

⁸¹ Australian Law Reform Commission Report 114, NSW Law Reform Commission Report 128, *Family Violence – A National Legal Response: Final Report*, Volume 2, October 2010, recommendation 25-7; NSW Law Reform Commission, *Consent in relation to sexual offences: Draft proposals*, October 2019, proposals 8.1-8.4, [8.3]-[8.24].

⁸² New Zealand Law Commission, *Report 142: The Second Review of the Evidence Act 2006*, February 2019, recommendations 21 and 22, [12.45]-[12.95]

- where the person does not say or anything to communicate consent
 - where the person is asleep or unconscious
 - where the person is so affected by alcohol or other drugs as to be incapable of consenting
 - cases of force or fear of force or harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs
 - cases of coercion, blackmail or intimidation occurring at any time
 - where the person is unlawfully detained
 - cases involving fraudulent representations;
- (3) limiting the excuse of honest and reasonable mistake of fact in the context of sexual offences so that
- a mistaken belief as to the existence of consent is not honest and reasonable where the defendant did not take reasonable steps to ascertain whether the complainant was consenting
 - in determining whether a mistaken belief is not reasonable, consideration is given to any relevant circumstances where consent is absent under a revised s.348(2);
- (4) the introduction of an objects clause and guiding principles;
- (5) the development of judicial directions and the reception of expert evidence to address myths and misconceptions regarding sexual offences.

53. We again thank the Committee for the opportunity to comment on the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld)*. If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED] or by email at [REDACTED]

Yours faithfully,

Rape & Domestic Violence Services Australia



Karen Willis

Executive Officer

Annexure A: RDVSA recommendations made to the QLRC

Recommendation 1: That Section 348 be amended to clearly endorse the affirmative consent model.

Recommendation 2: That an amended Section 348(1) include that the definition involves a positive act of communication. The definition could provide: "A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words and/or actions."

Recommendation 3: That an amended Section 348(2) include that a person does not consent where "the person consents, but later through words or actions withdraws consent to the sexual activity taking place or continuing."

Recommendation 4: That an amended Section 348(2) include a single, non-exhaustive list of "circumstances in which a person does not consent."

Recommendation 5: That an amended Section 348(2) include that a person does not consent where "the person is asleep or unconscious as to be incapable of consenting to the sexual activity."

Recommendation 6: That an amended Section 348(2) include that a person does not consent where "the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity."

Recommendation 7: That an amended Section 348(2) include that a person does not consent where "the person does not say or do anything to communicate consent to the act."

Recommendation 8: That current law should be maintained whereby a person's failure to disclose their HIV/AIDS positive status is dealt with separately from the law of sexual offences.

Recommendation 9: That an amended Section 348(2) include that a person does not consent where they submit to the sexual activity under "a mistaken belief that the sexual activity is for the purposes of monetary exchange."

Recommendation 10: That Section 348(2) should be amended to better capture sexual violence within the context of domestic and/or family violence.

Recommendation 11: That an amended Section 348(2) include that a person does not consent where "the person submits because of fear of harm of any type to that person, another person, an animal or damage to property."

Recommendation 12: That an exemption be inserted into Section 24 of the Criminal Code stating that the excuse of mistake of fact cannot be applied in relation to rape and sexual assault offences.

Recommendation 13: That the QLRC recommend amendments to each sexual offence provision in the Criminal Code to include the "no reasonable belief" test. The provisions of a "no reasonable belief" test could be adopted from Appendix A of our preliminary submission.

Recommendation 14: That an amended Section 348(2) include a provision that when making findings about the mental element, the fact finder must not consider any self-induced intoxication of the accused.

Recommendation 15: That an amended Section 348(2) include a provision that when making findings about the mental element, the fact finder must not consider any opinions, values or attitudes held by the accused that do not meet community standards.

Recommendation 16: That Queensland legislation regarding rape and sexual assault offences include an objective and guiding principles to reflect that every person has a fundamental right to choose whether or not to participate in sexual activity.

Recommendation 17: That if juries continue to operate as the fact-finder in sexual violence proceedings, reforms should be implemented to overcome the influence of rape myths and victim-blaming attitudes as to their decision-making. This may include improved processes in relation to jury selection, expert evidence and/or judicial direction.

Recommendation 18: That the Queensland Government consider the inclusion of a provision such as Section 388 of the Criminal Procedure Act 2009 (Vic) which would allow for evidence of specialised knowledge as to the social, psychological and cultural factors that may affect the behaviour of a complainant in sexual assault proceedings.

Recommendation 19: That in conjunction with legislative reform, there should be broad community education around the realities of sexual violence and the law of consent in order to improve criminal justice outcomes and encourage ethical sexual practice.

Recommendation 20: That trauma training should be provided to all professionals and community members who are likely to receive initial disclosures of sexual violence.

Recommendation 21: That adequate funding should be allocated to sexual, domestic and/or family violence services who perform a critical role in supporting those who have experienced sexual violence to access safety, support, recovery and the criminal justice system.

Recommendation 22: That a model of case management should be developed to provide coordinated service delivery to adults who have experienced sexual violence.

Recommendation 23: That if additional jury directions were proposed (legislated or otherwise), the QLRC should undertake extensive consultation with sexual violence organisations as well as considering mock jury studies in order to assess the potential of jury directions in combatting juror reliance on rape myths.