

22 September 2020

Legal Affairs and Community Safety (LACS) Committee
Parliament House
George Street
Brisbane QLD 4001

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

Dear LACS Committee members,

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

Thank you for the opportunity to make a submission in relation to the *Criminal Code (Consent and Mistake of Fact) & Other Legislation Amendment Bill 2020* ('the Bill'). Our submission responds to the proposed amendments to the laws of consent and the excuse of mistake of fact.

About Queensland Council of Social Services (QCOSS)

QCOSS is the peak body for the social service sector in Queensland. Our vision is to achieve equality, opportunity and wellbeing for every person, in every community.

Our submission reflects our engagement with QCOSS members and supporters, many of whom have deep and direct experience in supporting, counselling and caring for victims of rape and sexual assault.¹ On 7 September, QCOSS co-hosted a forum to debate these proposed laws from a human rights perspective. We partnered with the peak body for sexual assault services, the Queensland Sexual Assault Network (**QSAN**) and the Women's Legal Service Queensland (**WLSQ**) to run this online event, which attracted more than 100 registrants across the state, from the far north to the far west and throughout the south-east corner.

Sexual violence is a gendered crime

At the outset we acknowledge that sexual violence is a gendered crime: 80% of sexual violence survivors are female, 20% male.² We therefore frame our submission on the assumption that survivors are women and that the proposed changes to the law will impact most upon them. Our human rights analysis (below) is also conducted through a gendered lens.

¹ For brevity we use the terms 'victims' and 'survivors' interchangeably throughout this submission however we acknowledge that the term 'victim-survivors' is preferred and widely accepted.

² Australian Bureau of Statistics, Personal Safety, Australia, 2016 (Catalogue No 4906.0, 8 November 2017) revealed that one in five women (18% or 1.7 million) and one in twenty men (4.7% or 428,000) experienced sexual violence).

Executive Summary

QCROSS does not support the passage of the Bill as currently drafted. The Bill is a missed opportunity to meet community calls for meaningful reform to this vital area of law.

Our member and supporter polling indicates a near consensus view that the Bill will have no tangible benefit for rape and sexual assault survivors, nor will it effectively address the key issues that the community sector has persistently highlighted as being in need of reform. This perspective is shared by leading academics in the field, who describe the Bill as a ‘huge disappointment’.³

QCROSS respectfully asks the Committee to recommend that government redraft the Bill to incorporate the following features:

1. Implementation of an affirmative model of consent;
2. Fuller consideration of the human rights of sexual assault victims;
3. Recognition that people with disability *can* consent to sex;
4. Implementation of a set of Guiding Principles;
5. Repeal of the ‘mistake of fact’ excuse due to its perpetuation of harmful rape myths.

We now outline each of these issues in turn.

1. Towards an affirmative model of consent

QCROSS submits that section 348 of the *Criminal Code 1899* (Qld) should be amended to introduce an affirmative model of consent. This would enshrine the concept of ‘voluntary agreement’ between individuals and provide for greater sexual autonomy.

An affirmative model of consent would better align with current medical and psychological understanding of how humans respond in moments of rape and sexual assault ie. ‘freezing’ (tonic immobility) is a very common behavioural response and recognised survival tactic.

‘Affirmative consent’ is centred on the idea a person who wants to have sex with another person must actively confirm, by taking positive steps, that the other person also wants to have sex. Some jurisdictions frame this as the need for an ‘enthusiastic yes’ to sex.⁴ Introducing an affirmative model of consent would prevent passivity being accepted as a reasonable belief as to consent on the part of the accused. Currently this provides a basis for the mistake of fact excuse under section 24, which absolves the accused from criminal responsibility when successfully pleaded (see further, page 7).⁵

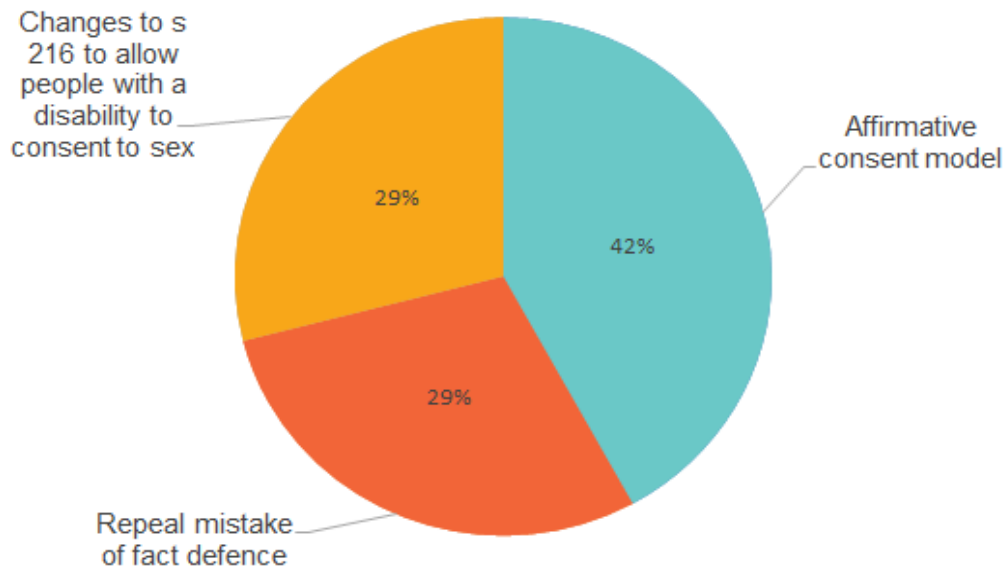
At our online forum, the number one concern of QCROSS members and supporters about these proposed laws was the exclusion of the affirmative consent model, as illustrated in the following graph:

³ Jonathan Crowe, ‘Queensland Rape Law ‘Loophole’ Could Remain After Review Ignores Concerns About Rape Myths and Consent’ (4 August 2020) (Web Page) <<https://theconversation.com/queensland-rape-law-loophole-could-remain-after-review-ignores-concerns-about-rape-myths-and-consent-141772>> (emphasis added). See also, Women’s Legal Service, ‘Sexual Assault Review Recommendations: A Step in the Right Direction But Do Not Go Far Enough and Continues to Leave Many Queensland Women Unprotected’, *Women’s Legal Service* (Media Release, 2 August 2020) <<https://wlsq.org.au/sexual-assault-review-recommendations/>>.

⁴ See generally, Queensland Law Reform Commission, ‘Review of Consent Laws and the Excuse of Mistake of Fact’ (Consultation Paper, December 2019) 21 [88].

⁵ *R v I.A. Shaw* [1996] 1 Qd R 641, 646 (Davies and McPherson JJA.).

What would you like to see changed in the Bill?



Affirmative consent model in other states

Victoria⁶ and Tasmania⁷ have already modernised their criminal laws by adopting an affirmative model of consent. Victoria defines consent to mean 'free agreement'⁸ and also sets out a non-exhaustive list of circumstances in which a person is seen not to consent.⁹ The Tasmanian law expands on this and provides that a mistake of fact will not be considered honest or reasonable where the accused 'did *not* take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'.¹⁰

The Tasmanian model of consent has been in place for sixteen years.¹¹

Affirmative consent is international best practice. The United Nations Handbook for Legislation on Violence Against Women states that consent requires, 'the existence of 'unquivocal and voluntary agreement' and requires proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting'.¹²

2. Human rights analysis: Victim perspective

⁶ *Crimes Act 1958* (Vic) s 36(1).

⁷ See, *Criminal Code Act 1924* (Tas) s 2A(2)(a).

⁸ *Crimes Act 1958* (Vic) s 36(1).

⁹ *Ibid* s 36(2).

¹⁰ *Criminal Code Act 1924* (Tas) s 2A.

¹¹ Women's Legal Service, 'Sexual Assault Review Recommendations: A Step in the Right Direction But Do Not Go Far Enough and Continues to Leave Many Queensland Women Unprotected', *Women's Legal Service* (Media Release, 2 August 2020) <<https://wlsq.org.au/sexual-assault-review-recommendations/>>.

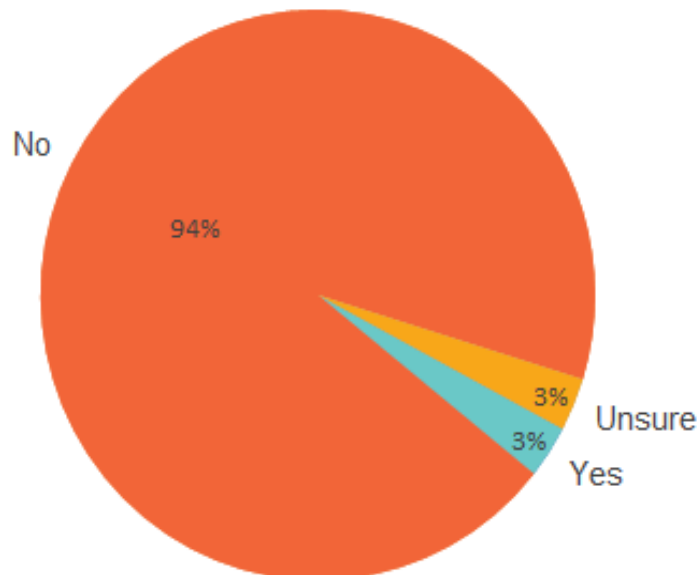
¹² United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, (Report 2010) <<https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>> 26.

The human rights analysis for this Bill is one-sided and solely considers the rights of defendants to a fair trial¹³ and their protection from retrospective criminal laws.¹⁴

It is important to recall that the reform process behind the Bill was prompted by a community campaign about inadequate protections for female complainants of sexual violence. Disappointingly, the Bill's Statement of Compatibility overlooks the human rights of complainants which includes the right to equal protection before the law,¹⁵ the right to life,¹⁶ the right to freedom from torture¹⁷ and the right to liberty and security.¹⁸

At our online event, **94%** of participants felt that the human rights of sexual assault survivors were not adequately protected by the Bill's proposed changes to the law.

Are the human rights of sexual assault survivors adequately protected by these proposed changes to the law?



According to the 2020 United Nations Handbook, acts of sexual violence infringe the rights to life, liberty, privacy, equality, discrimination and not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment.¹⁹ These human rights are explicitly

¹³ *Human Rights Act 2019* (Qld) s 32 ('*Human Rights Act*').

¹⁴ *Ibid* s 35.

¹⁵ *Ibid* s 15.

¹⁶ *Ibid* s 16.

¹⁷ *Ibid* s 17.

¹⁸ *Ibid* s 29.

¹⁹ Handbook for the United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence (2020) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/2020.08-UN-CRSV-Handbook.pdf>> page 20; See further, Office of the United Nations High Commissioner for Human Rights, (Report, 2018) <https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective_EN.pdf> page 30.

recognised in Queensland's new *Human Rights Act*.²⁰ Applying the compatibility test under section 8, it is clear that the Bill limits several of the enumerated human rights in a way that is not 'reasonable and demonstrably justifiable'.²¹ **The Bill fails to give any consideration to the human rights of sexual assault complainants.**

3. Human rights analysis: People with disability and consensual sex

The Bill also fails to address deficiencies in Queensland's consent laws with regard to people with disability. Under section 216 of the *Criminal Code 1899* (Qld) it is an offence to have sexual contact with a person who has an impairment of the mind. Under section 229L, it is an offence to cause or permit a person with an impairment of the mind to be at the place used for the purposes of prostitution.

These laws discriminate against people with disability. They engage a number of statutory human rights including the right to recognition as a person before the law,²² the right to privacy²³ and the right to enjoy human rights without discrimination.²⁴ The UN *Convention on the Rights of Persons with Disabilities* expressly provides for the right of people with disability to 'give consent for intimate relationships'.²⁵

Queensland's current consent laws limit the ability of people with a mental impairment to pursue a safe, satisfying sexual life and to decide matters regarding their choice of partner and their bodily integrity. The current definition of a 'person with an impairment of the mind' is also very broad and captures people whose ability to consent to sexual contact is unaffected by their impairment.²⁶

QCROSS acknowledges the important purpose of these provisions in protecting people with a disability from sexual exploitation. However, we note the sustained advocacy of frontline community organisations like Queensland Advocacy Inc. to improve consent laws for people with disability.²⁷ We also note the considered analysis of the Queensland Human Rights Commission on this point.²⁸ On balance, QCROSS considers that the Bill's silence on this issue is a missed opportunity to correct a law that unfairly discriminates against people with disability.

4. Guiding principles

Recognising the disproportionate impact on women and people with disability, equality could be achieved through the insertion of *Guiding Principles* in the Queensland Criminal Code, as

²⁰ See generally, *Human Rights Act 2019* (Qld) ss 15-17, 25, 29.

²¹ *Human Rights Act 2019* (Qld) s 13(2)(a)-(g) which lists several factors that are taken into account to consider whether a limit on a human right is reasonable and justifiable. They include, *inter alia* the nature of the human right; the purpose of the limitation; whether there are any less restrictive and reasonably available ways to achieve the purpose; and the importance of preserving the human right.

²² *Human Rights Act 2019* (Qld) s 15(1) (emphasis added).

²³ *Ibid* 25.

²⁴ *Ibid* s 15(2) (emphasis added).

²⁵ UN Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal recognition before the law*, 11th session, CRPD/C/GC/1 19 May 2014 (31 March – 11 April 2014) 2.

²⁶ See generally, Queensland Advocacy Incorporated, *Section 216* (Web Page) <<https://www.qai.org.au/2018/04/03/lets-nix-216/?fbclid=IwAR0gHskwnZEv2hr28M3yaSy4eE7tP67wx2WZ3oVFZTs4Ug5jp1ELCtCDF8E>>.

²⁷ *Ibid*.

²⁸ Queensland Human Rights Commission, *Review of Consent Laws and the Excuse of Mistake of Fact: Submission to Queensland Law Reform Commission*, p 12 - 13.

has been recommended by the Womens' Legal Service²⁹ and QSAN.³⁰ This mechanism will apply to the interpretation of the law relating to sexual offences, and rules of evidence in sexual offence proceedings. In Victoria, *Guiding Principles* are incorporated in s 37B of the *Crimes Act 1958* (Vic) as follows:

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

The Victorian Law Reform Commission explains that these *Guiding Principles* are an important educational tool to address the need for cultural change.³¹ The Australian Law Reform Commission also recognises that:

'[w]hile there is some question about the extent to which such provisions [guidelines to assist with the interpretation of sexual offences] have been effective in practice, such principles may provide an important **symbolic statement** about the nature of such violence, the **community's lack of tolerance** for such violence, and the **response of the law**' (emphasis added).³²

Criminal law reform can help to promote cultural change; it has both a regulatory and an educative function.³³ This view was also expressed in our online polling:

²⁹ Womens' Legal Service in a Media Release dated 2 August 2020. See further, Women's Legal Service, 'Sexual Assault Review Recommendations: A Step in the Right Direction But Do Not Go Far Enough and Continues to Leave Many Queensland Women Unprotected', *Women's Legal Service* (Media Release, 2 August 2020) <<https://wlsq.org.au/sexual-assault-review-recommendations/>>.

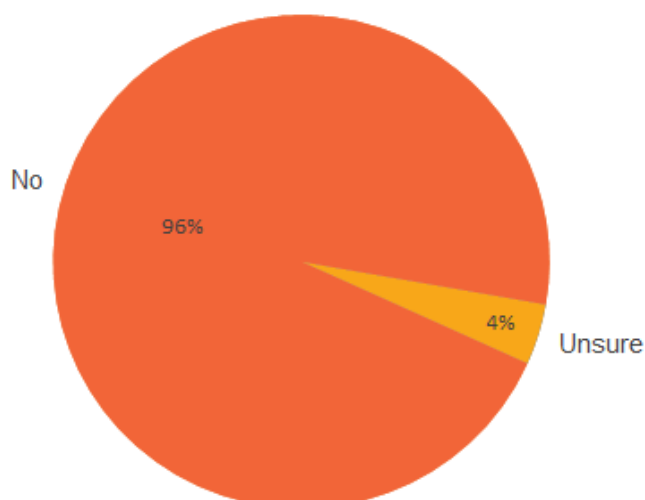
³⁰ Queensland Sexual Assault Network, Letter to The Secretary Queensland Law Reform Commission (31 January 2020) page 3.

³¹ Women's Legal Service (Media Release, 2 August); Victorian Law Reform Commission, 'Sexual Offences: Interim Report' (8 May 2003) (Interim Report) <<https://www.lawreform.vic.gov.au/sites/default/files/SEXUAL%2BOFFENCES%2BINTERIM%2BREPORT%2BFINAL.pdf>> 390 [8.88].

³² Australian Law Reform Commission 'Guiding Principles and Objects Clause' (11 November 2010) [25.189] citing R Hunter, 'Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence', *Thesis*, Stanford University 2006, page 65; R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24(1) *Alternative Law Journal* 12, 12.

³³ Victorian Law Reform Commission (n 16) 390 [8.88].

Do you think the Bill is good law reform?



5. Dispelling harmful rape myths: the excuse of mistake of fact

Sexual violence is unique to other forms of violence in that its perpetrators are empowered by cultural attitudes that excuse or justify their actions. These attitudes are largely informed by 'rape myths', which encompass any kind of false belief or stereotype which excuse rapists and shifts blame onto complainants.

A recent national survey about community attitudes towards sexual violence demonstrated that many rape myths are widely accepted by Australians.³⁴ For example, 42% of those surveyed believed it is 'common for sexual assault accusations to be used as a way of getting back at men'.³⁵

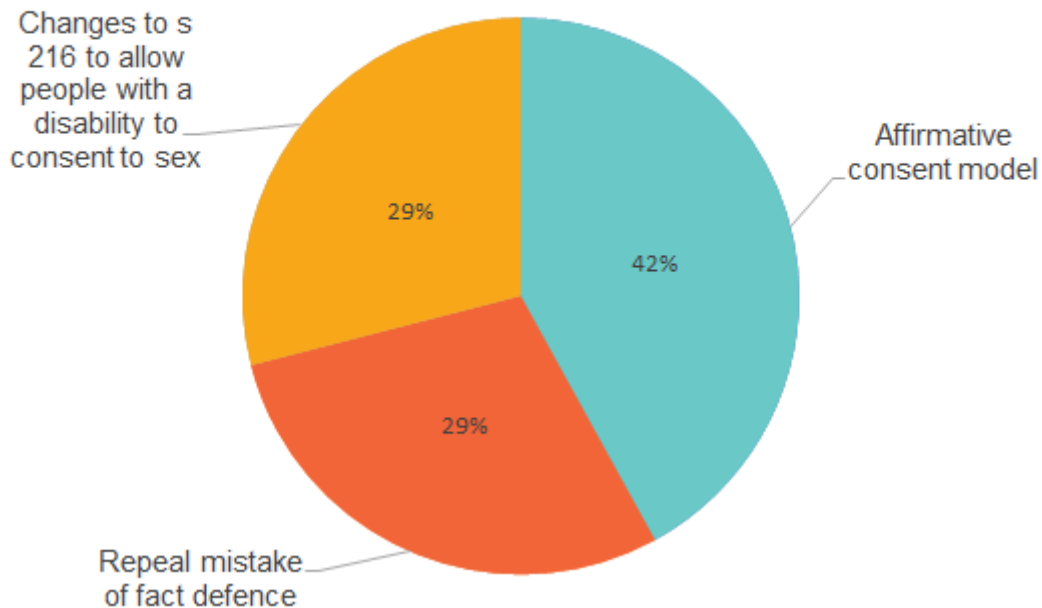
Rape myths jeopardise complainants' access to justice by causing police, jurors and other community members to undermine their credibility from the reporting stage to trial, and yet several rape myths are embodied by Queensland law. Most significantly, the excuse of mistake of fact in section 24 endorses perpetrators whose belief in the existence of consent is founded on a lack of verbal or physical resistance.

The continued application of the mistake of fact excuse in Queensland law enshrines deeply sexist rape myths. Our online polling showed that one third of participants would like to see the excuse of mistake of fact repealed:

³⁴ Kim Webster et al, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Research report, March 2018) 1-185.

³⁵ *Ibid* 48-50.

What would you like to see changed in the Bill?



Conclusion

The Bill restates existing Queensland law and does little to improve outcomes for victims of sexual violence. There is an overwhelming bias in favour of male defendants at the expense of female complainants. The Bill also fails to rectify discriminatory assumptions that people with disability are incapable of consenting to sex. Survey results gathered by QCOSS confirm that the Bill fails to adequately respond to community concerns which initially prompted the referral of this law reform issue to the QLRC.

QCOSS opposes the Bill and advocates for law reform that will adopt an affirmative model of consent, recognise the human rights of rape and sexual assault victim and people with disability, and address the mistake of fact excuse in perpetuating harmful rape myths.

Thank you again for the opportunity to provide our submission to the Committee.

Yours faithfully,

Aimee McVeigh
Chief Executive Officer