



*A place of healing, support & social action*

23 September 2020

Committee Secretary  
Legal Affairs and Community Safety Committee  
Parliament House  
George Street  
Brisbane Qld 4000  
Email: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

**Submission to the Legal Affairs and Community Safety Committee - Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020**

Dear Sir/Madam,

**Zig Zag Young Women's Resource Centre Inc ('Zig Zag')** welcomes the opportunity to provide a written submission to the **Legal Affairs and Community Safety Committee - Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 ('the Bill')**. We respectfully submit recommendations relating to specific areas of expertise based on our extensive knowledge and experience in providing specialist sexual assault support and prevention services to young women aged 12-25 years who have been victims of violent crime, specifically sexual offences, in Queensland, since 1988.

Zig Zag was established in 1988 to respond to the specific identified needs of young women, namely sexual violence, accommodation, and the provision of a safe and confidential place for young women to obtain information, advice, and support. Zig Zag is an incorporated community managed organisation that currently receives funding from the Department of Child Safety, Youth and Women (DCSYW) to provide three specialist sexual assault support and prevention programs to young women in the Wider Brisbane, Brisbane North, and Brisbane Southwest regions; and funding from the Department of Housing and Public Works (DHPW) to provide a specialist homelessness program to young women in the Wider Brisbane region.

**Prevalence of Sexual Violence**

It is important to firstly acknowledge that sexual violence continues to have the lowest rates of reporting, investigation, prosecution, and conviction of any violent crime in Australia, making it difficult to statistically measure the prevalence of sexual violence in the community. Data indicates that sexual violence is endemic with *one in three young women experiencing some form of sexual violence before the age of 18 years*<sup>i</sup>. Sexual violence is a largely hidden crime that often occurs within the family and other private contexts. Sexual violence is primarily perpetrated by males who are known to the victim such as family members, partners, friends, colleagues, neighbours, and acquaintances. Evidence suggest that *most victims/survivors of sexual violence*

*do not report the crime to the police*, and many do not access specialist support services available until weeks and/or years after the offences took place.

Sexual violence against women in Australia also frequently occurs within intimate partner relationships as observed in the following statistical snapshot:

- More than a quarter of a million women (272,300, or 24%) reported having been sexually assaulted by a previous partner since the age of 15<sup>ii</sup>.
- In a study on young people and domestic violence, 14% of surveyed women aged 12–20 had been sexually assaulted by a boyfriend<sup>iii</sup>.
- Specialist domestic violence prevention services report that 90% of women who have experienced domestic violence, namely physical, emotional, financial, and social abuse are also experiencing intimate partner sexual abuse<sup>iv</sup>.

There are significant barriers for victims/survivors in disclosing and reporting experiences of sexual violence and rates of disclosure are even lower for intimate partner sexual violence. A range of factors are observed as the primary deterrents for victims in disclosing intimate partner sexual offences, including safety concerns and fear of further violence; stigma and shame; limited understanding as to what constitutes 'consent'; lack of recognition of sexual assault as being a crime; and lack of trust in police and/or judicial responses<sup>v</sup>. Many women who experience intimate partner sexual violence may have difficulty identifying the experience as sexual assault or rape as male partners who engage in domestic violence often apply a range of subtle, coercive and/or violent behaviours to deny their partner capacity to voluntarily consent to sexual activity<sup>vi</sup>.

Zig Zag also acknowledges that a disproportionately high incidence of sexual violence is perpetrated against young women. The Queensland Police Service and the Australian Bureau of Statistics cited that *72% of all recorded sexual assault crimes from 2014-2018 involved female victims under the age of 25 years*. Children and young people face additional barriers in disclosing and reporting experiences of sexual assault and accessing appropriate, free, and confidential support services due to a range of factors including their age, level of knowledge of support services available, ability to travel, difficulties obtaining parental consent, safety concerns, mistrust of the Police or Child Safety, and poor perceptions of the criminal justice system being observed as the primary deterrents for child and adolescent victims of sexual offences<sup>vii</sup>.

## **Background**

The Legal Affairs and Community Safety Committee have an important opportunity to assess the operation and practical application of current legislation that would improve the safety of women, encourage them to report to police, and engage with the criminal justice system.

The definition of consent (Section 348 Queensland Criminal Code Act 1899) and the current operation of mistake of fact (Section 24 Queensland Criminal Code Act 1899) have significant negative impacts on the reporting, investigation, charge and prosecution of sexual offences, that has resulted in injustice to many sexual assault survivors. The current definition of consent for Chapter 32 offences does not adequately address all instances where consent may not be present. Section 348 (Meaning of consent) and the operation of Section 24 (Mistake of fact) should be amended to better reflect contemporary understanding of the circumstances and facts surrounding sexual assault and rape. The Bill does not make significant changes to existing law, or meet the required need for more substantive change to the current definition of consent to adopt an affirmative consent model in Queensland.

Another concern regarding the prosecution of Chapter 32 offences is that the general defence of mistake of fact (Section 24 Criminal Code 1899 (Qld)) is inadequate when applied to Chapter 32 offences. Currently, once mistake of fact is raised on the evidence it is for the prosecution to negate the excuse; that is, to establish beyond reasonable doubt that the defendant did not have a mistaken belief or that, if the defendant did, the belief was not honest or not reasonable. These are questions of fact for the jury to determine.<sup>viii</sup>

Placing the onus of proof on the prosecution raises serious concerns because:

- the prosecution is often not in a position to contest the defendant's claims because the only other 'witness' is the complainant;
- the defendant is in a better position than the prosecution to provide proof of whether they had an honest and reasonable belief there was consent;
- reversing the onus will lead to more clearly articulated claims of mistake of fact, which is fairer to all concerned including the jury; and
- reversing the onus will enhance the capacity of the trial judge to prevent unmeritorious claims being raised such as stereotypes and myths regarding rape and sexual assault victims.

Based on these reasons there is a strong argument that the burden of proof should shift to the defendant to demonstrate that they took *positive and reasonable steps by words and actions* in the circumstances known to them at the time of the act to ascertain that the other person is giving consent to the act. Although this raises concern regarding the presumption of innocence, such a reversal would not be unique to the Criminal Code Act 1899 (Qld). In the case of reform of the provocation defence to a murder charge<sup>ix</sup> similar concerns were determined to justify the reversal of the onus of proof.<sup>x</sup> In addition, the current state of law in Sections 348 and 24 of the Criminal Code Act 1899 (Qld) facilitates the perpetuation of stereotypes, myths, and biases that influence decision making by police and prosecution services regarding investigation and charge and jury opinion on the presence of consent and mistake of fact. The Bill does not make significant changes to existing law, or meet the required need for more substantive change to the mistake of fact defence as it relates to sexual offences in Queensland.

**Zig Zag believe that the proposed *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020* makes technical and inconsequential changes to existing law, and does not address the need for more substantive change to current legislation relating to consent and the mistake of fact defence as it relates to sexual offences in Queensland.**

**Zig Zag hereby submits a range of recommendations specific to the Bill, and in response to the Queensland Law Reform Commission 'Review of consent laws and the excuse of mistake of fact' Report ('QLRC Report'). Zig Zag strongly advocates for the repeal of the Bill with consideration for an urgent, broad based, interdepartmental review into the handling of sexual offences in Queensland that positions the experiences of victim/survivors of sexual violence at the centre, from barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial outcomes.**

### **Recommendations**

**Zig Zag respectfully submits the following recommendations for changes to the Criminal Code Act 1899 (Qld), in addition to broader actions by the Queensland Government to ensure more appropriate judicial and community responses to sexual offences in Queensland:**

- 1. Section 348 of the Criminal Code Act 1899 (Qld) should be amended to introduce the affirmative consent model into Queensland legislation that includes the concept of a 'voluntary agreement' between two parties.**
- 2. Section 348 of the Criminal Code Act 1899 (Qld) should be amended to establish a comprehensive definition of 'affirmative consent' that includes:**
  - **A non-exhaustive list of examples of scenarios where consent is not to be considered a voluntary agreement, to assist with understanding by professionals in the system, including police and the community at large.**
  - **These examples be extended to include the following scenarios where consent is not freely or voluntarily given:**
    - a. Where the person is asleep or unconscious when any part of the sexual act occurs; where the person is so affected by alcohol or another drug as to be incapable of**

consenting to the sexual act; and where the person fails to use a condom as agreed or sabotages the condom, where the person agrees.

- b. Where the person (victim) agrees to a sexual act under a mistaken belief (induced by the other person) that the other person does not suffer from an infectious and/or sexually transmitted disease.
  - c. Where the person consents to a sexual act under a mistake belief (induced by the other person) that there will be a monetary exchange in relation to the sexual act as previously negotiated in sex work.
  - d. Where the nature of the sexual act changes and consent is not continuing for example: when sexual acts become violent e.g. strangulation or a physical assault which may render the victim unable to use their voice.
3. A new and discrete mistake of fact defence should be included in Chapter 32 of the Criminal Code Act 1899 (Qld) that requires a defendant to prove that the defendant took reasonable steps to ascertain consent, that the defendant's mistaken belief was not due to self-induced intoxication, and that they were not reckless as to whether or not the complainant consented, before being able to rely on the defence.
  4. That a history of domestic, family, and/or intimate partner violence be expressly required to be considered in sexual violence offences, where it is relevant.
  5. Additional amendments to make jury directions clear and understandable and not overly legalistic, confusing, and/or technical.
  6. The introduction of a 'statement of objectives' or 'guiding principles' within the Criminal Code Act 1899 (Qld) which the court should have to regard in interpreting sexual violence offences and that attempts to counter known 'rape myths' and/or violence supportive attitudes.
  7. Amendments to the Evidence Act 1977 (Qld) to specifically allow for the admission into evidence of expert evidence in criminal proceedings that relates (wholly or partly) to a charge for a sexual offence.
  8. An urgent, broad based, interdepartmental review into the handling of sexual offences in Queensland that positions the experiences of victim/survivors of sexual violence at the centre, from barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial outcomes. A broad based, interdepartmental review would include the following areas of need as identified by specialist sexual assault support and prevention services, victims/survivors and advocates:
    - Introduction of Guiding Principles within Chapter 32 (Criminal Code Act 1899 (Qld)) offences.
    - Challenging rape myths and misconceptions.
    - The development of a comprehensive Sexual Assault Education Framework and campaign supporting the changes to legislation that specifically includes professionals in the criminal justice system including police officers, magistrates, judges, and tribunal members on issues relating to sexual offences that enhances their understanding of sexual violence and trauma, and improves judicial responses to sexual offences.
    - The introduction of a broader community awareness campaign that informs the community about the legal changes, counters rape myths and victim blaming, and promotes affirmative consent within sexual relationships.
    - Review of police responses in investigating sexual offences.
    - The training and compliance of police officers with interagency guidelines, protocols, and operational procedures in responding to sexual offences requires further attention and monitoring.
    - Specialised training packages on investigating sexual offences have been developed and should be a requisite for all new police officers, and compulsory for officers employed in the

**Sexual Crimes Investigation Unit (SCIU), Child Protection Investigation Units (CPIU), and Criminal Investigations Bureaus (CIB). Engaging specialist sexual assault services to deliver aspects of this training package is highly recommended as it has been demonstrably successful in promoting positive attitudinal and behavioural change in responding to victims/survivors of sexual violence.**

- **Review of the progression and outcomes of prosecutions within the criminal justice system**
- **Improved transparency and accountability of decision making within the Queensland Police Service (QPS) and Office of the Director of Public Prosecutions (ODPP) in relation to all matters that do not proceed to prosecution. An independent review of decisions should be considered.**
- **The introduction of a separate legal representative and advocate for victims of crime during criminal justice proceedings in Queensland to improve justice responses to victims of sexual offences.**
- **The introduction of specialist courts for sexual offences to be trialled in Queensland.**
- **Implementing time restrictions and other processes in order to expedite court proceedings for sexual offences.**

### **Proposed Amendments to Section 348 (Meaning Of Consent)**

Zig Zag strongly believes that the definition of consent in Section 348 of the Criminal Code Act 1899 (Qld) needs to be amended. We believe that Queensland legislation regarding consent should reflect an affirmative consent model as has been observed to operate successfully in other States for many years. Such a model would be more in line with contemporary understandings regarding expectations about sexual relations and the nature and circumstances surrounding rape and sexual assault. An amendment to the Queensland definition of consent in line with Tasmania and Victoria was rejected by the QLRC due to the possibility that it would not allow the context of the relationship between the two parties to be considered in determining whether there was consent. The QLRC's emphasis on the context of a relationship between parties in determining the presence of consent will fail to protect the overwhelming majority of victims who are raped by someone they know, including existing sexual partners.

The proposed provisions within the Bill maintains the onus on the victim to say no or prove that there was no consent through their own actions and words (e.g. fighting back, saying no) rather than considering the actions of the defendant. Zig Zag remain concerned that consent may be established by "remaining silent and doing nothing".<sup>xi</sup> This problematic rule of 'allowing passivity to amount to consent' is also reflected in the current operation of mistake of fact, where the factual issue about whether the accused believed the complainant had freely and voluntarily given consent can be proven by "an omission to act" in some circumstances<sup>xii</sup>. This is particularly concerning as there is no requirement that the defendant take any reasonable and positive steps to ensure consent, and consent itself can be established by remaining silent, thus discounting significant research identifying a common 'freeze response' experienced by many victims/survivors of sexual violence. Studies dating back to 1993 have demonstrated that up to 37 percent of survivors have reported experiencing a 'freeze response' during rape<sup>xiii</sup>.

The proposed provisions within the Bill also maintains the onus on the victim to withdraw consent even when the sexual encounter changes in nature such as becoming violent. The QLRC recommendation puts the onus on the victim to verbally withdraw consent after the sexual encounter has begun consensually. This is particularly problematic when the sexual encounter changes in nature - where a condom is removed without the consent of the other person; or the refusal for payment as previously negotiated in sex work; or where the situation becomes violent e.g. strangulation or a physical assault which may render the victim unable to use their voice. In an affirmative consent model, consent would need to be maintained or reaffirmed at every stage of the activity. This would require that permission was sought when the other party wanted to change the nature of the sexual act.

### **Implementation of an Affirmative Consent Model**

To address these issues surrounding the inadequacy of s348 and s24, Zig Zag strongly recommends that an affirmative consent model, which has been successfully adopted by other common law jurisdictions for many years, be implemented within the Queensland Criminal Code Act 1899 (Qld). The affirmative consent model can be defined and characterised as:

- A knowing, voluntary, and mutual decision by all participants to engage in sexual activity which is maintained or re-affirmed at *every stage* of the activity.
- An acknowledgment that consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- That silence or lack of resistance, of itself, does not demonstrate consent.
- In simple terms, it is a clear and unequivocal 'yes' (through words or actions) and highlights that it is the responsibility of each person involved in the sexual activity to ensure the affirmative consent of the other to engage in the sexual activity.<sup>xiv</sup>

### **Inclusion of 'agreement'**

We submit that consent should be defined as a 'free and voluntary agreement' in Section 348 Queensland Criminal Code Act 1899 (Qld), to clarify that consent requires positive communication for consent to be present. The 2018 proposal by the Canadian Senate<sup>xv</sup> to amend the Canadian *Criminal Code and the Department of Justice Act* through Bill C-51 should also be included in the proposed reformed Section 348 Criminal Code 1899 (Qld) for clarification of when the complainant cannot be found to have consented:

*(b) the complainant is incapable of consenting to the activity in question for any reason, including, but not limited to, the fact that they are:*

*(i) unable to understand the nature, circumstances, risks and consequences of the sexual activity in question,*

*(ii) unable to understand that they have the choice to engage in the sexual activity in question or not, or*

*(iii) unable to affirmatively express agreement to the sexual activity in question by words or by active conduct<sup>xvi</sup>*

### **Inclusion of list of examples where consent is not present**

Zig Zag propose that to provide further clarity and a comprehensive definition, a list of non-exhaustive examples of where consent is not present should be included. The kinds of examples we recommend are already found in the Queensland Criminal Code Act 1899 (Qld) and Criminal Code 1924 (Tas). This list of examples could be structured in a similar manner to the examples identified in Section 8(5) of the Domestic and Family Violence Protection Act 2012 (Qld).

*A person does not freely and voluntarily agree to an act if the person –*

*(a) does not say or do anything to communicate consent; or*

*(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or*

*(c) agrees or submits because of a threat of any kind against him or her or against another person; or*

*(d) agrees or submits because of intimidation; or*

*(e) agrees or submits because he or she or another person is unlawfully detained; or*

*(f) agrees or submits because he or she is overborne by the nature or position of another person; or*

*(g) agrees or submits because of the fraud of the accused about the nature or purpose of the act, or the accused's identity; or*

*(h) is asleep, unconscious, or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.*

### **Stealth and contraceptive sabotage**

Zig Zag also submit as considered on page 30 of the QLRC Consultation Paper that an example (or subsection) should be included in Section 348 Criminal Code Act 1899 (Qld) identifying that a *person does not freely agree to an act where the other person fails to use a condom as agreed or sabotages the condom.*

### **Harm or threats of harm to an animal**

Zig Zag also submit that a *person does not freely agree to an act if the person agrees or submits because of force, or a reasonable fear of force, to an animal*. We note that the Victorian legislation (Section 36(2) Crimes Act 1958 (Vic)) includes this example.

### **Evidence provision**

Drawing on the proposal by the Canadian Senate<sup>xvii</sup> to amend the Canadian *Criminal Code and the Department of Justice Act* through Bill C-51, Zig Zag propose that the following provision should be included as a sub-section in a remodelled Section 348 Queensland Criminal Code Act 1899 (Qld):

*for greater certainty, capacity to consent at the time of the sexual activity that forms the subject-matter of the charge cannot be inferred from evidence on capacity to consent at the time of another sexual activity.*<sup>xviii</sup>

### **Withdrawal of consent**

Zig Zag strongly recommend that an express provision providing that reasonable actions are taken to ensure that consent is obtained, that consent must be *continuous* and consent can be *withdrawn at any time* should also be included as a sub-section of the proposed Section 348 Criminal Code Act 1899 (Qld). The current provisions within the Bill places the onus on the victim to withdraw consent by words or actions even if the nature of the sexual act changes for example: the removal of a condom, or the refusal for payment as previously negotiated in sex work, or when sexual acts become violent e.g. strangulation or a physical assault which may render the victim unable to use their voice. In an affirmative consent model, consent would need to be maintained or reaffirmed at every stage of the activity. This would require that permission was sought when the other party wanted to change the nature of the sexual act. Provisions relating to the withdrawal of consent would not be unique to Queensland and is already included in South Australian legislation.<sup>xix</sup>

### **Application of consent definition to sexual assault**

Zig Zag propose that it is expressly legislated that the definition of consent found in the proposed Section 348 is directly applicable to Section 352 (sexual assaults) and all other Chapter 32 offences.

### **Grievous bodily harm**

Zig Zag also propose that a separate provision for when a person suffers grievous bodily harm as a result of or in connection with a Chapter 32 offence should be included. The Section 2A (3) of the Criminal Code Act 1924 (Tas) provides a model that we believe addresses the concern appropriately:

*(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX [i.e., Chapter 32 Criminal Code Act 1899 (Qld)], suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.*<sup>xx</sup>

## **Proposed Amendment to Include a New Discrete Defence of Mistake of Fact for Rape and Sexual Assault and Other Chapter 32 Offences**

### ***Separate defence for mistake of fact in relation to rape and sexual assault and other Chapter 32 (Criminal Code Act 1899 (Qld)) offences***

Zig Zag propose and support the introduction of a separate and unique mistake of fact provision for Chapter 32 offences. This change will address problems highlighted previously in relation to how the current onus is unsuitable in relations to Chapter 32 offences. Additionally, it will further strengthen the presence of the affirmative consent model in Queensland's legislation. Section 14A in the *Criminal Code Act 1924* (Tas) (mistake as to consent in certain sexual offences) is the recommended form for such a provision.

#### **14A. Mistake as to consent in certain sexual offences**

*(1) In proceedings for an offence against section 124, 125B, 127 or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –*

*(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or*

*(b) was reckless as to whether or not the complainant consented; or*

*(c) 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.*

### ***Introduction of reverse onus of proof***

Zig Zag also propose that the onus of proof should be reversed, for mistake of fact relating to rape, sexual assault and other chapter 32 offences, meaning that the defendant must prove that they held an honest and reasonable, but mistaken belief that the complainant was consenting. Mistake of fact currently requires the prosecution to disprove, beyond reasonable doubt, that the mistaken belief held by the defendant was honest and reasonable.<sup>xxi</sup> As heretofore mentioned, the defendant is in a better position to prove they held an honest and reasonable, but mistaken, belief for similar reasons outlined in the explanatory notes amending provocation (Section 304).<sup>xxii</sup> Further, by reversing the onus of proof, the perpetuation of stereotypes, myths, and biases regarding sexual offences may be lessened, leading to fairer and more just outcomes for rape and sexual assault survivors.

The QLRC recommendation and provisions within the Bill fall significantly short of requiring defendants to show they took positive steps to ascertain consent - a requirement which currently exists in Tasmania. The QLRC recommendation does not place any positive obligation on a person to 'take reasonable steps' to ascertain consent. It is simply open to the jury to consider the steps that were taken. The recommendation allows defendants to point to anything they did or said to determine consent, no matter how inadequate, to bolster their mistake of fact argument. Further, a failure to take steps to ensure the other person(s) is consenting does not prevent reliance on the excuse of mistake of fact (i.e. it does not rule out the defendant arguing that the belief was honest and reasonable). We propose that the mistaken belief of consent is not reasonable if the defendant did not take 'positive and reasonable steps' by words and actions in the circumstances known to them at the time of the act to ascertain that the other person is giving consent to the act.

Zig Zag strongly supports the introduction of a new form of the mistake of fact defence for application to Chapter 32 offences, including the reverse onus of proof and the requirements for the defendant to show they took 'positive and reasonable steps' to ascertain consent, were not reckless when ascertaining consent, and were not making the mistaken belief based on self-induced intoxication.

### ***Objective test for what constitutes reasonable in determining whether there was an honest and reasonable belief of consent***

Zig Zag are concerned about the current interpretation of 'reasonable' in the context of the mistake of fact defence under Section 24 Criminal Code Act 1899 (Qld) . Currently what is 'reasonable' is not a purely objective assessment in the sense of what a 'theoretical ordinary, reasonable person would or should' have done.<sup>xxiii</sup> Rather, the personal circumstances of the defendant must be considered, with the understanding that the defendant's belief cannot be assessed separately from the relevant information on which it was based.<sup>xxiv</sup> This interpretation may enable unjust outcomes for rape and sexual assault survivors, and contribute to the perpetuation of misconceptions about rape and sexual assault.

A purely objective approach may be considered more appropriate for a mistake of fact defence developed specifically for operation with Chapter 32 Criminal Code Act 1899 (Qld) offences. It is noted, however, that a theoretically objective test may also have unintended consequences on particularly vulnerable classes of defendants such as those with intellectual or learning disabilities. This concern may be mitigated by introducing a new form of the mistake of fact defence, as suggested above, for application to Chapter 32 offences, including the reverse onus of proof and the requirements for the defendant to show they took 'reasonable steps' to ascertain consent, were not reckless when ascertaining consent, and were not making the mistaken belief based on self-induced intoxication.

## **Proposed Amendments to the Evidence Act 1977 (Qld) to Specifically Allow the Admission into Evidence of Expert Evidence in Sexual Offences**

Zig Zag supports amendments to the Evidence Act 1977 (Qld) to specifically allow for the admission into evidence of expert evidence in sexual offences. Neither the Criminal Code Act 1899 (Qld) nor the Evidence Act 1977 (Qld) currently specifically allow for this.

Expert evidence would provide for relevant, contemporary social scientific research to be made available to enable jurors to be more informed and to ensure their decision making is based on accurate information about the nature and dynamics of sexual offences and factors that may affect the behaviour of people who have experienced sexual violence. Zig Zag supports the legislation provided for the admission of expert evidence in sexual offences in Victoria under Section 388 of the Criminal Procedure Act 2009 (Vic). Specific consideration and attention must be given to reduce the likelihood of unforeseen consequences of any change in legislation in this area as we remain concerned that this could invite inappropriate witnesses by the defence that could serve to reinforce negative myths and misconceptions relating to sexual violence.

### **Case Scenario 1**

X was a young woman aged 13 years who reported a sexual assault involving an unknown male that she had met in a public place. X was a vulnerable young woman, having been in foster care for most of her life. X had been a victim of other sexual crimes and had previously been through criminal justice proceedings relating to some of these offences.

X reported that this offence occurred after she had met an adult male at a shopping center and they had talked for some time. X reported that he then invited her to come and hang out at his place and she agreed to go with him. X reported that at his house he gave her alcoholic beverages. X reported that they 'made out' (kissed) for a while but things progressed further and X reported that he held her down and raped her. X was very clear that she did not want to have sex with this adult male. X was also underage and so could not provide legal consent to participate in sexual acts.

In the subsequent police investigation and criminal proceedings, it was suggested that X had lied about her age; however X reports that she had been honest with the adult male in telling him her true age. It was also suggested that, as X had made prior sexual assault complaints, this specific complaint had been fabricated. X's behavior in going to an unknown male's house was also questioned.

Zig Zag provided significant advocacy and specialist information and advice during the initial reporting to the police and with the ODPP in subsequent criminal proceedings to enhance their professional understanding of the vulnerability and heightened risk factors that X experienced, and to identify the power differential and grooming tactics used by this adult male in soliciting an underage person for sexual activities. If expert evidence had been admissible in Court it would have addressed a range of misconceptions relating to the nature, dynamics, and impact of sexual assault against a child or young person.

As demonstrated in the above case scenario, expert evidence can provide relevant contextual information regarding the nature and dynamics of sexual offences where there is a significant power differential relating to the gender and age of the complainant and defendant; the social, psychological, cultural, and developmental factors that may impact on a complainant's behavior; and factors relating to increased risk of re-victimisation for children and young people who have experienced childhood sexual assault or been exposed to domestic and family violence.

## **Other Matters Requiring a Broad Based Interdepartmental Review into the Handling of Sexual Offences in Queensland**

The Queensland Government have not undertaken a substantive review into the handling of sexual offences within the criminal justice system since the Crime and Misconduct Commission's Report: Seeking Justice: An Inquiry into How Sexual Offences Are Handled by the Criminal Justice System (June 2003).

Zig Zag is among many stakeholders now calling for an urgent, broad based, interdepartmental review into the handling of sexual offences in Queensland that positions the experiences of victim/survivors of sexual violence at the centre, from barriers to reporting, the process of reporting to police, attrition through the criminal justice system through to trial outcomes.

Areas for inclusion within a broader review, include but not limited to:

1. Introduction of Guiding Principles within Chapter 32 (Criminal Code Act 1899 (Qld)) offences
2. Development of a sexual assault education framework
3. Challenging rape myths and misconceptions
4. Review of police responses in investigating sexual offences
5. Review of the progression and outcomes of prosecutions within the criminal justice system
6. Introduction of a separate legal representative for victims of sexual offences
7. Introduction of specialist courts for sexual offences to be trialled in Queensland
8. Implementing time restrictions and other processes in order to expedite court proceedings for sexual offences

### ***Guiding principles within Chapter 32 (Criminal Code Act 1899 (Qld)) offences***

Zig Zag recommend that Chapter 32 should include guiding principles to assist in interpreting the legislation; in providing a contextual framework for legislative responses to sexual offences; and that actively discourages the use of rape myths, misconceptions, and stereotypes within criminal justice proceedings. A good example of guiding principles can be found at page 71 of the QLRC Consultation Paper. Specifically the Consultation Paper refers to the guidelines suggested by reviews undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC) in their Joint Report on Family Violence in 2010, and the Victorian Law Reform Commission. Zig Zag supports this approach and strongly advocates for the inclusion of guiding principles at the beginning of Chapter 32.

### ***Challenging Rape Myths and Misconceptions***

Rape myths can be defined as:

*pervasive stereotypes that somehow shift the blame for the incident onto the complainant because of her actions such as drinking, voluntarily going somewhere alone with a man not well known to her, or being dressed or acting provocatively as in some way contributing to or even causing the offender's behaviour.*<sup>xxv</sup>

The most recent national survey of community attitudes towards violence against women was cited in the QLRC Report and found the prevalence of various misconceptions about sexual assault offending<sup>xxvi</sup>, including:

- 42% Australians agreed that it is 'common for sexual assault accusations to be used as a way of getting back at men'.<sup>xxvii</sup>
- 31% Australians agreed that 'a lot of the times women who say they were raped had led the man on then had regrets'.<sup>xxviii</sup>
- 33% Australians are unaware that a woman is more likely to be sexually assaulted by someone she knows, than by a stranger<sup>xxix</sup>.

Importantly, these statistics from the same national survey were not mentioned in the QLRC Report:

- 16% Australians agreed that many of the allegations of sexual assault made by women are false.<sup>xxx</sup>
- 11% Australians 'thought it likely that a woman who waited weeks or months to report sexual assault was lying'.<sup>xxxi</sup>
- 7% Australians agreed that if 'a woman doesn't physically resist - even if protesting verbally - then it isn't really rape'.<sup>xxxii</sup>
- 33% Australians believe that 'rape results from men being unable to control their need for sex.'
- 28% Australians believe that, when sexually aroused, 'men may be unaware a woman does not want to have sex.'

Rape myths and misconceptions are pervasive and persistent within our society, and also frequently observed within the QPS, professionals and juror members within the criminal justice system, negatively affecting outcomes relating to the investigation and/or prosecution of sexual offences. For example, victims/survivors of

sexual violence frequently report to Zig Zag that they have been actively discouraged by police officers from proceeding with a formal complaint. Negative attitudinal responses by police officers that minimise the crime and/or hold the victim at fault for or as in some way contributing to the offence being committed against them have been frequently observed in cases of recent and historic sexual offences. Common misconceptions held by police officers in relation to sexual offences include instances where the victim was out at night; had been drinking alcohol prior to the offence; and/or where the offender was known to the victim, when there were no physical injuries sustained during the sexual assault, or when there was no evidence of use of a weapon.

### **Case Scenario 2**

W was a young woman aged 16 years who reported being raped by an 18-year-old male acquaintance at a party at a friend's house. W said she had been drinking and blacked out. She said she has never blacked out before and had wondered whether her drink had been spiked.

W said she had been told by friends later that she had been 'flirting' with the perpetrator but she didn't remember this. W said she woke up later at the house where the party was being held with injuries to her vagina and bruises on her legs and arm. W said the Police had attended the party for noise complaints and she had to leave the house with her friend. W said she hadn't wanted to report immediately to the Police as she didn't clearly remember what had happened and was still in shock.

Two days later her friend encouraged her to make a report to the Police. She was offered a forensic medical examination and said she still had significant physical injuries; however she stated that she did not feel comfortable going through the forensic medical examination process. W reported that the police had advised her that there was a risk it would be 'her word against his' and that the legal process may be long and drawn out. W stated that she preferred to make an anonymous report using the alternative reporting option as she wanted to avoid a lengthy legal process. W stated that her hopes in reporting to the Police were that the perpetrator does not hurt someone else. W continues to access Zig Zag for specialist sexual assault counselling and support.

### **Development of a sexual assault education framework**

Zig Zag strongly supports the development of a comprehensive Sexual Assault Education Framework and campaign supporting the changes to legislation that specifically includes professionals in the criminal justice system including police officers, magistrates, judges, tribunal members, judicial officers, and other relevant service providers on issues relating to sexual offences that enhances their understanding of sexual violence and trauma, and improves judicial responses to sexual offences. Responding to criminal matters involving sexual violence is a specialist area requiring significant professional competencies to be met. The judiciary is unlikely to access specialist education specific to sexual offences through university education alone.

### **Review of police responses in investigating sexual offences**

Queensland has well developed interagency guidelines for responding to people who have experienced sexual assault<sup>xxxiii</sup>. The QPS are guided by current legislation relating to sexual offences as defined within the Criminal Code Act 1899 (Qld) which is why substantive changes are needed to address issues relating to the definition of consent and the mistake of fact defence. The QLRC Report included research relating to trial decisions however Zig Zag believe that the scope of the review was too narrow and excluded research regarding how deficiencies in the law impact whether police decide to pursue and investigation, which in turn deters victims / survivors of sexual violence from reporting.

Zig Zag would like to address some of the continuing concerns observed at the initial stage of reporting sexual offences as experienced by so many victims of crime. The ABS Personal Safety Survey found that 87% of sexual assaults were never reported to the police<sup>xxxiv</sup>. As sexual offences are largely unreported, it is of significant concern to Zig Zag that the majority of reported crimes of sexual violence are not advancing through the criminal justice system and the attrition rate remains high for these types of offences. *In Queensland, reported sexual assault outcomes from 2010-2018 indicate that 72% of investigations resulted in no further legal action or remained unresolved*<sup>xxxv</sup>. Of the limited number of investigations that proceed with legal action we continue to observe high rates of attrition within the criminal justice system. For example, the Queensland

Office for the Director of Public Prosecutions (ODPP) reported a 23.2% decrease in adult sexual offences committed for trial, and a 44.3% reduction in child sexual offences being committed for trial in Queensland in 2012-2013 with no explanation<sup>xxxvi</sup>.

For those who do choose to report the sexual offences we have observed that the current legislation is among many systemic issues within the QPS that actively discourage victims/survivors from continuing with a formal complaint as highlighted in the following case scenario:

### **Case Scenario 3**

Y was a young woman aged 17 years when she reported a sexual assault involving an adult male whom she had met online. Y was living in rural Queensland at the time with her family and was attending school.

Y was a vulnerable young woman who had been known to Child Protection Services. Y was living with a diagnosis of Autism Spectrum Disorder and mental illness.

Y reported that the offence occurred when she went to the male's house for dinner, shortly after meeting him in person for the first time. Y was plied with alcohol and cannabis. Y became intoxicated and was pushed into a bedroom where she was restrained and sexual assaulted more than once. Y was threatened with a knife by the male, who threatened to kill her family if she said anything. Y was released from the man's home several days later and went to school where she reported the sexual assault to the guidance officer that same day. The guidance officer reported to Child Protection Services who notified the Queensland Police Service.

Y said that the Queensland Police Service came to her school and interviewed her approximately two weeks after the assault. No forensic examination or counselling was offered to Y by the Queensland Police Service. Y was interviewed with her mother present even though she had not consented to this. Y reported that two police officers recorded the interview and took notes.

During the interview Y reported that the police officers suggested to her that:

- Y was in a relationship with the man and this meant it was irrelevant whether she had consented to sex or not;
- Y had consented to sexual intercourse because she had consented to the man kissing her and touching her through her clothing;
- Y was not a credible witness because she had not contacted the police at the time the assaults were happening;
- Y was reporting out of regret that "her first sexual experience had not been a positive one"; and
- Y was not a credible witness because she had learnt martial arts and could have fought the man off, and this would mean she would be discredited in court as a witness.

Y reported that she was told by the police officers that she would not be believed in court and it was no use proceeding with further legal action. As far as Y is aware the investigation did not proceed any further. Y learnt a number of years later that her complaint had been classified as 'unsubstantiated'.

It is clear to Zig Zag that many responses by officers of the QPS have not met the standards set out in the Operational Procedures Manual (OPM) or the fundamental principles of justice outlined in the *Criminal Offences Victim Act 1995*. Some of the common concerns that we observe for victims/survivors of sexual violence when approaching QPS in relation to sexual offences include:

- The OPM advises Police officers to treat every complaint as genuine and to ensure the provision of adequate information to the complainant about procedures in how to make a formal complaint. Victims/survivors of sexual violence frequently report that they have been actively discouraged by police officers from proceeding with a formal complaint. Negative attitudinal responses by police officers that minimise the crime and/or hold the victim at fault for or as in some way contributing to the offence being committed against them have been frequently observed in cases of recent and historic sexual offences. Common and persistent misconceptions held by police officers in relation to sexual

offences include instances where the victim was out at night; had been drinking alcohol prior to the offence; and/or where the offender was known to the victim, when there was no physical injuries sustained during the sexual assault, or where there was no evidence of use of a weapon.

- Inadequacy of investigations at the initial stage have been observed where victims/survivors have not been advised by police officers of the option to undertake a forensic examination nor has other forensic evidence been collected at the scene of the crime. Insufficient gathering of supporting evidence, such as the refusal to contact potential witnesses, has also been observed.
- Limited information and support provided to victims/survivors in relation to options for accessing specialist sexual assault counselling and support. Specialist sexual assault counselling soon after a sexual assault is known to decrease the long term impacts and also the likelihood of young women re-entering health care services for mental health-related issues. Zig Zag acknowledges some improvements in this area since the introduction of the QPS Community Referral System in Queensland.
- A lack of transparency of decision making within the QPS in relation to sexual assault complaints that do not proceed through to the taking of a formal statement from the victim, or the undertaking of any investigation into initial complaints or to eventual prosecution. Significantly, police data shows that 40 percent of sexual assault reports in Queensland were 'unfounded' or withdrawn in 2018<sup>xxxvii</sup>

### ***Review of the progression and outcomes of prosecutions within the criminal justice system***

As sexual offences are largely unreported, it is of significant concern to Zig Zag that the majority of reported crimes of sexual violence are not advancing through the criminal justice system and the attrition rate remains high for these types of offences. Zig Zag also observe a lack of transparency in decision making within the ODPP in relation to matters that do not proceed to trial. For example, the Queensland Office for the Director of Public Prosecutions (ODPP) reported a 23.2% decrease in adult sexual offences committed for trial, and a 44.3% reduction in child sexual offences being committed for trial in Queensland in 2012-2013 without explanation<sup>xxxviii</sup>. This lack of transparency in decision making has been previously identified and subject to review in Queensland<sup>xxxix</sup>. Victims/survivors often report a lack of understanding as to why their complaint has not progressed. This lack of transparency in decision making unfortunately reinforces a common belief held by young women victims/survivors of sexual violence that “no-one believes them” [in relation to the offences] and/or “it is not worth reporting as nothing happens to the offender anyway” [no justice or perpetrator accountability and continuing sense of perpetrator impunity].

### ***Introduction of a separate legal representative for victims of sexual offences***

Victims/survivors often report to Zig Zag that they do not know what is happening with their complaint at each stage, as it advances through Court, nor have they felt appropriately prepared by the ODPP in their role as a 'witness' in the proceedings. Zig Zag has also observed that many victims of crime have not been appropriately advised of essential support services available including: specialist sexual assault support services, financial assistance/Victims Assist Queensland, court support services, and the Victims Register.

As a 'witness' in proceedings, victims of crime often report that they have limited control, choice, or active participation in criminal justice proceedings. This often negatively reiterates the dynamics of violence where victims/survivors have experienced a profound loss of control and power. Victims of crime do not currently have separate legal support and representation during criminal justice proceedings. In order to effectively minimise re-traumatisation and improve justice responses to victims of sexual offences, a separate legal representative and advocate is recommended; this has been successfully introduced in Canada and Ireland<sup>xl</sup>. It is important that this role is independent of the ODPP.

### ***The introduction of specialist courts for sexual offences to be trialled in Queensland***

Zig Zag recognises that there may be limited knowledge, understanding, and recognition of the impact of trauma as experienced by young women victims/survivors of sexual violence within criminal justice proceedings. Trauma informed practice is essential to ensure appropriate support is made available for victims of crime throughout criminal justice proceedings. There is substantial evidence relating to the experience of secondary victimisation and additional harm caused to victims of crime as a direct result of inappropriate service/system responses and practices. Such re-victimisation is likely to exacerbate existing psychological

distress and delay recovery from the initial trauma. It is important to note that not all victims/survivors have had a negative experience of the criminal justice system and there continues to be significant developments in different jurisdictions aimed at improving responses to victims of crime, recognising their justice needs, and ensuring best practice in identifying and responding to trauma. The use of specialised prosecution units and Courts to respond to sexual offences has been successfully introduced and have operated in Victoria since 2007. An evaluation of this model has shown improved responses and outcomes for victims/survivors before and during court proceedings<sup>xii</sup>. Zig Zag strongly recommends the introduction of specialist courts for sexual offences in Queensland be trialled.

***Implementing time restrictions and other processes in order to expedite court proceedings for sexual offences***

It is common for matters relating to sexual offences to take 1-4 years to proceed through the criminal justice system, and there are often lengthy delays and adjournments of court proceedings. At times this can be observed as deliberate defence tactics aimed at delaying trial proceedings. In some jurisdictions there has been success in implementing time restrictions and other processes in order to expedite court proceedings to address some of the needs of victims whilst balancing the due process rights of the accused<sup>xiii</sup>. Zig Zag supports the implementation of time restrictions and other processes in order to expedite proceedings for sexual offences to reduce the traumatic impact of lengthy proceedings on victims of violent crime.

Zig Zag acknowledges that this written submission has been developed within significant time constraints and invites opportunities to provide further comment to any recommendations made herein. For further information or commentary please contact Stephanie Anne, Manager, Zig Zag Young Women's Resource Centre Inc on telephone: [REDACTED]

Yours sincerely,



**Stephanie Anne**  
Manager  
Zig Zag Young Women's Resource Centre Inc

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