Women's
Legal Service Qld

25th September 2020

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

1. Introduction

The Women's Legal Service Queensland (WLSQ) is a specialist community legal centre, established in 1984, that provides free legal and social work services and support to Queensland women. We assist women in the areas of family law, domestic violence, child protection and sexual violence. WLS provides State-wide assistance through our legal Domestic Violence Helpline, as well as providing a designated Rural, Regional and Remote telephone line to increase women's access to our service in non-metropolitan regions. In the last financial year, we assisted 16 000 women. We provide the sexual assault counselling privilege service (Counselling Notes Protect "CNP") in partnership with Legal Aid QLD, for upholding a victim's rights to resist their counselling records being made available in a criminal and domestic violence proceedings.

We undertake outreach work at the Brisbane Women's Correctional Centre and at Family Relationship Centres in Brisbane. We also conduct domestic violence duty lawyer services at three Courts: the Holland Park, Caboolture and Ipswich Magistrates Court. Our specialist domestic violence units in Brisbane, Southport and Caboolture provide intensive casework and court representation for our most vulnerable clients. We conduct Health Justice Partnerships with a domestic violence solicitor visiting the Gold Coast, Logan, Redlands, RBWH, PA and QEII hospitals on a weekly basis. This same Health Justice Partnership provides a legal advice and information for women who are experiencing domestic violence in Caboolture and Redcliffe hospitals. We undertake community legal education, including to rural and regional Queensland and regularly participate in legal and policy reform issues. We also have a Financial Abuse Prevention Unit that assist clients with debt issues arising because of financial abuse and/or domestic violence.

Thankyou for the opportunity to provide this submission which is legislating the recommendations of the Queensland Law Reform Commissions in their Mistake of Fact and Consent law review.

2. Overview

Sexual violence is a violent and insidious crime that is a clear assault and takes away a woman's sense of safety, identity, control and privacy. It has severe and deleterious impacts on victims physical and mental health that can last a lifetime. Unfortunately, it is also a crime with little to no accountability as the statistics below make abundantly clear.

The QLRC recommendations, for all intents and purposes maintain the status quo and will do little if anything to improve the safety of women, encourage women to report incidents of rape and sexual violence when they occur, or the accountability of offenders. This, in our view, is not consistent with the expectation of the community (refer for example, to the broad community support for the #MeToo Movement). We believe the government has an opportunity to align the law with those expectations and deliver clarity and justice for all, in relation to matters of consent but it will not be through this bill which will achieve little.

This bill as is, is a missed opportunity to draft legislation in a way that provides a clear and unequivocal benchmark for the whole community about acceptable norms for the community to expect in consensual sexual relationships.

3. **What do the statistics tell us?**

Of interest, the QLRC did not undertake a current statistical analysis of sexual violence in Queensland. We have done our best on the statistics available to provide as clear a picture as possible to inform the committee.

On the reading of the latest available statistics in Queensland, approximately less than 5 per cent of sexual violence matters reported to the police end in conviction or a guilty plea. This does not even consider that most sexual assaults are not reported to the police.

Research of victimisation rates tell us only 14% of sexual assaults are ever reported (Daly and Bahours, 2010).

We understand approximately 6,500 charges were made by QPS in relation to rape, attempted rape and other sexual offences in the latest statistical analysis available 2016/17. https://www.police.qld.gov.au/sites/default/files/2019-01/AnnualStatisticalReview_2016-17.pdf.

We understand approximately 2,100 rape and sexual assault matters were received to the ODPP in 2018/19 https://www.publications.qld.gov.au/dataset/c581f931-288f-4dd9-86f3-df062feba0a6/resource/067eb193-69e7-4b3f-8c73-7a5bbd2b3974/fs_download/odpp-annual-report-2018-19.pdf

Drawing on these numbers we can hypothesise approximately $^{2}/_{3}$ attrition rate between being charged by the police to being received by the ODPP.

Given established rates of reporting, and victimisation rates, this approximates to about 46 500 instances of sexual violence occurring each year in Queensland.

Across 2018, 546 matters were finalised with 308 sexual violence matters recorded as resulting in a conviction or guilty plea (please see footnote 17 of the Commission report). This is a concerningly low conviction rate.

Research has also shown that conviction rates have significantly reduced over time. In Australia the average conviction rate was 17% (1970 – 1989) to 12.5% (1990 – 2005) (Daly and Bahours, 2010).

Evidence of conviction rates **were not** considered by the Commission.

Clearly something is not working. In our view, this legislation fails to acknowledge or respond to the concern that the current criminal justice system is unresponsive to victim/survivors.

4. A failure to adequately address domestic violence

According to the Australian Bureau of Statistics reported crime date 33% of sexual assaults are family and domestic violence related. (https://www.abs.gov.au/ausstats/abs@.nsf/mf/4510.0?OpenDocument)

This is an extremely under reported crime however the QLRC and this proposed legislation proposes no change.

At paragraph 6.99 of its report, the Commission itself says that sexual offences involving ongoing domestic violence and that involving a cumulative impact *appear to have a varied treatment in Queensland*. That is, there is an inconsistent approach in the case law about whether a history of the domestic violence can be introduced to assist the jury in their deliberations and to help them understand more fully issues of consent where there is a history of domestic violence.

The Commission then goes onto analyse this varied approach in the case law but concludes that amendment is not necessary (paragraph 6.224) as the current law can permit the reception of evidence of domestic violence in a relationship where it is relevant.

The Commission does not address the concern that it itself concluded, that there is variability about the application of the law. There is clearly inconsistency in the court's responses and approaches to this issue on the Commission's own evidence. This is a concern that is highly relevant and requires intervention to ensure clarity and consistency of the law's application.

Consistency could be achieved by making amendments to how domestic violence evidence should be addressed in cases of intimate partner sexual violence. This failure is extremely concerning, especially given the importance to the Queensland community of improving responses to domestic violence.

There has also been an obvious failure to address the inconsistency of Section 132 B of the Evidence Act (that specifically excludes relevant domestic violence evidence from being introduced into rape and sexual violence matters).

5. A failure to critique other jurisdictions where a changed approach is well settled

We support the Tasmanian model (which includes positive consent and reasonable steps) which has been in place since 2004 with no controversy. The Tasmanian model was itself based on the Canadian model that introduced the need for "reasonable steps" (associated with the operation of Mistake of Fact) in 1992 again with no controversy or evidence of 'unjust outcomes'.

We note the QLRC summarises the Canadian and Tasmanian laws but does examine their approaches, nor therefore undertake any critical analysis of the evidence that exists in these jurisdictions to support a changed approach to consent.

6. Laws should be understandable and accessible

The position of WLSQ is that all laws should be written in a manner that ensures they can be easily communicated and understood by people with no legal training or qualification and supports a number of recommendations that would provide clarity "on the face of the legislation". The Queensland Criminal Code belongs to the people of Queensland and not to the legal community. The law should be clear on its face and not left to case law, which is only accessible to the legal profession and not the community at large.

This approach is especially important for the law on consent as the laws have an educative impact and should provide very clear guidance about acceptable and unacceptable behaviour, especially for young people who are about to engage in their first sexual relationships.

Similarly, to New South Wales, WLSQ supports the Queensland law including "reckless disregard" in the definition as negating consent. At paragraph 71 of the QLRC report, the Commission advises its explicit inclusion might cause complications, without expanding on this or providing examples of what complications might arise and despite it being a settled part of NSW law for some time.

Similarly, to Victoria, NSW, Tasmania, and South Australia we support the inclusion of the word 'agreement' in the definition of consent in Queensland.

Both 'reckless disregard' and 'agreement' operate with little concern or controversy in other jurisdictions and for the purposes of consistency and clarity should be included in Queensland law. The argument that the current law (through case law) is flexible enough to incorporate these concepts so no change is required. With respect, if these principles are already settled law in Queensland, then it is even more appropriate to make the law as clear and accessible as possible, and so these changes should be included on the face of the legislation.

7. Where there are injuries

WLSQ notes that the proposed amendments have failed to address circumstances where the victim complainant has also suffered injuries. WLSQ argues that circumstances of injuries (arguable about what level of injury is required) to the victim should automatically negate consent. Such a position would remove the accused's ability to rely on consent, or to the mistaken belief as to consent, where the victim has been injured. We note that such an amendment is in keeping with criminalising behaviour of an accused who is violent during sex, where the contact may have originally began with consent, but a victim complainant is too scared to do anything that might anger an already violent accused.

8. Analysis of Mistake of Fact

Our major concern about Mistake of Fact is that allows the undermining of consent in Queensland as free and voluntary and allows defendants with outdated, misogynist, and sexist views about women to be legitimised and endorsed by the legal system.

The QLRC report has provided many tables and figures based upon the 135 trials, 87 (64%) resulted in discharge and 48 (36%) resulted in conviction. The statistically significant result that was found by the report is that the existence of mistake of fact is a feature in an extremely low conviction rate and in fact the lowering of conviction rates. At Table 6 of the QLRC reports a 35% conviction rate where mistake of fact is left to the jury, and 17%

conviction rate where mistake of fact not left to jury. These low convictions rates are extremely concerning and, in fact provide evidence of the concerns that WLSQ has about the excuse.

9. The Current Bill

Definition of Consent

The community and law enforcement relies upon the law to make clear and explicit the benchmark upon which consensual sexual behaviour is to be assessed.

The QLRC's proposed amendment of section 348 states:

(3) *A person is not to be taken to give consent to an act only because the person does not, before at the time the act is done, say or do anything to communicate that the person does not consent to the act.*

WLSQ advocates for a definition of consent which requires and reflects positive "agreement" between parties engaged in the sexual activity. The above definition of consent as proposed by the QLRC is inadequate and should be modified to reflect an affirmative model of consent, that is: <u>if a person does not do or say anything to indicate consent they do not consent</u>.

Examples of an affirmative model of consent can be found in the Tasmanian Criminal Code:
S2A(2)(a) - no consent where a person does not say or do anything to communicate consent.

And the Victorian Crimes Act
S36(2)(1) - no consent where a person does not say or do anything to communicate consent.
And in Canada

S273.2 Mistaken belief as to consent, does not apply where:

(c) no evidence the complainant's voluntary agreement was affirmatively expressed by words or actively expressed by conduct.

Unfortunately, QLRC's proposed definition of consent (and adopted by this bill) literally means that "if a person does not say or do anything to indicate consent, the finder of fact can infer that they may not be consenting".

This approach ignores the overwhelming neurological and sociological evidence which highlights the relationship between an individual's reaction to fear and the involuntary, automatic "freeze" response. Consequently, the amendment articulates and underscores an accused's existing capacity to rely upon a victim complainants "freeze" response to danger and threat as being evidence of consent.

This proposed amendment therefore re-enforces and legitimises the dangerous stereotype that women indicate consent to sexual activity in mysterious, subtle, and ultimately passive ways.

This iteration of the existing "rape myths and misconceptions" which influence and inform the community, juries, law enforcement and the criminal justice response to allegations of rape and sexual violence by victim complainants.

Withdrawal of Consent

A further proposed amendment to the definition of consent by the QLRC is at section 348 and is as follows:

(4) *If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.*

We oppose this amendment as it can make matters worse for complainants. We believe that if the definition of consent reflected an affirmative model of consent, then passivity and lack of resistance by a victim to a variation or change to the sexual act could also not amount to consent.

This proposed amendment **places the onus of withdrawing consent on the victim/ complainant**. Again, instead of requiring the accused to turn their mind and take 'reasonable steps' to ascertain consent to the new, novel sexual act within the course of sexual engagement, the finder of fact is required to assess the behaviour of the victim complainant – that is; what did she say and do to withdraw consent.

This proposed inclusion of the definition of consent will move the test even further away from an affirmative model of consent, because instead of requiring both parties to say or do something to indicate consent, the test requires the victim in a potentially compromised circumstances, to do or say something to withdraw consent and again codifies the involuntary freeze response to threat as "consent". This recommendation is a potentially dangerous and wholly unsatisfactory outcome of the QLRC's report into the QLD criminal justice systems responses to sexual violence.

Mistake of fact in relation to Consent

Proposed amendment

> *348A (2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.*

The application of the mistake of fact excuse should not be available, or left to the jury, where there is no evidence of reasonable steps taken by the Defendant to determine the victim complainant was consenting. The proposed amendments do not alter the existing operation of the excuse of mistake of fact in any way, and making the consideration of the defendant's behaviour discretionary falls far short of a legal requirement upon a party engaging in consensual sex to take positive, reasonable steps to ascertain consent.

As the law currently operates, whether the defendant gives evidence or not, they can rely on 'mistake of fact' if there is evidence which raises for consideration the inference that the defendant believed that the complainant had a particular state of mind consisting of a willingness to engage in the act of sex, and also believed that the complainant had freely and voluntarily given consent to the act. The existing QLD law focuses on the behaviour and words of the complainant, in fact it is on the version of the complainant's evidence most

favourable to the defendant that an assessment of whether the excuse of mistake of fact, can be relied upon or left to the jury.

The recommended amendments maintain the legal status quo of defendants being able to rely upon a complainant's behaviour to argue their mistaken belief for example: she sent me naked photo's, she previously consented, I had sex with her when she was asleep in the past, she invited me in for a drink; she agreed to get the car with me and got in the back seat – these are scenarios still capable of giving rise to a reasonable but honest mistaken belief as to consent. Furthermore, the QLRC proposal still allows for the accused to be 'reckless' as to whether the victim complainant was consenting.

Concerningly, defining this discretionary test of the defendant's behaviour as "anything" they said or did to determine consent, as opposed to 'reasonable steps' to determine consent, allows for an defendant to rely upon mistake of fact no matter how inadequate or cursory their attempts to determine consent might actually have been. There needs to be a requirement that the mistake of fact excuse can only be relied upon where the defendant took "reasonable steps" to ascertain whether the other person was giving consent to the act.

At an absolute minimum, WLSQ recommends the following to address the inadequacies of the existing proposed legislative amendments:

<u>Amendment of s348 (Meaning of Consent)</u>
Section 348 –
insert –

(3) A person does not consent to an act if the person does not say or do anything to communicate consent to the act.
(4) A person does not consent to an act having given consent to the act, where the person later withdraws consent to the act taking place or continuing.
(5) If a person, against whom a crime is alleged to have been committed under Chapter 32, and Chapter 22 (other than section 224, 225 or 226), suffers an injury as a result of, or in connection with, such a crime, the injury so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.
(6) Insertion of the words "agreement" into the definition of consent.

<u>Insertion of new s24 (3) Mistake of Fact</u> (*Current recommendation inserts at s348 Meaning of Consent)*

Mistake of Fact

After section 24 (2)
insert

(3) In proceedings for an offence against Chapter 32 and Chapter 22 (other than section 224, 225 or 226), 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.

Thankyou for the opportunity to respond if you have any further queries please do not hesitate to contact me.

Kind Regards,

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