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25 September 2020

Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: [REDACTED]

Dear Chair

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

Thank you for the opportunity to provide a submission to the Committee's consideration of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill).

The Role of the Human Rights Commission

The Queensland Human Rights Commission (QHRC) has functions under the *Anti-Discrimination Act 1991* (ADA) and the *Human Rights Act 2019* (HRA) to promote an understanding and discussion of human rights in Queensland, and to provide information and educative services about human rights.

This submission focuses on the application of the Queensland *Human Rights Act 2019* to the *Criminal Code* amendments in the Bill.¹ The Statement of Compatibility seeks to justify other amendments in the Bill that limit human rights. The QHRC does not provide further comment on those proposals

The HRA provides a framework to balance the rights of people in Queensland with the need to achieve community safety. The criminal law limits and promotes several rights, most particularly the rights of an accused, and the rights of victims of crime as well as the broader community.

In summary, the QHRC agrees with the Government's analysis that the legislation is a reasonable limitation on rights. However, consistent with the objects of the HRA to protect and promote the human rights of all individuals, including victims, the Government should consider any limits on victims' rights of the *Criminal Code* as

¹ The Queensland *Criminal Code* is Schedule 1 to the *Criminal Code Act 1899*

amended and closely monitor the impact of these changes to determine if further law reform in this area is necessary.

Changes to Consent and Mistake of Fact

The Bill makes amendments to the *Criminal Code* to implement the recommendations of the Queensland Law Reform Commission's (QLRC) comprehensive consideration of consent laws and the excuse of mistake of fact.²

In the QLRC's view, two significant aspects of the current law relating to consent reflect what has been variously described as an affirmative, communicative or positive consent model, namely:

- consent is a state of mind, but it must also be 'given'; and
- mere failure to manifest an absence of consent by words or actions is not sufficient to prove that consent was given.³

Nonetheless, the QLRC found the law in this area could be made clearer. In particular, the QLRC recommended an amendment be made to provide that a person is not taken to give consent to an act only because, at or before the time of the relevant act, the person does not say or do anything to communicate that they do not consent to that act.⁴ While also arguably part of the current law, the Report further recommended that the *Criminal Code* be amended to provide that, 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.

The QLRC also recommended that the *Criminal Code* be amended so that when deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may be had to what, if anything, the defendant said or did to ascertain whether the complainant gave consent. The QLRC further recommended that in deciding whether a defendant acted under an honest and reasonable, but mistaken, belief as to consent, regard may **not** be had to the voluntary intoxication of the defendant in deciding whether a belief was reasonable.

Limitation on Rights

The QHRC supports the recommendations in the QLRC's report, as they seek to ensure that consent is freely and voluntarily given. The QHRC agrees with the Statement of Compatibility that to the extent these amendments limit the right to fair trial, that limitation is reasonable and proportionate given the amendments seek to

² Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact*, (Report No 78, June 2020), v. ('QLRC Report')

³ *QLRC Report*, 85.

⁴ *QLRC Report*, 92.

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modernise the *Criminal Code* by giving effect to contemporary standards about sexual behaviour. In doing so, the Statement notes that they reinforce the rights of victims to security of the person.

The QHRC also agrees with the Statement of Compatibility's analysis that the prohibition against retrospective criminal laws is not engaged because the amendments seek to confirm, not change, the existing law. Nonetheless, the Statement goes on to justify any potential limitation because

It may be possible to take a contrary view and argue that there is currently sufficient ambiguity that the law does not meet the requirements of accessibility and foreseeability, and that the amendments resolve that ambiguity. On that basis, the right could be limited by the amendments because the law may not have the required accessibility, foreseeability, certainty and predictability for defendants who would not be subject to the amendments in the Bill when they commit the offence, but would be when charged.

The QHRC welcomes the commitment of the Government to provide fulsome discussions of rights limitations. However, while the HR Act states that all rights may be subject to reasonable limitations under law, the prohibition against retrospective criminal laws is considered an absolute right under international law.⁵ If the Committee forms the view through this Inquiry that the amendments do more than clarify the existing law, and do indeed engage the prohibition against retrospective criminal laws by changing the law, the QHRC suggests that the commencement of the amendments should be reconsidered. In particular, these amendments would better reflect the protection of this right if they applied to alleged conduct that occurs after they commence (as opposed to applying at the time a person is charged).⁶

Further reform

Many submissions to the QLRC expressed concern that the present law does not adequately provide for an affirmative model of consent and that the application of the mistake of fact excuse should be further reformed. Section 3(a) of the HRA states the objects of the Act are to protect and promote human rights. Relevant rights to be protected for victims of sexual assault include the right to life,⁷ freedom from torture and cruel, inhuman or degrading treatment,⁸ and the right to equality,⁹ noting that victims of sexual assault are predominantly women.¹⁰ The QLRC also noted that vulnerable populations tend to experience a higher incidence of sexual violence, including Aboriginal peoples and Torres Strait Islander peoples, women with disability, and sex workers.¹¹

⁵ Article 15 of the ICCPR

⁶ Noting that the Statement of Compatibility suggests that approach will not achieve the purpose of clarifying and making the law more accessible as soon as possible.

⁷ HRA s 16

⁸ HRA s 17

⁹ HRA s 15

¹⁰ The Queensland Government's *Prevent. Support. Believe. Queensland's Framework to address Sexual Violence* notes that around 1 in 5 women and 1 in 20 men have experienced sexual violence since the age of 15. In 2018, there were almost six times more female victims of reported sexual assault than male victims in Queensland. In 2017-18, 95.8% of reported perpetrators of sexual offences in Queensland were identified as male.

¹¹ *QLRC Report*, 49.

The Victorian Law Reform Commission's 2016 Report, *The Role of Victims of Crime in the Criminal Trial Process*, discussed the principles of a fair trial in detail. It noted that the state's control of all elements of the criminal process has resulted in a focus on how to address the power imbalance and 'equality of arms' with the accused. This focus has eclipsed the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. The report notes that the Victorian *Charter of Rights and Responsibilities Act 2006*, substantially similar to the HRA, reinforces several rights of the accused relevant to receiving a fair trial. This however does not prevent the interests of the victim being considered:

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary. There is a public interest in ensuring that trials are fair. This interest can be served not only by safeguarding the rights of the accused and the objectivity of the prosecution but also by acknowledging the victim's interest.¹²

Consistent with its human rights obligations and the objects of the HRA to protect and promote rights, the Government must also continue to monitor the law in this area, particularly the impact of these amendments on the rights of victims.

As the QLRC noted in its report, the law of consent has been subject to significant review across Australian jurisdictions in recent years. It is imperative that the Government continues to ensure it is discharging its human rights obligations to victims, the accused and the broader community.

Changes that the QLRC considered but ultimately found not necessary may need to be revisited to ensure the law keeps up with contemporary standards. These potential changes included:

- a more affirmative model of consent,
- changes to the list of circumstances in s 348(2) of the *Criminal Code* in which consent is not freely and voluntarily, and
- changes to the way that the mistake of fact excuse applies, and in particular, further amendments to prevent a defendant relying on a mistake of fact excuse if they have done nothing to find out if the other person is consenting, or in cases where a victim is asleep, unconscious or heavily intoxicated.

Further, the QLRC found that some issues were outside the terms of reference for the review, such as the question of the relevance and admissibility of evidence of domestic violence in relation to offences outside Chapter 32 of the *Criminal Code*. These are relevant issues that warrant separate consideration.

Any inadvertent effect of these amendments may also need to be considered. For example, ensuring the amendments negating earlier consent when it is later withdrawn

¹² Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report*, August 2016, 29.

do not place too great an onus on victims subjected to unwanted sexual acts to withdraw their consent, particularly in situations where a previously consensual sexual encounter turns violent or the nature of the activity suddenly changes.

As the QLRC noted there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices and legislative amendment is only one means of addressing these issues. Consistent with its human rights obligations, the Government must continue to work with key stakeholders, including victims, to ensure beyond law reform, other measures are considered.

Thank you for the opportunity to comment on these amendments.

Yours sincerely

A handwritten signature in black ink, appearing to read "Scott McDougall". The signature is written in a cursive style with a horizontal line above the first few letters.

Scott McDougall
Queensland Human Rights Commissioner