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Our Ref: RH:AL

28 September 2020

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

[REDACTED]

Dear Committee Secretary

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

The LGBTI Legal Service Inc (the Service) thanks the Committee Members for receiving our submission to the Legal Affairs and Community Safety Committee's consideration of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld).

The Service recognises the difficulties faced by the lesbian, gay, bisexual, transgender and intersex ('LGBTI') community and seeks to assist the Queensland LGBTI community to gain access to justice. The Service provides legal assistance across a broad range of areas such as criminal, family, domestic violence, employment and discrimination law. The Service also has an active Law Reform division that seeks to advocate for LGBTI-inclusive law reform and the protection of human rights in Australia.

The Service supports the view of reforming the existing legislative framework regarding sexual assault and the excuse of 'mistake of fact'. However, the Service believes that the proposed legislation fails to consider the experiences of survivors of rape and sexual assault and is not adequate in addressing many major concerns.

**The Bill**

***i. Purpose of the Bill***

In drafting this submission, the Service acknowledges that the primary objective of this bill is to implement the recommendations outlined by the Queensland Law Reform Commission ('QLRC') in its report entitled *Review of consent laws and the excuse of mistake of fact* ('the QLRC Report').<sup>1</sup> The original terms of reference for the QLRC Inquiry were focussed on conducting a review with reference to the operation of section

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<sup>1</sup> Queensland Parliament, *Inquiry Overview* (13 August 2020) <<https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/CrimCodeCandMoFOLAB2020>>.

348 (consent) and section 24 (mistake of fact) of the *Criminal Code Act 1899* (Qld) ('the Code'), with regards to Chapter 32 – Rape and Sexual Assaults.<sup>2</sup>

The recommendations of the QLRC Report are based on the “rigorous examination of the laws on consent and excuse of mistake of fact in QLD”. A total of 135 rape and sexual assault trial transcripts were examined, in addition to 40 appellate decisions.<sup>3</sup> This examination concluded that there is no evidence to “support a conclusion that Queensland's current laws should be subject to extensive change”.<sup>4</sup> The only reform recommended by the QLRC was to explicitly outline already entrenched common law principles within the text of the Code.

## **ii. Current Law**

The law in its current form effectively allows defendants in rape trials the opportunity to argue that they ‘honestly and reasonably’ believed that the other person consented to sex.<sup>5</sup> Consent is outlined under section 348 of the Code.<sup>6</sup>

The excuse of ‘mistake of fact’<sup>7</sup> applies to all persons charged with an offence pursuant to the Code. It therefore applies to the context of rape and sexual assault.

## **iii. QLRC Recommendations**

The Service notes that the QLRC's recommendation did not find evidence to support any extensive change to the current laws. However, we do note the benefit of explicitly outlining existing case law within the Code and allowing for a more effective communication of legislative rights and obligations.

The amendments to the Code outlined in the Bill follow the recommendations from the QLRC, which are outlined as follows:<sup>8</sup>

1. Section 348 of the Criminal Code should be amended to include a new subsection to expressly 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;

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<sup>2</sup> Explanatory Notes, Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld), 1.

<sup>3</sup> Ibid 2.

<sup>4</sup> Ibid 2.

<sup>5</sup> Jonathon Crowe and Bri Lee, Submission to Queensland Law Reform Commission, *Consent and Mistake of Fact Review: Mistake of Fact Excuse in Queensland Rape and Sexual Assault Law* (20 January 2020).

<sup>6</sup> *Criminal Code Act 1899* (Qld) s 348.

<sup>7</sup> Ibid s 24.

<sup>8</sup> Explanatory Notes (n 2) 2-3; Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) ("List of Recommendations").

2. Chapter 32 of the Criminal Code should be amended to apply the definition of 'consent' in section 348 to the offences provided for under sections 351(1) (assault with intent to commit rape) and 352(1)(a) (sexual assault);
3. Section 348 of the Criminal Code should be amended to include a new subsection to expressly 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;
4. The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act; and
5. The Criminal Code should be amended to provide that, for offences in Chapter 32, in deciding under section 24 whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may not be had, in deciding whether a belief was reasonable, to the voluntary intoxication of the defendant by alcohol, a drug or another substance.

The Bill directly implements these five recommendations.

#### ***iv. Key Shortfalls***

It is the Service's view that whilst the amendments to the Code are beneficial in somewhat improving access to justice for the general population, the proposed reforms do not significantly change or strengthen the law in a manner that addresses the underlying concerns that prompted the review. The reforms fail to appropriately consider the experiences of survivors of sexual violence.

With respect to the first three recommendations which involve the definition of consent, there are a number of concerns. Namely, that the onus is placed upon the victim to withdraw their consent.

Recommendation 1 describes a reform that allows for passivity to still amount to consent in some circumstances.<sup>9</sup> Recommendations 2 and 3 do not provide for any real legislative change, as they reflect administrative and technical amendments to the Code. These recommendations are derived from jurisprudence in Queensland and recommendation 2 has recently been addressed in the case of *R v Sunderland*.<sup>10</sup>

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<sup>9</sup> Women's Legal Service Queensland 'Response to QLRC Report on Consent and Mistake of Fact' (2020).

<sup>10</sup> [2020] QCA 156 [41] and [44] (Sofronoff P).

With respect to recommendations 4 and 5 involving the mistake of fact defence, further limitations can be identified. Recommendation 4 is already present within case law<sup>11</sup> and missed an opportunity to enforce an affirmative model of consent. Recommendation 5 does not appropriately address the issue of a defendant's intoxication and thus lowering the bar for a mistake of fact excuse to be successful. Similar to the other recommendations of the QLRC Report, it only enshrines already existing common law principles.<sup>12</sup>

The recommendations allow for a lack of resistance to successfully be argued as valid consent. This is fundamentally contradictory to an affirmative consent model. This issue will be touched upon later in this submission when the Service provides their own pathways to successful reform. It is the Service's view that the Bill also fails to consider the influence of rape myths and overlooks common responses, such as freezing.

## **LGBTI Context and Issues**

### ***i. Overview***

There is a need for legislation such as this to take into consideration the experiences of minority communities, such as the LGBTI community.

Australia's National Research Organisation for Women's Safety ('ANROWS'), in their *Review of Consent Laws and the Excuse of Mistake of Fact*, provide a number of recommendations as to how the law can be reformed to be one that is more inclusive and better suited to accommodating survivors.<sup>13</sup> It is the Service's view that an LGBTI context can apply to their recommendations for reform.

The Service promotes, specifically, recommendations 2, 3 and 6.<sup>14</sup> These recommendations would reform the law to be more inclusive and justiciable towards the LGBTI community, and promote the concerns of vulnerable members of this community by giving them equal attention and protection before the law.

The relevant recommendations are as follows:

Recommendation 2: Consider revising inconsistent, non-inclusive and outdated terminology to make the updated *Criminal Code Act 1899 (QLD)* easier for all Queenslanders to understand.

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<sup>11</sup> Women's Legal Service Queensland 'Response to QLRC Report on Consent and Mistake of Fact' (2020).

<sup>12</sup> Ibid.

<sup>13</sup> ANROWS 'Review of consent laws and the excuse of mistake of fact' (2020) 1-24.

<sup>14</sup> Ibid 1.

Recommendation 3: Any changes to the *Criminal Code Act 1899* (QLD) must carefully consider the impact upon equitable access to justice for priority populations.

Recommendation 6: The list of circumstances in s348(2) of the Queensland *Criminal Code Act (1899)* should either be extended to include non-imminent threats, fear of harm (either to the person, another person, or an animal), fear of degradation, humiliation, exposure, outing, or harassment, intimidation, blackmail, and coercion as part of a pattern of harmful behaviour. Alternatively, the Act should be reframed to mandate the use of a social entrapment framework when domestic or family violence is present.

Modernising the law to be more accommodating and inclusive of many different communities within our society can create improved accessibility to justice and facilitate a more consistent and correct understanding of the law.<sup>15</sup>

***i. Data of LGBTI and rape/sexual violence***

At the outset, it must be acknowledged that data about LGBTI communities remains a significant gap in reporting on issues such as sexual or family violence. This is attributed to small sample sizes and a lack of consistency in determining what criteria are used to identify LGBTI populations.<sup>16</sup> Current literature suggests that gay men may be overrepresented in statistics around sexual violence,<sup>17</sup> while lesbians and transgender people are significantly underrepresented.<sup>18</sup>

In this context, the Australian Human Rights Commission 2017 report into sexual violence on university campuses provides some of the best local data on sexual assault broken down by sexual orientation and gender identity. The study's definition of sexual assault considered incidents "when a person is forced, coerced or tricked into sexual acts against their will or without their consent, including when they have withdrawn their consent".<sup>19</sup>

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<sup>15</sup> Ibid 5.

<sup>16</sup> Jenna Calton, Lauren Bennett Cattaneo and Kris Gebhard, "Barriers to Help Seeking to Lesbian, Gay, Bisexual, Transgender and Queer Survivors of Intimate Partner Violence" (2016) 17(5) *Trauma, Violence & Abuse* 585, 587 and 592.

<sup>17</sup> Katie Edwards, Kateryna Sylaska and Angela Neal, "Intimate Partner Violence Among Sexual Minority Populations: A Critical Review of the Literature and Agenda for Future Research" (2015) 5(2) *Psychology of Violence* 112, 113.

<sup>18</sup> Kierrynn David and Nel Glass, "Reframing the Heteronormative Constructions of Lesbian Partner Violence: An Australian Case Study" in Janice Ristock, *Intimate Partner Violence in LGBTQ Lives* (2011) 13; Australia's National Research Organisation for Women's Safety, *Crossing the Line - Lived Experience of Sexual Violence among trans women of colour from culturally and linguistically diverse (CALD) backgrounds in Australia: Key findings and future directions* (Research to Policy & Practice, Issue 14, 2020).

<sup>19</sup> Australian Human Rights Commission, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Sydney, 2017) 57.

This report identifies that transgender people experienced the highest rate of sexual assault: 16.2% of respondents, compared to 10% of cisgender women and 2.9% of cisgender men.<sup>20</sup> Sexual assault was also much more prevalent among LGBTI respondents than among their heterosexual peers, with bisexual people (18%) and asexual people (15%) representing the two demographics most likely to have experienced sexual assault.<sup>21</sup> Perpetrator data is also of note here, with both men and women reporting that perpetrators of sexual assault were most likely to be male.<sup>22</sup> As noted by the AHRC President Gillian Triggs, the data on LGBTI students is “disproportionately high”.<sup>23</sup>

Another study of sexual violence among women was performed by the Australian Institute of Health and Welfare in 2019. Among female respondents to this study, bisexual women were more than twice as likely (14%) to report sexual violence than their heterosexual (2%) or mostly heterosexual identifying peers (6%).<sup>24</sup> Statistics around other LGBTI populations were not adequately separated, but it was noted that 62% of gay, bisexual, transgender, intersex and queer men reported abuse in a relationship.<sup>25</sup>

These comparisons are important because absolute numbers of sexual violence can appear deceptively low. For example, a 2012 survey noted that only 2.9% of LGBTI respondents reported sexual violence. Although even here, transwomen were over-represented in reporting, with 6.8% reporting sexual assault.<sup>26</sup>

These results reflect broader statistical patterns internationally, where a greater amount of data is available. The US Centre for Disease Control and Prevention notes that 40% of gay men and 47% of bisexual men have been subjected to sexual violence, compared to 21% of heterosexual men.<sup>27</sup> Similarly, 46% of bisexual women report sexual violence, compared to 17% of heterosexual women. However, lesbians had the lowest rate, at 13%.<sup>28</sup>

Transgender people are consistently shown to have experienced the highest rates of sexual assault, with the US National Survey on Transgender Discrimination indicating that a disproportionate percentage of respondents had experienced sexual assault, with

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<sup>20</sup> Ibid 49.

<sup>21</sup> Ibid 50.

<sup>22</sup> Ibid 55.

<sup>23</sup> Seb Starcevic, “Why are we ignoring LGBTI Sexual Assault Survivors?” *Star Observer* (26 May 2017). Available at <<https://www.starobserver.com.au/news/national-news/why-ignoring-lgbti-assault/158645>>.

<sup>24</sup> Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (Australian Government, Canberra, 2019) 99.

<sup>25</sup> Ibid 100.

<sup>26</sup> William Leonard et al, *Private Lives 2: The second national survey on the health and wellbeing of GLBT Australians* (La Trobe University, Melbourne: 2012) 47.

<sup>27</sup> Centre for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: An Overview of 2010 Findings on Victimization by Sexual Orientation* (CDC, Washington: 2011) 1.

<sup>28</sup> Ibid.

disproportionate numbers in the schooling system (12%),<sup>29</sup> police custody (15%),<sup>30</sup> and the housing sector (22%).<sup>31</sup> While sources often generalise by stating that LGBTI communities experience sexual violence at similar rates to their heterosexual peers, statistics do not support this notion and suggest that in fact rates of sexual violence are higher among these communities.

Law enforcement and the legal system have not contributed to positive resolutions of sexual assault cases for victims, with discrimination posing a particular issue for LGBTI people. A 2013 study by the Service also found that problems in seeking assistance from police was extremely common for LGBTI people, with 18.18% of participants experiencing harassment, humiliation or intimidation by police; 9.09% experiencing issues with their gender or sexuality being incorrectly recorded; and 27.27% noting that the police refused to address a crime or problem they had reported.<sup>32</sup> This contributed to a very low rate of reporting, as while 34.37% of participants to the study noted they had experienced violence, 90% of those people did not make a report. This figure is 15% higher than similar incidences that were noted among heterosexual individuals.<sup>33</sup>

While there is limited data on the long-term impacts of sexual violence on LGBTI communities specifically, these outcomes are likely worsened by consistently poor mental health outcomes for these people. The AIHW study cited above<sup>34</sup> noted long-term health impacts to the mental and physical health of violence and abuse victims. Mental health outcomes are often noted to be worse among the LGBTI community, due primarily to minority stressors and discrimination.<sup>35</sup> A 2012 report described 30.5% of LGBTI respondents reporting depression, and 22.3% reporting an anxious or nervous disorder.<sup>36</sup> Another survey found that 64% of transgender people who have experienced sexual assault had contemplated suicide.<sup>37</sup> These findings are concerning, and would likely worsen health outcomes following sexual assault for vulnerable minorities.

It is the view of the Service that the proposed reforms will likely not improve the low rates of reporting within the LGBTI community, as the amendments do not represent any real legislative change that would promote greater community confidence in the legal system. Clearly, the LGBTI community experiences rape and sexual assault at disproportionately

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<sup>29</sup> Jaime Grant et al, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Centre for Transgender Equality, Washington: 2011) 3.

<sup>30</sup> *Ibid* 6.

<sup>31</sup> *Ibid* 4.

<sup>32</sup> Jordyn Jones and Gabriella Leibowitz, "Accessing LGBTI Justice: Identifying the Legal Needs of the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Communities in Queensland" (LGBTI Legal Service, 2013) 27.

<sup>33</sup> *Ibid* 20.

<sup>34</sup> Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story* (Australian Government, Canberra, 2019).

<sup>35</sup> National LGBTI Health Alliance, "The Statistics at a Glance: the mental health of lesbian, gay, bisexual, transgender and intersex people in Australia" (2020). Available at <https://lgbtihealth.org.au/statistics/>.

<sup>36</sup> Leonard et al, above n 26, 31.

<sup>37</sup> Grant et al, above n 29, 2.

high rates and these amendments do not implement adequate protections to ensure that victims will receive justice for the crimes committed against them.

The lack of engagement with minority groups, such as the LGBTI community, by the QLRC further indicates its limited engagement with survivors' experiences and the complex nature of rape and sexual assault for diverse communities within Queensland.

### **Insight from other jurisdictions**

It is useful to consider appropriate approaches taken by other Australian states in relation to consent and mistake of fact to illustrate preferred approaches that should be considered within Queensland. Queensland's broad approach to applying mistake of fact to sexual assault cases is inappropriate by its' requirement on the part of the accused to demonstrate that some attempt to obtain consent was made.

We provide an overview of the Tasmanian and Victorian approaches for context of alternative models that we believe the Queensland Parliament should consider following.

#### ***i. Tasmania***

Tasmania's approach requires that a mistake of fact be 'honest and reasonable'<sup>38</sup> in determining criminal responsibility. Reforms to the *Criminal Code Act 1924* (Tas) in 2004 created a higher standard for the application of the mistake of fact for sexual offences.<sup>39</sup> There are three important limbs to this provision that mean the 'mistake', as pleaded by the accused, cannot be held to be reasonable or honest if the accused:

1. was self-intoxicated<sup>40</sup>;
2. was reckless regarding whether the complainant consented<sup>41</sup>; or
3. did not take reasonable steps to determine if the complainant was consenting.<sup>42</sup>

The Tasmanian approach effectively considers the defence in the context of the accused's behaviour in obtaining consent. It assists in distinguishing whether the accused's actions were indeed 'reasonable or honest', or simply reckless in the disregard for the complainant. It requires the accused to demonstrate that some action was taken in obtaining consent before pleading mistake of fact.

Tasmania's reforms have foundations in the Canadian approach, which has been interpreted as a move towards "a positive consent standard in rape law".<sup>43</sup>

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<sup>38</sup> *Criminal Code Act 1924* (Tas) s 14.

<sup>39</sup> *Ibid* s 14A(1).

<sup>40</sup> *Ibid* s 14A(1)(a).

<sup>41</sup> *Ibid* s 14A(1)(b).

<sup>42</sup> *Ibid* s 14A(1)(c).

<sup>43</sup> Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1995) 18 *Criminal Law Journal* 249.

**ii. Victoria**

Victoria's approach also aligns with the Canadian positive consent model. Victoria defines 'consent' as 'free agreement',<sup>44</sup> and outlines a 'reasonable belief in consent', requiring an examination of the circumstances, including the accused's attempts to determine if consent has been given. This approach effectively creates a greater requirement from the accused in relying on the defence of mistake of fact. Similarly, to Tasmania, if the accused is honestly and reasonably relying on this defence, any attempts to obtain consent should be clearly evident.

**Conclusions**

It is noted that the QLRC has considered the approaches adopted in other states at some length, including the Queensland case law that aligns to some extent with these approaches, and found that extensive legislative reform was not necessary. However, it is the view of the Service that the Queensland Parliament should enshrine these legislative protections for victims of sexual violence, akin to what is contained within the Tasmanian legislation.

The experiences of survivors of rape and sexual assault have largely been overlooked within the proposed Bill, which undermines its benefits to the wider community including the Queensland LGBTI community. While we applaud the Queensland Government's attempt at reconsidering these provisions, we believe that they do not go far enough in ensuring justice will be served for survivors of sexual assault and rape.

This submission was drafted by Mr Alex Ladd, Law Reform Director, with the assistance of Mr Craig Land, Mr Angus Mival and Ms Olivia Roney.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our office.

Yours faithfully



**Renea Hart**

Director and Principal Solicitor | LGBTI Legal Service Inc.

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<sup>44</sup> *Crimes Act 1958 (Vic)* s 36(1).