

YOUTH ADVOCACY CENTRE INC

Submission to:

Legal Affairs and Community Safety Committee

Queensland Parliament

in relation to

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

SEPTEMBER 2020



The Youth Advocacy Centre Inc (YAC) is a specialist community legal and social welfare agency for young people aged 10-18. Predominantly our clients are those who are engaged with, or at risk of engagement with, the youth justice and/or child protection systems and or are homeless or at risk of homelessness (assistance may be up to 25 for those who are homeless). YAC provides a legal service; family, homelessness and youth, bail support and court support services; and a community legal education program. It has been working with young people for nearly 40 years and is regarded as having expertise in assisting children and young people involved in the legal system. YAC is able to support both young people who are alleged to have broken the law but also those who have been the victims of an offence (obviously not in relation to the same matter).

YAC regrets that it was not able to provide comment at the time Queensland Law Reform Commission (QLRC) released its discussion paper.

The Explanatory Notes to the Bill state:

Chapter 32 (Rape and Sexual Assaults) of the Criminal Code deals with sexual offending **against adults** where the absence of consent is an element of the offence. [Our emphasis]

This is not correct. Chapter 32 deals with sexual offending against any **person**, and therefore age is irrelevant. This misunderstanding may stem from the QLRC position as stated in its Report on *Review of consent laws and the excuse of mistake of fact*¹(the Report):

In the review of trial transcripts, outlined in Chapter 3 below, the Commission generally separates trials involving **complainants over 16 ('Adult complainants')** and trials involving complainants aged 12 to 15 (who, for the purpose of Chapter 3, are referred to as 'Child complainants'). [Our emphasis]

This may be because 16- and 17-year olds are able to consent to sexual activity in the same way as adults, and so are not covered by the provisions in relation to the offence of *carnal knowledge with or of children under 16* (s 215 Criminal Code which is contained in Chapter 22: *Offences against morality* rather than Chapter 32) where consent is irrelevant to criminality. Sixteen and seventeen year olds are, of course, still considered to be minors for general legal purposes.

No distinction is drawn between adult (18 years and over) and youth offenders (10-17 years) in the Criminal Code in relation to commission of offences in Chapter 32 (or indeed the Criminal Code generally) beyond where s 29(2) may be relevant. This provides some additional requirements for the prosecution in relation to children aged 10-13 years. However, in reality, the section provides little protection to this cohort. Section s29(2) does not require proof of any actual knowledge of wrongfulness, permitting a lower bar to be set for children than in some other Australian jurisdictions: all that need be established in Queensland is that the child in question has the **capacity** to know in order to bear criminal responsibility.²

It is noted that in 2018-19:

- 108 males and 4 females aged 10 to 17 were charged with rape
- 343 males and about 74 females were charged with other sexual offences
- 64 males and 317 females aged 0 to 14, and 23 males and 462 females aged 15 to 19, were reported as victims of rape or attempted rape.
- A further 332 males and 1078 females aged 0 to 14, and 83 males and 660 females aged 15-19, were reported as victims of other sexual assault.³

¹ Report No 78, June 2020

² R v JJ; ex parte Attorney-General [2005] QCA 153; R v EI [2009] QCA 177 at [16]; R v TT [2009] QCA 199 at [19]

³ Queensland Government Statistician's Office, Crime report, Queensland, 2018-19

The Report does not provide any analysis of Chapter 32 offences or alleged offences where the complainant and the defendant were both minors/children, that is, under 18 years. Below is a brief discussion of why this may be of concern in some circumstances.

Adolescence can be a confusing time for young people who are going through a key phase of emotional, psychological and physical development. This has been, and continues to be, the subject of much research and discussion, as indicated by the following.

Adolescence is a time of learning and development, from the point of view of the maturing brain but also physically and emotionally as a result of puberty. It is clear that teenagers are dealing with, not only massive hormonal shifts, but also substantial neural changes.

These changes do not happen gradually and steadily between the ages of 0–18. They come on in great spurts and puberty is one of the most dramatic developmental stages.⁴

And:

Teen hormones affect teenagers' moods, emotions, and impulses as well as their body. The mood swings that teens experience are caused by fluctuations in estrogen, progesterone, and testosterone—the sex hormones. These same teen hormones will also affect the way they think about dating and sex. Teens become much more interested in sex, sometimes to the point of obsession, as teen hormones kick into gear.⁵

Further:

Because the prefrontal cortex is still developing, teenagers might rely on a part of the brain called the amygdala to make decisions and solve problems more than adults do. The amygdala is associated with emotions, impulses, aggression and instinctive behaviour. The self-monitoring, problem-solving and decision-making part of the brain – the prefrontal cortex – develops last.⁶

As a result, teenagers are programmed to seek out new experiences, risks and sensations, do not always have a lot of self-control or good judgment and are more prone to risk-taking behaviours, including sexual activity.

Additionally:

Key-developmental tasks in adolescence are forming more complex peer relationships, first romantic relationships and the detachment from parents (Lerner and Steinberg, 2004). Well-functioning basic facial emotion recognition is therefore crucial for the transitional phase of adolescence. Adolescents need to be able to quickly and accurately identify the facial emotions of their parents and peers in order to act appropriately.⁷

The results of one study suggest that:

... teenagers have not yet reached maturity in either their ability to identify vocal emotions, or to express them. This means that teenagers face quite a challenge in their social spheres: they must interpret poorly expressed cues with immature recognition skills. Understanding how we learn emotional communication skills will be important to help teenagers who struggle socially.⁸

⁴ http://www.nbcnews.com/id/14738243/ns/technology_and_science-science/t/study-teenage-brain-lacks-empathy/#.X2RoGJMzYW8

⁵ <https://www.newportacademy.com/resources/empowering-teens/teenage-hormones-and-sexuality/>

⁶ <https://raisingchildren.net.au/pre-teens/development/understanding-your-pre-teen/brain-development-teens>

⁷ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6022279/>

⁸ <https://medicalxpress.com/news/2018-08-teenagers-hard-tones-voice.html> Michele Morningstar, the first author on the paper, who conducted the research while completing her Ph.D. in Psychology at McGill University

Some children have particular challenges:

Children with ASD might have trouble understanding other people's emotions because of the way they scan faces.

People with ASD tend to scan faces in a more random way than typically developing people. They spend less time looking at the eyes and more time focusing on the mouth. This means the information they get from a person's face tells them less about what that person is feeling.

From an early age, children with ASD often pay less attention to other people's emotional behaviour and faces.

They don't tend to point out interesting things to other people, or respond to interesting things that others point out to them. This is called **social or joint attention**, and the lack of it is one of the early warning signs for ASD...

Children with ASD often also find it hard to use emotion to manage social interactions. They might show less concern for others and less ability to comfort others or share emotions.

They might misread situations and respond with emotions that are off the mark.⁹

The use of alcohol or other substances may also be relevant:

Population based studies also indicate that victims of child sexual abuse are more often found among adolescents and adults with alcohol and/or drug related disorders compared with non-abused populations (odds ratios ranging from 1.01 to 8.9) (Cutajar et al., 2010b, p. 814; Kendler et al., 2000). Survivors of child sexual abuse are also at greater risk of substance dependencies including not only alcohol but also nicotine dependency (Nelson et al., 2002).¹⁰

YAC has concerns that the Report does not take into account, nor make any provision for, the challenges faced by both complainants and defendants who are minors/children with the potential for misunderstanding or miscommunication on the part of one or both in relation to consent or mistake of fact. We further note that, at present, those aged 10 and above are able to be prosecuted for rape and sexual assault.

YAC respectfully requests that the QLRC be asked to specifically examine the cases of child defendants and complainants and consider whether the recommendations made in the report should apply to minors or whether the legal response should be modified to some extent in certain situations – noting that the harm experienced by the complainant must be properly acknowledged.

We would be happy to discuss this further with the QLRC.

⁹ <https://raisingchildren.net.au/autism/development/social-emotional-development/emotional-development-asd>

¹⁰ <https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse/behavioural-aspects-mental-health-functioning>