



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

About LawRight

LawRight is an independent community legal centre and the leading facilitator of pro bono legal services in Queensland, directing the resources of the private legal profession to increase access to justice. The Chief Justice of Queensland, the Honourable Catherine Holmes is the Patron of LawRight.

LawRight identifies vulnerable people with unaddressed legal need and how we can connect with them. We collaborate with the civic, community and health organisations that our clients engage with and form strategic partnerships with pro bono legal professionals at these connection points. This enables LawRight to increase access to the justice system, improve health and well-being and increase access to housing, income and legal rights.

With over 40 member law firms and 100 member barristers, we deliver over 25,000 hours of pro bono assistance annually.

About the Community and Health Justice Partnerships

LawRight's Community and Health Justice Partnerships (including the former Homeless Persons' Legal Clinic) collaborate with housing, health, social work and other community professionals to deliver comprehensive, holistic support. Of particular relevance to these submissions, we partner with specialised frontline services which offer health and social work support to survivors of sexual violence.

Clients of our Community and Health Justice Partnerships experience complex, intersecting layers of structural vulnerability including prolonged histories of violence, physical and mental illness, severe financial hardship, homelessness and complex family backgrounds. These vulnerabilities make our clients particularly susceptible to sexual violence, and create significant barriers to receiving the appropriate legal, social and medical support in the aftermath of a rape or sexual assault.¹

¹ Goodman, L., Fels, K., & Glenn, C. (2006). *No safe place: Sexual assault in the lives of homeless women*. Retrieved from http://www.vawnet.org/sexual-violence/summary.php?doc_id=558&find_type=web_desc_AR

Summary of submissions

LawRight's Community and Health Justice Partnerships welcome the review of Queensland laws around consent, and the excuse pertaining to mistake of fact.

While we do not assist with criminal law matters, we work with survivors of sexual violence to address the civil law issues that arise from their experiences, and our submissions reflect this perspective.

To summarise LawRight's position, we:

- endorse the adoption of an affirmative consent model for sexual offences within the Queensland criminal framework;
- believe that the proposed amendments fail to make significant improvements to the existing legal framework, and fail to capture all instances and circumstances where there is a lack of consent (specifically, instances where there has been an absence of overt resistance);
- are concerned that the proposed amendments fail to make prosecution of sexual violence accessible, which subsequently fails to promote appropriate and thorough police investigations into complaints of sexual violence; and
- are concerned that the proposed amendments will not significantly improve the experiences of survivors of sexual violence when making reports to police.

Our submissions are illustrated throughout by the reflections of one of our clients: a young woman in her early twenties who is a survivor of rape, and whom we have given the pseudonym Jasmine. We thank Jasmine for sharing her story, and acknowledge her courage and resilience.

Submissions

Term of reference: the operation and practical application of the definition of consent, pursuant to section 348.

Consent

We note that the Bill proposes three amendments to the *Criminal Code Act 1899* (Qld) that address the definition of consent. Specifically, the proposed amendments intend to extend the legislative definition of consent to state:

- that consent cannot be implied *only* because an individual does not say or do anything to expressly communicate that they do not give consent;
- if consent is withdrawn at any time by words or actions, then any continuing sexual act is done without consent; and
- the definition of consent as it applies to rape, also applies to other sexual assaults.



Impacts of the proposed amendments – consent

We have had the benefit of reading the submissions jointly prepared by Professor Jonathan Crowe (Bond University), Dr Rachael Burgin (Swinburne University), Angela Lynch and Julie Sarkozi (Women’s Legal Service Queensland). We agree that the proposed amendments both fail to make significant improvements to the existing legal framework, and fail to capture all instances and circumstances where there is a lack of consent.

By failing to legislate an affirmative model of consent, grounded in principals of voluntary and unequivocal agreement, the proposed amendments do not require consent to be ascertained through positive words and actions. That is, the amendments still envisage circumstances where, in the absence of overt resistance, it is appropriate to imply or infer consent. This places responsibility on the survivor of sexual violence to overtly and explicitly announce their lack of consent. It neither reflects the complexity of a survivor’s experience, nor recognises the well-established understanding that sexual violence often elicits an involuntarily “freeze” response.² We hold particular concerns for survivors who are attempting to evidence a lack of consent where they have experienced sexual violence following prior consensual intimate activity.

Term of reference: the operation and practical application of the mistake of fact excuse, pursuant to section 24.

Mistake of fact

Under the existing framework, the mistake of fact excuse contained in section 24 of the *Criminal Code* provides that a defendant will not be criminally responsible for a rape or sexual assault offence if the defendant honestly and reasonably, but mistakenly, believed that the survivor gave consent. The excuse can be used even if the survivor was asleep, unconscious, or heavily intoxicated at the time of the offence.

The excuse of mistake of fact places an evidentiary burden on prosecutors to prove the beliefs of the defendant. We note that the Bill proposes two amendments to the *Criminal Code Act* which:

- allow consideration of anything the accused said or did to ascertain whether the survivor was giving consent to the act, when determining whether a mistake was honest and reasonable; and
- disallows consideration of the accused’s voluntary intoxication caused by alcohol or other drugs, when determining whether a mistake was reasonable.

Impacts of the proposed amendments

We again agree with the submissions jointly prepared by Professor Crowe, Dr Burgin, Angela Lynch and Julie Sarkozi, and assert that the proposed amendments fail to make significant improvements to the current legal framework.

² Schiewe, Moriah. *Tonic Immobility: The Fear-Freeze Response as a Forgotten Factor in Sexual Assault Laws*. DePaul J. Women Gender & L. 8 (2019): 1.



While the proposed amendments would allow juries to consider anything a defendant said or did to determine whether or not the survivor consented, it falls short of requiring defendants to show they took positive steps to ascertain consent (as is the case under the Tasmanian framework).

The excuse of mistake of fact perpetuates myths about rape and sexual assault which are left unaddressed by the proposed amendments. Factors such as previous sexual contact, flirting, going home with a person, or kissing a person have all been found to support a defendant's honest belief of consent. The failure to address this in the proposed legislation not only sustains pernicious myths about sexual offences, it also disempowers and diminishes the rights of survivors, particularly survivors who are experiencing homelessness or other vulnerabilities. After discussing the mistake of fact excuse with her lawyer, Jasmine told us it that it made her feel her experiences were invalid:

Women are not objects. We are important. Why are the perpetrator's feelings and their memory more important than mine? They won't have post-traumatic stress disorder, they won't have to think about it all the time. If this is the case, then sexual assault is going nowhere.

Jasmine

The experiences of our clients when reporting sexual violence

Any legislation governing the prosecution of sexual violence will necessarily influence the way that these offences are charged and investigated. A legislative framework which places an unreasonable onus on a survivor of sexual violence may deter investigations where there are disputes around consent.

In the experience drawn from LawRight's casework, vulnerable people who have experienced a sexual offence are unlikely to report to the police due to previous negative interactions with the justice system, or the belief that police will not take proper steps to investigate or pursue charges against the offender.

Where our clients choose to report experiences of sexual violence, they often advise that police abandon investigations and do not press charges. Our clients often tell us that after reporting sexual violence the police say they are constrained from further investigations due to the possibility of consent. We are told that the police dispute the memories of our clients, and discourage them from pursuing charges. Jasmine was told by the police that they could not pursue further investigations, because there was some evidence that she indicated her interest:

I froze up at the start. Then I said no, multiple times. I spoke to the police officer over the phone about my case. He told me the guy had mentioned that I said no, but he also said that I was acting like I wanted it, that I kept trying to come at him. Why is his interpretation of my words and actions, more important than mine?

Jasmine



We are concerned that the proposed amendments fail to generate significant improvements for survivors when reporting sexual violence to police, or during any subsequent investigations.

Jasmine experienced sexual violence after leaving a Brisbane night club with a male peer. When Jasmine made a report, the police did commence preliminary investigations however, they were soon abandoned. Jasmine explains:

The police officer said that even though our stories of that night were quite similar, that there were important differences. He told me that the guy said we had been kissing in the club, and then in the taxi. That never happened, and that is not consent.

Jasmine

Jasmine advised that police informed her that the investigation could not proceed due to a lack of evidence. An affirmative model of consent may have encouraged a more thorough investigation into Jasmine's complaint, and prompted questions about consent to sexual intercourse, rather than the allegations that they had consensually kissed.

The perspectives of our clients, including Jasmine, are born out by the literature, with a 2017 Queensland Audit Office report finding that Queensland Police pressure clients to withdraw complaints in sexual offences.³

It is our view that the proposed amendments do not adequately promote the rights of survivors where consent is in dispute, particularly where the survivor experiences homelessness, mental illness, or other significant vulnerability.

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³ Queensland Audit Office, *Criminal Justice System – Reliability and Integration of Data*, Report No 14, 26 April 2017

