QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
Protecting Queenslanders' individual rights and liberties since 1967

Committee Secretary
Legal Affairs and Community Safety Committee
[redacted]

Dear Madam,

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

Kindly accept this submission in relation to the above Bill.

The QCCL was established in 1967 and has as its objective the protection of Queenslanders' individual rights and liberties.

This submission addresses two aspects of this legislation. The first is the changes in relation to mistake and consent. The second is the changes in relation to police banning powers.

Mistake and consent

For the committee's ease of reference, I **enclose** a copy of the Council's submission to the Queensland Law Reform Commission.

That submission opposed proposals to abolish the defence of mistake in relation to the issue of consent in sexual assault cases, on the basis that a person who makes a genuine mistake about the central feature of a crime cannot be said to have the necessary guilty mind for that crime. There may be a legitimate reason (for example cultural background or learning difficulties) why an accused person misinterpreted the complainant's behaviour. This is particularly so in the context of sexual interaction.

However, we also recognised, contrary to much discussion in the community, that Queensland law already requires an assessment as to whether a person's belief about a fact is not only honest but also reasonable.

In other words, Queensland law departs from a strict subjective approach to criminal responsibility when it comes to this defence.

Furthermore, we recognised that the object of promoting and protecting female sexual freedom justified a departure from the purely subjectivist approach.

We submitted that the law should reflect the proposition that in determining whether or not an accused's belief that a person was consenting was reasonable, the jury should be able to take into account whether the accused was aware of circumstances which would lead a reasonable person to inquire further into the issue of consent. So that if the circumstances known to the accused were such that a reasonable person would not or might not take further steps to ascertain consent, then the accused will not be required to take any further steps either.

We went on to note the opinion expressed by one of our members that in everyday practice directions to juries in Queensland already reflect that proposition.

We note that the Commission in paragraph 7.77 of its report essentially agreed with that assessment.

In our submission, having regard to the potential educative effect of a change to the law, we proposed that a statutory jury direction be enacted reflecting this proposition or alternatively that the law be amended to expressly state this proposition.

The final recommendation of the Commission reflects the latter view and is to be enacted by clause 348A (2) of the Bill. We support this amendment.

Other amendments are made which we also support, namely in section 348(3) to provide that consent is not simply to be inferred from silence, in section 348(4) to confirm that consent can be withdrawn and finally in section 348A (3) to confirm what is already the law, that intoxication cannot be taken into account in assessing the reasonableness of a person's belief.

Banning orders and licence scanning

For the record, we restate our opposition to these arrangements.

The Council accepts that of course licensees are entitled to comply with their lawful obligations by sighting proof of age. However, in our view the copying of a driver's licence represents a gross violation of the right to privacy.

We certainly would have no objection to licensed venues being supplied with photographs of persons who are banned by Court orders from their premises. This no doubt is a necessary and proportionate measure to effectively enforce such orders

The QCCL opposed the grant to the police of the power to ban persons from being in or around licensed venues. These are a type of preventative measure which tend to be based on over predictions of the likelihood of further offending and on the assumption that the person in question cannot be changed and cannot be trusted to comply with the law

In any event the move on power is entirely adequate.

We characterized the proposed power as transparently open to abuse. It is most likely to be used against indigenous and other disadvantaged members of the community as had been the case with the move on power.

We oppose the amendment which increases the period of the banning order made by a police officer to one month.

Somewhat reluctantly the QCCL accepts the power which has been granted to the Court to issue banning orders. That at least has the advantage that the orders are made by a Court in the context of a sentencing regime having heard argument and been presented with evidence.

Our opposition to the police issuing these banning orders, is reinforced by the frank admission by the Queensland Alcohol-related violence and Night-time Economy Monitoring report, at page 694, that these bans are intended as a form of punishment. As noted above, these types of orders are usually characterised as preventive in nature. Though it has always been our view that they are in fact punitive. The frank

acknowledgement that these orders are in fact punitive, means in our view that they should under no circumstances be issued by a police officer. Under our system, the infliction of punishment is the exclusive domain of the judiciary. It should not be being inflicted by police officers.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
9 September 2020

QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

Watching Them While They're Watching You

The Secretary
Queensland Law Reform Commission
PO Box 13312
George Street Post Shop QLD 4003
[redacted]

Dear Sir

Consent and the excuse of mistake of fact review

Kindly accept this submission into your review of the law on this issue.

CHANGE TO DEFENCE TO RAPE

The QCCL supports a subjectivist approach to the criminal law, as the approach which best promotes individual liberty. Subjectivism is the view that individuals can be considered culpable for harm only where they were at the material time aware of the risk of causing that harm, and thus were able to avoid it.

It is a fundamental principle of our criminal law that a person cannot be made liable on the basis of a mistaken belief. To the extent that the public debate involves an assertion that this defence should be abolished we reject that as an entirely appalling and unreasonable suggestion.[1]

As the Scottish Law Commission has noted, "The main argument in support of this subjective test for belief in consent is that a person who makes a genuine mistake about the central feature of a crime cannot be said to have the necessary guilty mind for that crime. Furthermore, it may be unfair to judge a person's actions by some external criteria. There may well be legitimate reasons (for example, cultural background or learning difficulties) why the accused misinterpreted the complainant's behaviour. There are complexities in "reading the signs" in the context of sexual interaction"[2].

[1] HLA Hart's exposition of this and related principles in *Punishment and Responsibility* (OUP 1968)- especially Chapter 2 *Legal Responsibility and Excuses* - warrants re visiting in an era in which these principles are under attack from parts of both the left and the right of politics.
[2] Scottish Law Commission - *Report on Rape and Other Sexual Offences* December 2007 para 3.71.

There is a difference between how our Criminal Code deals with the defence of mistake and how the Common Law deals with it. At common-law, a person will succeed in a defence of mistake of fact, if they held the belief in the mistaken fact honestly. However, under the Queensland Criminal Code the mistake of fact defence can only succeed when a person not only honestly has made a mistake, but their belief is reasonable.

Once again, public commentary on this issue seems to ignore the fact that Queensland law already provides for a mixture of subjective and objective factors in assessing whether or not the accused has made a mistake of fact. In particular, in our review of the law we found no support for the view that "reckless indifference" would ever be consistent with the reasonableness requirement in the Criminal Code

In assessing this issue then we start from the practical consideration that no matter what we may think of it as a matter of principle, Queensland law in this area already departs from a strict subjectivist approach.

Furthermore, whatever maybe said in another context, it does seem to us that in the context of rape, the purpose of protecting and promoting female sexual freedom, does justify a departure from the purely subjective approach. The case for doing so was well put by Justice L'Heureux-Dube of the Canadian Supreme Court [3]

> Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent.
>
> In my view, the primary concern animating and underlying the present offence of sexual assault is the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in. If this is the case, then our approach to consent must evolve accordingly, for it may be out of phase with that conceptualization of the law.

The question is, does the current law in Queensland adequately accommodate the principle that individuals should not be found guilty of offences they did not intend commit, with the need to protect and promote female sexual freedom.

Our concern is that the law in Queensland does not achieve that result in so far as this is the law:

> A complainant who at or before the time of sexual penetration **fails by word or action to manifest her dissent is not in law thereby taken to have consented to it**. Failing to do so **may**, however, depending on the circumstances, **have the consequence that at the trial a jury may decide not to accept her evidence that she did not consent**; or it may furnish some ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse, and so provide a basis for exemption from criminal responsibility under s. 24 of the Criminal Code[4]. (emphasis added)

[3] *Her Majesty the Queen v. Darryl Gordon Park*, 1995 S.C.R. 836 (1995) 864-5 and 866.
[4] *R. v. I.A. Shaw* [1996] 1 Qd.R. 641 at 646 per McPherson and Davis JJA

Some other cases that illustrate the concern about the current law include the following:

R v Kovacs [2007] QCA 143

The appellant ran a takeaway shop in Weipa with his wife, a Philippine national. The appellant and his wife had arranged for the complainant, also a Philippine national, to travel to Weipa to live with them and work in the shop. As soon as the complainant arrived in the country, the appellant began to sexually molest her; this continued over several months. The complainant was in Australia illegally, knew little English and had no independent means of support.

The Court of Appeal held that the defence of mistake of fact under s 24 should have been left to the jury. The decision was based, in part, on the complainant's lack of English; **it was held that the language differences between the parties may have led the appellant to form a mistaken belief that the complainant was consenting to sex**. This was despite evidence that the **complainant had repeatedly resisted the appellant's advances both verbally and by conduct**. It was also despite **evidence suggesting that the appellant had brought the complainant to a country where she could not speak the language as part of a plan to abuse her**; in other words, the appellant's strategy to make the complainant vulnerable to him was instrumental in enabling him to rely on s 24.

R v Dunrobin [2008] QCA 116

The complainant was staying overnight at the appellant's house. After she went to bed, the appellant entered the room and asked for sexual intercourse. The complainant refused. The appellant then climbed on top of her and molested her while she struggled, before pulling off her clothes and penetrating her against her protests. The Court of Appeal held that s 24 should have been left to the jury.

Phillips v The Queen [2009] QCA 57

The twenty-one year old appellant was spending the night at the home of the thirteen year old complainant. The appellant entered the complainant's room while she was asleep, climbed on top of her and penetrated her while she tried to push him off. Similar events occurred on three other occasions, resulting in four charges in total. The jury convicted the appellant of rape on the fourth count, but convicted him only of unlawful carnal knowledge on the first and third counts, each of which involved physical resistance by the complainant. The second count resulted in an acquittal.

The Court of Appeal considered that the jury must have thought either that the complainant was consenting to the first and third counts or that the appellant mistakenly believed she was consenting. However, since the evidence of resistance was greater on those counts than on count four, which resulted in a conviction for rape, the latter verdict was considered unreasonable. The Court therefore substituted a verdict of unlawful carnal knowledge.

> The end result in *Phillips* was that no rape convictions were recorded, even though counts one and three involved the complainant physically struggling against the appellant as he penetrated her. In this respect, the unsound aspect of the verdicts seems to be not so much that the jury convicted on the fourth count, but that they failed to convict on counts one and three. However, the Court of Appeal treated that aspect of the verdicts as potentially supported by the application of s 24.

Of course, the first 2 of these three cases could have been subject to a retrial. We concede that to make a full evaluation of the operation of the law in cases leading to retrials, it is necessary to know the outcome of the retrials.

However, it is our view that as a matter of principle the law should reflect that in Canada where the legislation provides that, the accused's belief will not be reasonable where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting".

This requirement was held in *Malcolm*[5], to mean "whether the accused is aware of circumstances which would lead a reasonable man to inquire further into the issue of consent. If the circumstances known to the accused are such that a reasonable man would not or might not take further steps to ascertain consent, then the accused will not be required to take any further steps either".

In the same case it was said "First, the circumstances known to the accused must be ascertained. Then, the issue which arises is, if a reasonable man was aware of the same circumstances, would he take further steps before proceeding with the sexual activity? If the answer is yes, and the accused has not taken further steps, then the accused is not entitled to the defence of honest belief in consent. If the answer is no, or even maybe, then the accused would not be required to take further steps and the defence will apply"[6] ("the Canadian principles").

This approach already has some support in Queensland in the form of the judgment of President McMurdo in *R v Cutts* [2005] QCA 306 pages 5-6.

In fact, one member of the Executive of the Council who practices extensively and exclusively in the area of criminal law, says that in day-to-day practice directions to the jury in rape trials already reflect the Canadian principles[7]. Accepting that to be so, it seems to us that the Criminal Code should be amended to reflect that situation. We say that, because having the statute reflect what actually happens in the court would have an educative effect That could be achieved by either amending section 24 in so far as it applies to sexual offences or by providing for a statutory jury direction which reflects the Canadian principles. Our preferred position is that a statutory jury direction be enacted, as this would allow for the further development of the jurisprudence on section 24. Obviously, if that position were rejected, our preferred position would be an amendment to section 24 to reflect the Canadian principles.

We oppose proposals to introduce a so-called affirmative model of consent, which has been defined to mean a requirement that "a person should actively seek the consent of their

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[5] *R. v. Malcolm*, 2000 MBCA 77 at page 10.
[6] ibid page 11.
[7] It is this information that has led us to modify our position from that contained in our submission to the Attorney General.

prospective sexual partner, and only act in accordance with a consent which is willfully and enthusiastically given."[8]

In California it has been defined to mean, "affirmative, conscious and voluntary agreement to engage in sexual activity...Lack of protest or resistance does not mean consent, nor does silence mean consent."[9]

These are our reasons for opposing the affirmative model of consent.

First, non-consenting sexual conduct should be criminalised. And secondly, consenting sexual conduct should not be criminalised unless there are strong reasons for doing so.

The Canadian model effectively implements "no means no". It seems to us that imposing an obligation on the accused to take some positive step to satisfy themselves that the complainant consented when circumstances warranted an inquiry, does not depart radically from the subjectivist approach but adds additional protection to female sexual freedom. In the words of Justice L'Heureux-Dube:

> Under such an analytic approach, although the communication gap between the sexes may still avail confusion and miscommunication, the consequences will accrue more equally to both. Women, as a practical matter, still run the risk of being sexually assaulted unless they communicate nonconsenting in a manner that is sufficiently clear for others to understand. Men, by contrast, must assume the responsibility for that part of the communication gap that is driven by androcentric myths and stereotypes, rather than by genuine misunderstanding due to gender-based miscommunication.[10]

Secondly, the model of affirmative consent would involve a practical reversal of the onus of proof. We oppose any change in relation to the burden of proof etc from that described by Jerrard JA in *Cutts*[11]:

> Once a defendant shows that there is evidence of an honest and reasonable mistake fit for the jury's consideration, the onus is on the prosecution to negative it. If any authority is needed for that, see R v Lyons (1987) 24 A Crim R 298 at 299. To show that evidence, a defendant is not obliged to give evidence of his or her state of mind. (R v Lyons; Sancoff v Holford; ex parte Holford [1973] Qd R 25 at 33; Larson v GJ Coles & Co Ltd; ex parte GJ Coles & Co Ltd (1984) 13 A Crim R 109 at 111; R v CV [2004] QCA 411 per Jones J at [39] and Cullinane J).
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> However, although it is clear a defendant is not bound to give evidence to having acted under an operative mistake for the defence to be raised, and although there is authority that the absence of honest and reasonable but mistaken belief in the existence of consent must be proved beyond reasonable doubt the prosecution, (per Fitzgerald P in R v Hunt [1994] QCA 226), there

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[8] We do not agree that the Canadian law is a form of affirmative consent see A Dyer Yes! To communication about consent; no! To affirmative consent: a reply to anna kerr 2019 7 GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY 17 at page 36.
[9] quoted in Cathy Young *Campus Rape: The Problem With "Yes Means Yes".* Time 29 August 2014
[10] *Her Majesty the Queen v. Darryl Gordon Park*, 1995 S.C.R. 836 (1995) 864-5 and 866. We would submit that this quote is inconsistent with the idea that the Canadian Law enacts affirmative consent.
[11] opcit paras 74 and 75.

> must be some evidence, looking at the case as a whole, of the operative mistake. (Loveday v Ayre; ex parte Ayre [1955] St R Qd 264 at 267-8).

Once again, we see no reason to modify this principle, which is one of the parts of the principled asymmetry between the Crown and the accused designed to counter the imbalance in power and resources between them.

Thirdly, we are concerned that some in the debate fail to adequately recognise the deep subjectivity and diversity of human sexual experience[12]. Such a test would fail to have regard to those with learning difficulties nor to cultural differences. Sexual relations cannot be the subject of the legal equivalent of a Human Resources manual.[13] It is not the role of the State to create ideal or perfect human beings[14].

We have to concede that a 1991 review of rape law by the Law Reform Commission of Victoria examined 53 DPP files covering rape trials and reported that 'belief in consent' was the primary issue in only three cases (6%), and in another nine (17%) the accused relied on a mix of 'consent' and 'belief in consent' in their defence. The LRCV concluded that the mental element is rarely the main issue in rape trials.

In its 2004 report the Victorian Law Reform Commission[15] rejected this view on the basis that in Victoria Judges always direct on mens rea. However, it is noted that decisions such as *R v Cutts* [2005] QCA 306 at para 37 per Williams JA, make it clear that in Queensland it is not necessary for the Judge to direct on s24 in every rape trial.[16]

We would submit that it would be useful to conduct similar research in this State prior to formulating the jury direction or amendment to section 24.

DEFINITION OF CONSENT

We would also support a change to the definition of consent.

Consent is currently defined in section 348 of the Criminal Code as follows:

> (1) In this chapter, ***consent*** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained—
> (a)by force; or
> (b)by threat or intimidation; or
> (c)by fear of bodily harm; or
> (d)by exercise of authority; or
> (e)by false and fraudulent representations about the nature or purpose of the act; or
> (f)by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

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[12] Cathy Young Campus Rape: The Problem With "Yes Means Yes". Time 29 August 2014
[13] Gay Alcorn has written usefully on this topic, see for example *Helen Garner's The First Stone is outdated. But her questions about sexual harassment aren't* The Guardian 8 January 2018.
[14] JS Mill - *An Examination of Sir William Hamilton's Philosophy* 1845 passim; see also Dyer op cit page 30
[15] *Sexual Offences* Final Report July 2004 at paras 8.21-2
[16] Footnote 1084 found in para 8.22, seems to concede that this is a feature of the "common law states". Whereas in Queensland as Williams JA makes clear there must be some evidence that accused had a mistaken belief before the matter goes to the jury *Cutts at* 45.

It is our submission that subsection 348(1) should be retained to be supplemented by a non-exhaustive list of factual situations which define when a person has not consented to sexual activity. As recommended by the Scottish Law Commission[17] the situations should include the following:

(a) where the person had taken or been given alcohol or other substances and as a result lacked the capacity to consent at the time of expressing or indicating consent unless consent had earlier been given to engaging in the activity in that condition;
(b) where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances;
(c) where the person agreed or submitted to the act because he or she was subject to violence, or the threat of violence, against him or her, or against another person;
(d) where the person agreed or submitted to the act because at the time of the act he or she was unlawfully detained by the accused;
(e) where the person agreed or submitted to the act because he or she was deceived by the accused about the nature or purpose of the activity;
(f) where the person agreed to the act because the accused impersonated someone who was known to the person;
(g) where the only expression of agreement to the act was made by someone other than the person.

We object to any presumptions or other reversals of the onus of proof. We support the Scottish Commission's proposal because the facts listed constitute circumstances where once they have been proved, the Crown has proven that the complainant has not consented.

We find further support for this approach in the Scottish Law Commission's finding that the presumptions introduced into English law have been of only limited value in proving lack of consent [para 2.47]

We note that the Scottish Commission rejected a proposal to enact a list of situations which do not in themselves constitute consent, noting the difficulty of identifying which factors should be included. The Commission also expressed the concern that listing some factors might give rise to unwanted inferences of consent.

We agree with and express our support for the Scottish Commission's recommendation that the right of a person to withdraw their consent at any time should be specified in law.

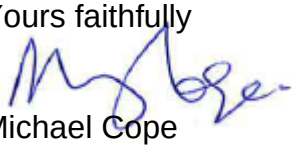
For completeness, and finally, we would also oppose any proposal to substitute trial by judge for trial by jury in the case of rape. We take the view that the jury forms a fundamental part of our legal system. Those who seek to abolish it or restrict its use, both underestimate the capacity of jury members for sound judgements and overstate the extent to which judges are immune from the prejudices which affect the minds of some citizens in our community.

We acknowledge valuable research by former QCCL interns Nikita Aganoff, Alex Ladd and Amye Fairbairn which has informed this submission.

[17] *Report on Rape and Other Sexual Offences* December 2007 pages 25-38

We trust this is of assistance to you.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
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