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12h January 2021

RE: CRIMINAL CODE (CONSENT AND MISTAKE OF FACT) AND OTHER LEGISLATION AMENDMENT BILL 2020

We welcome and appreciate the opportunity to make a submission in relation to the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill* 2020. Our submissions address the provisions in Part 3, concerning amendments to the Criminal Code following the recommendations made in the Queensland Law Reform Commission Report *Review of Consent Laws and the Excuse of Mistake of Fact,* and also address provisions in Part 8 containing proposed changes to police banning notices.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives

(which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

OVERVIEW

We note the wide-ranging and rigorous review of recent trials and appeals done by the Queensland Law Reform Commission to inform their careful analysis of the law and the evidence-based approach to their recommendations.

Modern Human Rights standards require full respect of the rights of the accused to a fair trial and due regard to the protection of complainants. How the law grapples with the evidentiary and legal issues around sexual assault trials presents challenges for the fundamental goals of certainty of the law and fairness in criminal proceedings and due regard to the protection of complainants.

Where the application of the Criminal Code has evolved considerably through significant developments in case law, it can be appropriate to amend the Criminal Code to reflect those developments.

The QLRC carefully analysed the interaction of the principles surrounding the requirements for the giving of consent and the withdrawal of consent with the principles surrounding mistake of fact for the giving or withdrawal of consent. We note the concern of the QLRC that any changes should make the law clearer and not to introduce more intricacies that could leave the state of the law more unclear and harder for juries to apply.

It is important that the Criminal Code is clear and unambiguous in its statement of the law and, subject to some specific comments below, we agree with the general approach that the specific caselaw principles identified by the Queensland Law Reform Commission should be explicitly included in the Criminal Code.

We do have concerns about the proposed extension of powers for police banning notices and invite greater consideration of alternatives to these provisions.

Compatibility with Human Rights - Affording full respect of the rights of the accused to a fair trial and due regard to the protection of complainants

Both international human rights law and the fundamental principles of the common law systems protect the right to a fair trial. While the right is not unlimited and other rights and considerations can be relevant, the right of an accused person to a fair trial is strongly protected. The task of the court is to afford full respect of the rights of the accused to a fair trial and to give due regard to the protection of complainants.

This is illustrated by the English decision of *R v A (No 2)*[1] in the House of Lords where the lead

[1] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, per Lord Steyn at para [46], the remainder of the court concurring explicitly with the language used in para [46], *see* Lord Slynn of Hadley at para [15], Lord Hope of Craighead at para [110], Lord Clyde at para [140],and Lord Hutton at para [163].

judgment of Lord Steyn highlighted the approach taken in international[2] and domestic courts.

> " *46. It is of supreme importance that the effect of the speeches today should be clear to trial judges who have to deal with problems of the admissibility of questioning and evidence on alleged prior sexual experience between an accused and a complainant. The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and* ***due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions****, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that* ***to exclude it would endanger the fairness of the trial under article 6 of the convention****. If this test is satisfied the evidence should not be excluded*." (Emphasis added)

The rule is also expressed in the treaty creating the International Criminal Court. The state parties to the Rome Statute have evinced the rule in the drafting of Article 64(2) of the Rome Statute of the International Criminal Court:

> "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with **full respect for the rights of the accused and due regard for the protection of victims and witnesses**" (emphasis added)

The same rule has been applied in international criminal courts and tribunals. See for example, *Prosecutor v. Brđanin & Talić,* Case No. IT-99-36, Decision on third motion by Prosecution for protective measures, November 8, 2000, para. 13 and accompanying footnotes, including *Prosecutor v Tadic*, Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996, at 4.

The Human Rights associated with fair trial are found in section 29 of the *Human Rights Act*, the Right to liberty and security of person, based on Articles 9 and 11 of the ICCPR; section 31 of the *Human Rights Act*, the Right to Fair Hearing, based on Article 14(1) of the ICCPR, and section 32 of the *Human Rights Act*, Rights in criminal proceedings, based on Article 14 of the ICCPR. The last provides:

> *A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law and is entitled without discrimination to receive certain minimum guarantees.*

PART 3- CLAUSES 6,7,8,9, 10

USES 6 & 7: AMENDMENTS TO ACHIEVE A UNIFORM DEFINITION OF CONSENT FOR CHAPTER 32 (SEXUAL OFFENCES)

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. Section 348(1) provides that consent means consent freely and voluntarily given by a person with the cognitive capacity to consent. Section 348(2) provides a non-exhaustive list of circumstances where consent is not freely and voluntarily given .

The amendments introduced by Clauses 6 and 7 achieve the necessary amendments to sections 1 and 347 of the Criminal Code which then makes clear that the definition of consent at section 348 of the Criminal Code is the definition of consent that must be applied to all offences that are in chapter 32 of the Criminal Code. These amendments follow the QLRC recommendation 5-2 that 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. The state of the law was uncertain at the time that the QLRC made the recommendation. The QLRC recommendation is consistent with the subsequent decision in *R v Sutherland*(2020) QCA 156. .

Clauses 6 and 7 contain changes designed to address the difficulties described *in R v BAS* and *R v Sutherland.* Because the law was previously in an uncertain state, our only comments as to conformity with Human Rights principles arise under the question of retrospective application and therefore are addressed under the discussion of clause 10.

CLAUSE 8 – AMENDMENTS TO SECTION 348 REGARDING CONSENT

Clause 8 amends section 348 *Meaning of consent* by creating new subsections (3) and (4) in accordance with QLRC Recommendations 5-1 and 5-3.

The law is clear that consent is a state of mind, but must also be given, that is, by a representation through words or conduct. The relationship between silence and consent and/or lack of consent however can be problematic.

New subsection (3) provides that a person is not taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.

As noted in the leading case on consent in the Queensland Court of Appeal in *Makary*, 'a representation [of consent] might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle of ways, or by nuance, evaluated against a pattern of past behaviour'.[3] The caselaw has also evolved to the point 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.

Where the case law has evolved, it is sometimes appropriate to amend the Criminal Code to reflect that position. We do however note that the position should remain clear as expressed in *Makary* that while silence does not necessarily signify consent, it also does not necessarily signify lack of consent.

New subsection (4) provides that if a person does or continues to do an act after the consent to the act has been withdrawn by words or conduct, then the act is done or continues without consent.

[33] *R v Makary* [2019] 2 Qd R 528, per Sofronoff P at para [50]

This proposed amendment creates an express provision in the Criminal Code 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. This amendment makes Queensland law consistent with the other states and territories. We support this change.

Compatibility with Human Rights

With respect to compatibility with Human Rights, the provisions affect the Right to liberty and security of person as evinced in section 29 of the *Human Rights Act* (Qld) 2019. Section 29 is based on Articles 9 and 11 of the *International Covenant on the Protection of Civil and Political Rights* (the ICCPR). and is also informed by the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW).

Section 29 provides that every person has the right to liberty and security. This right protects against the unlawful or arbitrary deprivation of liberty. If a person is arrested or detained, they are entitled to certain minimum rights, including the right to be brought to trial without unreasonable delay.

Section 29 also encompasses the protection of the bodily integrity and sexual autonomy of individuals. We note the General Recommendation of the United Nations Committee on the Elimination of Discrimination Against Women which calls on states to 'ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes … is based on the lack of freely given consent and takes into account coercive circumstances'[4] and that the implementation of these measures should be 'centred around the victim/survivor, acknowledging women as rights holders and promoting their agency and autonomy'.[5]

The effect of Clause 8 is to entrench norms presently contained in the caselaw into statutory form in the Criminal Code, namely that consent to sexual activity is a state of mind that must be given or communicated; that a failure to manifest an absence of consent by words or actions is not sufficient by itself to prove that consent was given; and that consent can be withdrawn by words or conduct at any time. The amendments contained in Clause 8 would not only give clear expression to the law as it presently stands it would also reinforce the notion that consent must be given or communicated, and it gives effect to the human rights norm of bodily integrity and sexual autonomy of individuals.

It is however important to ensure that the rule that a person is not taken to give consent to an act **only** because… the person does not say or do anything to communicate that they do not consent to that act does not become confused by a jury as a rule that silence necessarily signifies absence of consent.

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[4] Committee on the Elimination of Discrimination against Women, *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (14 July 2017)

[5] *Ibid*.

CLAUSE 9: THE CODE EXCUSE OF MISTAKE OF FACT AS TO CONSENT, MATTERS THAT MAY BE TAKEN INTO ACCOUNT

Clause 9 inserts a new section 348A *Mistake of fact in relation to consent* in accordance with QLRC Recommendations 7-1 and 7-2.

Section 24 of the Criminal Code presently contains the elements of the excuse of mistake of fact, that is that it must be honest and reasonable. As the law now stands, once the excuse of mistake of fact in section 24 is raised, any steps taken by the defendant to ascertain consent are relevant circumstances to be taken into account by the jury in considering whether the defendant's belief was honest and reasonable.

Recommendation 7-1

In Recommendation 7-1, the QLRC has not recommended a formal requirement to take reasonable steps to ascertain consent but instead has recommended explicit wording in the Criminal Code that a jury may take into account the steps taken or not taken by the defendant to ascertain consent.

We agree with that approach, a formulaic approach doesn't always protect the victim and sometimes even increases the risk to the victim. It is also ineffective to draw a dividing line between criminal and innocent activity: failure to observe a formula may mark innocent conduct as criminal, and exploitation of the observation of a formula may mask criminal conduct as innocent. A formulaic approach is also highly artificial.

> *"In a society where much consensual sexual intercourse takes place, it is unrealistic to expect that verbalisation of consent should invariably observe set formalities. In many cases, and perhaps desirably, it does. But in other cases, consent is sufficiently indicated by conduct and implication. The law would defy reality if it endeavoured to stamp the necessity of a particular verbal formula upon conduct usually so intimate, individual and private."*[6]

Section 24 of the Criminal Code presently contains the elements of the excuse of mistake of fact, that is that it must be honest and reasonable. As the law now stands, once the excuse of mistake of fact in section 24 is raised, any steps taken by the defendant to ascertain consent are relevant circumstances to be taken into account by the jury in considering whether the defendant's belief was honest and reasonable.

It makes good sense that when the excuse of mistake of fact is raised for a jury to consider, that the Code contain not only the elements of the mistake of fact that a mistake was both honest and reasonably held but also an explicit statement that the jury may consider any steps that were taken (or that no steps were taken, depending on the facts of the case), in considering whether the defendant honestly and reasonably believed the complainant consented.

[6] Per Kirby J in *DPP (NT) v WJI* [2004] HCA 47,(2004)219 CLR 43 at para [100].

The amendment would not only give clear expression to the law as it presently stands it would also reinforce the notion that consent must be given or communicated.

Recommendation 7-2

> *Clause 9 Insertion of new s 348A After section 348— insert— 348A Mistake of fact in relation to consent … (3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.*

The Criminal Code does not expressly provide that either intoxication or voluntary intoxication is relevant to whether a defendant's mistaken belief that the complainant gave consent was honest and reasonable.

As noted by the QLRC, whether a defendant's mistaken belief was honest, fairness demands that a person is not judged against a hypothetical standard but by a standard that asks what was reasonable for the defendant in their actual circumstances. These actual circumstances can include intellectual disability, mental illness and language difficulties.

The reasonableness of a mistaken belief

Under the existing case law, voluntary intoxication is not relevant in determining whether a defendant's mistaken belief as to consent was reasonable. The policy reasons for that is obvious. While in 90% of cases this is an uncontroversial statement, there is potential for real unfairness in a small number of other instances, such as for example where the complainant supplied the drug to the defendant.

> *First Example*: Albie and Bert meet at a nightclub. Albie shares a pill with Bert and takes one himself. Bert goes home with Albie. In the morning Albie complains that he was raped by Bert.
>
> *Second Example*: Neither Albie nor Bert consumed more than a few beers at the nightclub. Bert goes home with Albie. Bert cannot sleep and is given a Stilnox sleeping tablet by Albie. In the morning Albie complains that he was raped by Bert, Bert has no recollection of any events after he took the sleeping pill.

Solution to the drafting of 348A(3)

We accept that the proposed amendment reflects the case law as it presently stands and its inclusion in the Code would help avoid confusion when directions are given to juries on how to deal with intoxication and whether a mistake of fact was reasonable.

However, there will remain a small number of cases where there has been voluntary consumption by both the complainant and defendant of substances, whether those substances be prescribed, over the counter medications or illicit drugs remains problematic. In those circumstances, it may be relevant in determining whether a defendant's mistaken belief as to consent was reasonable and it may constitute a legitimate defence.

For that reason it is undesirable to codify a blanket rule making all evidence of voluntary intoxication irrelevant as to reasonableness of mistake of fact without a saving passage for the discretion of a judge to admit the evidence if it would otherwise be in the interests of justice to admit it.

Compatibility with Human Rights – denial of a legitimate ground of defence

Both the Human Rights cases *R v A (No 2)*[7] and *R v Seaboyer,*[8] in the House of Lords and the Supreme Court of Canada respectively, arose because the provision was drawn too broadly and excluded the defence from relying upon a legitimate ground of defence. Following the decision of the Canadian Supreme Court in *Seaboyer*, the provision was amended to explicitly allow admission of relevant and highly probative evidence taking into account "the interests of justice, including the right of the accused to make a full answer and defence."[9] The solution found by the House of Lords in *R v A (No 2)* was to avoid a declaration of incompatibility by reading the problematic section as "subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible."[10]

Both cases illustrate the need to take great care to avoid provisions that when drawn too broadly exclude the defence from relying upon a legitimate ground of defence.

CLAUSE 10: RETROSPECTIVE APPLICATION OF THE NEW RULES TO UNCHARGED ACTS

We note the insertion of section 754 to allow for the new provisions to apply to any charges laid after the commencement, regardless of whether the offence was committed before or after the commencement of the provisions.

We agree that it is undesirable to change the law for proceedings which are already on foot or where the defendant has already been charged. We additionally are concerned with an approach which would allow for retrospective application of the laws when a historic offence is charged. Clauses 6 and 7 contain changes designed to address the difficulties described *in R v BAS* and *R v Sutherland* and part of Clause 8 brings Queensland law into line with the laws of other states and territories. The incursion into the principle of legality is not insignificant. The clearly available alternative is to make the changes prospective not retrospective. Prospective application of the changes would be less restrictive on human rights and fundamental legal principles and are reasonably available.

Compatibility with Human Rights – impact of procedural rights on fair trial

While fair trial rights do not actively proscribe specific procedural rights and international or supranational courts are loathe to do so either - the logic of that being obvious for the wide variety of legal systems that seek to uphold international human rights standards - it is well established that particular procedural measures may be in conflict with human rights fair trial standards because they prevent a fair trial.

This was illustrated in the case of *R v A (No 2)* where evidentiary rules had been drafted so broadly as to make an excessive inroad into the right to a fair trial, the House of Lords read down the provision.[11] It has also been illustrated in the decision of the Canadian Supreme Court in *R v Seaboyer*.[12] In *Seaboyer*, McLachlin J described the impact that evidentiary rules may have on affording fair trial rights to an

[7] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, see discussion below.
[8] *R v Seaboyer* 83 DLR (4th) 193, see discussion below
[9] The amended provision is set out in the judgment of Lord Steyn in *R v A (No 2), ibid*, at para [33].
[10] *R v A (No 2), ibid*, at para [45].
[11] *Ibid*, per Lord Steyn at paras [45]-[46].
[12] 83 DLR (4th) 193.

accused:

> *"The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s 11(d) of the Charter. It has long been recognized that an essential facet of a fair hearing is the 'opportunity adequately to state [one's] case.' ….*
> *The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it:*
> *'If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.'*
> *In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent."*[13]

Compatibility with Human Rights – retrospective criminal laws

Protections against retrospective criminal laws are contained in section 35 of the *Human Rights Act* 2019, which in turn is based on Article 15 of the ICCPR: A person must not be prosecuted or punished for conduct that was not a criminal offence at the time the conduct was engaged in. A person must not receive a penalty that is greater than the penalty that applied at the time they committed the offence." Similarly, the *Legislative Standards Act*, section 4 provides:

> (1) For the purposes of this Act, *fundamental legislative principles* are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. ,,,
>
> (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation— (g)does not adversely affect rights and liberties, or impose obligations, retrospectively;

In our view, laws should be enacted retrospectively only in the rarest of cases and for the clearest of reasons. The changes contained in the provisions of this bill do not fall under the exceptional category and should not be applied retrospectively.

PART 8 - POLICE BANNING NOTICES

The proposals to substantially increase the length of police banning notices raises a number of problems. While temporary banning notices are used as a means of excluding people from public places or events as a protective measure, in our experience practices that have sprung up around the use of banning notices is disproportionate to their legitimate protective use.

As noted in the Statement of Compatibility, the use of banning notices impacts on freedom of movement, peaceful assembly and freedom of association, and fair hearing, which are provided for in sections 19,22, and 31 of the *Human Rights Act*. Several comments can be made about the proposed substantial increase in police powers:

First, banning notices are imposed in response to behaviour that is disorderly, offensive, threatening or violent. What is a reasonable limitation on someone who has been disorderly is substantially different

[13] *Ibid*, per McLachlin J at pp 260-261.

from a reasonable limitation on someone who has been violent, yet the justification seems to attach to the lesser behaviours as well. When police have existing powers to issue an extended banning notice a week later for an additional three months, the justification is not clear for the need for longer notices.

Secondly the banning notices can cause real hardship and exceed the purpose for which they were imposed. Although the statement of compatibility refers to exemptions contained in *Police Powers and Responsibilities Act* 2000, s 602J for residence or place of employment or place of education, it fails to exclude places such as centrelink offices, rehab centres and services, late night pharmacies and transport hubs.

Section (b) which refers to the nature of the purpose of the limitation in the SOC refers to purposes such as "increase accountability", "provide a sufficient deterrent", and "highlight the seriousness", all of which are judicial functions exercised in the course of sentencing, and should properly be exercised by a judicial officer, not a police officer.

Section (d) refers to existing banning mechanisms which is court imposed banning orders. In our view judicial officers are the proper persons to exercise independent oversight and consideration of justification for longer banning orders.

CONCLUSION

We note the well thought out and well considered proposals by the Queensland Law Reform Commission. Subject to the specific concerns we raised above, we welcome the approach to incorporate statements from the existing case law into the Code and to provide some more specificity to the broad statement of principles contained in the Queensland Criminal Code, while recognising the ability of that broad language to transcend the specifics of the day.

We do have concerns about the retrospective application of the Code amendments. Where the law has changed, and those changes may have either predictable or unpredictable consequences, it is undesirable to give those changes retrospective application. To do otherwise could undermine the certainty and fairness of the law and for those reasons we oppose the retrospective application of the provisions to historic offences.

We also have concerns about the disproportionate effect of banning notices and would recommend greater scrutiny of current practices of the use of banning notices before provisions extending the length of police banning notices are enacted.

We thank you for the opportunity to provide feedback in this important bill.

Yours faithfully,

Shane Duffy

Chief Executive Officer