Queensland Law Society

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Office of the President

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Committee Secretary
Legal Affairs and Community Safety
Parliament House
George Street
Brisbane Qld 4000

[redacted]

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (**the Bill**).

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members of the QLS Criminal Law Committee, whose members have substantial expertise in this area.

As outlined in the Explanatory Notes, the Bill, amongst other matters, proposes amendments to the Criminal Code following the Queensland Law Reform Commission's (QLRC) report on the "Review of consent laws and the excuse of mistake of fact"[1] (**the QLRC report**). The QLRC report provided an extensive and thorough analysis of the current state of the law in Queensland and subsequently made 5 recommendations which relate to consent and the excuse of mistake of fact.

The Bill also proposes amendments to the *Police Powers and Responsibilities Act 2000* (**the PPRA**) and a number of other Acts. This submission is limited to the proposed amendments of the Criminal Code, PPRA and the *Legal Profession Act 2007*. Our comments in relation to these amendments are set out below.

[1] https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T1217.pdf

Part 3 Amendment of Criminal Code

QLS accepts the QLRC's position, following its extensive review, that there should be some amendments to the Criminal Code to 'clarify, reinforce and update the current operation of the law'.[2]

The Bill, in so far as the proposed amendments to the Criminal Code, reflects the drafting proposed by the QLRC report.

These amendments include:

- Amendments to section 348 to insert (3) which 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.

- The insertion of new section 348 subsection (4) which 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.

- The new section 348A(1)-(2) clarifies that in relation to mistake of fact 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.

- The new section 348A(3) clarifies that in relation to the reasonableness of a mistaken belief, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or other substance.

- Chapter 32 is amended to apply the definition of 'consent' in section 348 for the offences contained in chapter 32.

In relation to the amendments to section 348, the insertion of sub section (3) is consistent with the interpretation of the provision by the courts who have recognised that a complainant who fails to communicate dissent "by words or action" cannot necessarily be taken to have given consent.[3] Similarly, proposed sub section (4) reflects the present state of the law in Queensland that an offence of sexual assault or rape is committed if an act continues after consent is withdrawn.[4]

With respect to the proposed insertion of section 348A, as noted in the QLRC report, whilst the Criminal Code does not expressly provide for consideration of the steps taken by a defendant to ascertain whether consent to an act was given, any steps taken by the defendant would be relevant in considering the defendant's belief was honest and reasonable.[5] The proposed amendment would not change the law, we note however, the QLRC's position that the amendment may assist in providing a clear expression of the law as it presently stands.[6]

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[2] https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0010/654958/qlrc-report-78-final-web.pdf at p v.
[3] *R v Shaw* [1996] 1 Qd R 641,646 (Davies and McPherson JJA); see also *R v Makary* [2018] QCA 258, [49] -[50] (Sofronoff P).
[4] *R v Johnson* [2015] QCA 270; *R v OU* [2017] QCA 266.
[5] Note 2 at p 182.
[6] Note 2 at 189.

The addition of section 348A(3) also reflects the current state of the law in Queensland. That is, a defendant's intoxication is not relevant to deciding whether their belief was reasonable and they cannot rely on their own intoxication to establish a defence.[7]

QLS supports the amendment to section 347 to apply the definition of consent in section 348 to the offence of sexual assault (section 352(1)(a)) and the offence of assault with intent to commit rape (section 351(1)). As identified in the QLRC report and consistent with previous submissions by QLS, this will overcome the issue of statutory construction identified in *R v BAS*.[8]

Lastly, QLS objects to the transitional provisions of the Bill allowing for the retrospective application of the amendments to the Criminal Code. We note the intent and effect of the Bill is to create uniformity with the drafting of the Criminal Code, and its application arising from developments in case law and therefore, the amendments do not substantively change the current state of the law in Queensland. However, consistent with the Society's position on retrospective legislation, QLS submits the provisions ought to only apply to offences committed after commencement.

Part 8 Amendment of Police Powers and Responsibilities Act 2000

QLS has a number of concerns with the proposed amendments to the *Police Powers and Responsibilities Act 2000* (**PPRA**) with respect to banning orders.

Firstly, section 602G creates a reverse onus on the person subject to a banning order. The amendment has set out that unless the contrary is proved, a police banning notice sent by electronic communication to a nominated email address by the respondent, is taken to have been received at the time of it being sent. The Explanatory notes state at p 17 that "*This is necessary as the respondent may deliberately nominate an invalid email address or phone number to the police officer to avoid receiving the notice and police will not be able to prove that the respondent received the notice and was aware of the banning period and places from which the respondent was banned*[9]." Any reversal of the onus of proof, particularly in criminal proceedings, requires the strongest justification. In the context of this proposal, there has been no evidence provided to justify an unfair evidentiary burden on the public. In the absence of any justification any step to change such a fundamental cornerstone principle of our legal system must not be taken.

Secondly, we do not support the amendment to section 602D which extends the duration for which an initial police banning notice can be in place from 10 days to not more than 1 month. There appears to have been no consultation with legal service providers about the policy intent of the expansion nor the practical issues encountered within the current regime.

The 'Queensland Alcohol-related violence and Night Time Economy Monitoring (**QUANTEM**)' final report suggested at p 718 "*that the current 10 day police ban is amenable to review as it does not realistically represent a punishment for most people attending SNPs*[10]" (**Safe Night Precinct**). However, there are two issues which arise from this suggestion. The first is that this regime is intended to reduce the risk of violence in SNPs. It is not intended to exact extra-

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[7] *R v Hopper* [1993] QCA 561 at [10].
[8] R v BAS [2005] QCA 97.
[9] https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T1368.pdf.
[10] https://www.publications.qld.gov.au/dataset/8bd52786-f51e-486a-be23-096bec93bddb/resource/bff18db2-8891-4532-8661-9d86f8ac0c76/download/final-report-tafv.pdf

curial punishment on persons who are not necessarily convicted of a criminal offence for alleged anti-social conduct. Second, in the experience of our members, intoxicated persons at risk of committing acts of violence in a SNP are not the only persons who may be the subject of these orders.

Our members have raised concerns about the current administration of police banning notices which can have unintended and undue impact, inconsistent with the intention of the notice on those subject to them. For example, our members have reported instances where any degree of antisocial behaviour in a SNP has been met with a banning notice for multiple local drink safe precincts, often with a 24 hour effect. Members of the public subject to 24 hour bans for 10 days or the proposed 30 days are also unable to access various service providers who operate in the listed SNPs such as doctors or support workers. We have been advised of instances where clients have been charged for breaching notices when they were going into the area during the day for medical or other support purposes. There are also concerns about the use of these notices in relation to homeless persons.

In addition, where there has been a breach allegation, and the originating encounter with the police officer was recorded and provided, our members advise the encounters are often instigated by a police street check on an intoxicated person, whose conduct would not have met the requirements of section 602C(3) and that banning notices are often issued without the approval of a sergeant pursuant to section 602C(2). These experiences heighten our members concern about the proposed expansion of the banning notice regime and the unintended impacts on persons who may be the subject of them.

Whilst we do not support the expansion, if the notices are extended to one month, fixed timeframes should be imposed upon Police to review the issue of an initial notice. Currently, section 602O of the PPRA states that the Commissioner must decide an application "as soon as reasonably practicable" for an initial banning notice or no later than 5 business days if the application is in relation to an extended police banning notice. If initial police banning notice periods are extended as proposed, then similar timeframes for review should be imposed. QLS supports the proposed amendment to the power to cancel an extended banning notice in Clause 54 and the extension of the review period from 5 to 15 days in Clause 58.

Lastly, QLS queries the drafting and effect of section 602S which expands the powers of police to photograph a person for the purpose of attaching an image of the person to a banning order, removing the current prescription that the photograph for this purpose must be limited to the person's face, neck and hair. An individual's fundamental right to privacy and reputation may potentially, be negatively impacted by the power for police to photograph a respondent not having safeguards or sufficient limitations.

Part 6 Amendment of Legal Profession Act 2007

Administering and maintaining the Fidelity Fund for Queensland solicitors is a continuing initiative of the legal profession of this state, as a part of its duty to the general public.

In introducing the Queensland Law Society Act Amendment Bill to Parliament on 5 December 1930, the then Attorney-General, the Hon N. F. Macgroarty said:

> "The Bill has been promoted by the legal profession, and I am very pleased to introduce it as Attorney-General. Its object is to provide a fund for persons who suffer any pecuniary loss through the defalcations or fraudulent acts of legal practitioners, who include solicitors, conveyancers and barristers practising as solicitors.

> "Hon. members will see this is not a measure promoted by the Government but represents a purely voluntary offer by the legal profession; and the Government are providing the machinery to put it into effect.
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> "The defalcations of a member of the legal profession reflect upon the whole of the profession, and this Bill shows that the legal practitioners are prepared to tax themselves for the purpose of protecting the public."[11]

From its inception nearly a hundred years ago to this day the solicitors of Queensland have maintained and taxed themselves for the benefit of the public. In doing so the legal profession has set itself apart from most other callings and businesses which do not protect the public against the dishonesty of their competitors. However, the service of the public good remains a key element of the professional identity of solicitors as officers of the court and members of an honourable profession.

In this regard, the Queensland Law Society supports the amendments in this Bill to authorise the full payment of any claim not paid in full since the commencement of the *Legal Profession Act 2007* due to the operation of statutory caps and to provide clarity about the application of statutory caps.

Statutory caps on payments have been a part of the scheme of the Fidelity Fund since its original conception in 1930. They have been particularly important in those times where the Fund has suffered significant investment losses or when low balances in the Fund were present. Due to these circumstances the *Legal Profession Act 2004* reintroduced statutory caps on payments from the Fidelity Fund and this was continued into the *Legal Profession Act 2007*.

The Society has also maintained the policy to pay claims in full when the availability of funds permitted. This was the position immediately prior to the 2004 Act and most recently the Queensland Law Society changed its policy to full payment of claims in November 2016 due to the availability of balances in the Fidelity Fund. The Queensland Law Society, throughout its long management of the Fund, has always dedicated itself to the original purpose of protecting the public.

This amendment is necessary as the previous drafting of the *Legal Profession Act 2007* did not empower the Queensland Law Society to revisit previous decisions on claims and make payments to claimants where statutory caps had historically been applied. Given the financial position of the Fund this can now occur.

In this regard the Queensland Law Society is particularly grateful to the Government for its willingness to work with us to achieve this result. We also see this amendment as the start of a package of changes to respond to the current pressures on legal practices.

Presently, the *Legal Profession Act 2007* does not permit the Fidelity Fund to support any preventative or claims reduction activities, but historically it did so.

In our view, the amendment currently in the Bill relating to the Fidelity Fund should be supported by an amendment to permit the Fidelity Fund to provide resourcing for measures likely to have a material effect in minimising the risk or magnitude of defalcations, such as:

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[11] *Queensland Parliament Hansard,* 5 December 1930, available at https://www.parliament.qld.gov.au/documents/hansard/1930/1930_12_05_A.pdf

- programs to prevent or more expeditiously identify trust account defaults, and
- educational programs to improve compliance and trust accounting systems in law firms to prevent claims.

Permitting initiatives such as these to be supported by the Fidelity Fund would have the beneficial effect of preventing claims rather than merely compensating those who have suffered loss. Doing so supports the protective intention of the amendments to the Fidelity Fund currently in the Bill and is the best result for the public and the legal profession going forward.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted]

Yours faithfully

Luke Murphy
President