

29 September, 2020

Adela Brent

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Legal Affairs and Community Safety (LACS) Committee

Dear LACS Committee,

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

Thank you for the opportunity to provide feedback on this Bill.

Our submission responds to the proposed amendments to the Criminal Code regarding the law of consent and the excuse of mistake of fact.

I am a member of ASLA (Australia Solidarity with Latin America). In our community, sexual violence is common and when survivors go to Court they do not usually get any justice. Offenders walk away and they do it again with impunity. Many women in our community do not trust the CJS for evident reasons.

We oppose the Bill for the following reasons:

1. The Bill retains an outdated model of consent. This is an historic opportunity to reframe and modernise Queensland's outdated sexual assault laws. Unfortunately, this Bill only tinkers with existing legislative definitions. [I/we] would prefer to see a Bill that introduces an affirmative consent model. Such a model would require individuals to enthusiastically and clearly affirm their willingness to have sex through words or actions. An affirmative consent model

would provide greater protection for individual sexual autonomy. It would also send a very clear message to the community that the person seeking consent is responsible for taking active and reasonable steps to ensure that consent exists.

2. The Bill fails to uphold the human rights of sexual assault survivors. The human rights analysis for this Bill is one-sided and solely considers the rights of defendants to a fair trial, and their protection from retrospective criminal laws. The Attorney-General's statement of compatibility is silent on the human rights of sexual assault survivors. Sexual violence is disproportionately a gendered crime. Human rights to equal protection of the law without discrimination (section 15 Human Rights Act 2019); the right to life (section 16 Human Rights Act 2019); protection from torture and cruel, inhuman or degrading treatment (section 17 Human Rights Act 2019); and the right to liberty and security of person (section 29 Human Rights Act 2019) all apply to all survivors of rape and sexual assault, yet these rights have been entirely overlooked.

3. The excuse of mistake of fact will continue to be used to perpetuate rape myths. The Bill retains the mistake of fact excuse which defendants will be able to argue in situations where a person is asleep, heavily intoxicated or unconscious. The proposed changes do not require defendants to show they took positive steps to ascertain consent. This leaves open the possibility that consent can be inferred from a lack of resistance, even though victims 'freezing' (tonic immobility) during an assault is a very common behavioural response and recognised survival tactic.

4. The Bill fails to address the negation of consent for a person with disability. Section 216 of the Criminal Code makes it unlawful for any person to have sex with another person who has an impairment of the mind. This is a discriminatory provision as it assumes that people with disability are not

capable of consenting to sex. Pages 11 to 15 of the Queensland Human Rights Commission's submission to the Queensland Law Reform Commission (Review of consent laws and the excuse of mistake of fact, available on the QHRC website addresses this point at length.

This is a missed opportunity to correct a law that unfairly discriminates against people with disability in Queensland.

Reform of consent laws and the excuse of mistake of fact is long overdue in Queensland. We ask that the LACS Committee rejects the Bill in its current form and requires government to make amendments that incorporate the issues we have outlined.

Offenders need to be held accountable for their actions. Survivors deserve justice.

Yours faithfully

Adela Brent – Secretary

ASLA