

From: [REDACTED]
To: [Legal Affairs and Community Safety Committee](#)
Subject: Submission: Criminal Code (Consent and Mistake of Fact) & Other Legislation Amendment Bill 2020
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Legal Affairs and Community Safety (LACS) Committee
[REDACTED]

28 September, 2020

Dear LACS Committee;

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

I am grateful for the opportunity to provide feedback in the form of this submission on this Bill. The submission contained below responds to the proposed amendments to the Criminal Code regarding the law of consent and the defence of Mistake of Fact.

I believe if the current Bill is passed, rape and sexual assault survivors will face even more obstacles on the road to justice than are already present. When it comes to rape and sexual assault, we have a cultural problem in Australia, one that does not support affirmative and enthusiastic consent. We need our legal codes to be the benchmark for human behaviour and to promote social change. For years, there has been extensive recommendations by experts (including those in the legal field) that a standard of affirmative consent is the most beneficial to ensuring justice for victims of rape and sexual assault crimes. The current Bill does not support a beneficial social change, and therefore I cannot in good faith support it.

I 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 The Bill retains an outdated model of consent: this is an historic opportunity to reframe and modernise Queensland's outdated sexual assault laws. We advocate for and would like 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.

I support an amendment to the Bill (as drafted by Rape & Sexual Assault Research & Advocacy and the Women's Legal Service Queensland), asking s 348 (Meaning of Consent) to be adjusted to:

- (3) A person does not consent to an act if the person does not say or do anything to communicate consent to the act.

2. The Bill fails to uphold the human rights of sexual assault survivors: the human rights analysis of this Bill 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 (s 15 Human Rights Act 2019); the right to life (s 16 Human Rights Act 2019); protection from torture and cruel, inhuman or degrading treatment (s 17 Human Rights Act 2019); and the right to liberty and security of person (s 29 Human Rights Act 2019) all apply to survivors of rape and sexual assault, yet these rights have been entirely overlooked.
3. The defence of Mistake of Fact will continue to be used to perpetuate rape myths: the Bill retains the Mistake of Fact defence, which defendants will be able to continue to use 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.

I support an amendment to the Bill (as drafted by Rape & Sexual Assault Research & Advocacy and the Women's Legal Service Queensland), asking for the insertion of a new s 348A:

(2) A mistaken belief by the person as to the existence of consent is not honest or reasonable if the person did not take positive and reasonable steps, by words or conduct, in the circumstances known to the person at the time of the act, to ascertain that the other person was giving consent to the act.

4. The Bill fails to address the negation of consent for a person with a 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 a disability are not capable of consenting to sex. Pages 11-15 of the Queensland Human Rights Commission's submission to the Queensland Law Reform Commission address this point at length, and we support their submission on this issue. This is a missed opportunity to correct a law that unfairly discriminates against people with a disability in Queensland.

Reform of consent laws and the defence of Mistake of Fact is long overdue in Queensland. I wish to ask that the LACS Committee rejects the Bill in its current form and requires the government to make amendments to incorporate the issues above that I have outlined.

Kindly,
Sophia

Sophia Leen
Resident of Queensland



The One Woman Project acknowledges that the land upon which we meet and work always was and always will be the land of the Yuggera people. We acknowledge that sovereignty has never been ceded and support our Indigenous communities in fighting for recognition, treaty and self-determination. We also acknowledge that the work we undertake is built upon the passion, dedication and courage of First Nations activists, advocates and feminists who came before us, and who continue to lead the movement towards global gender equality.

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