

24 September 2020

Emma Iwinska and Morgana Jones

Legal Affairs and Community Safety (LACS) Committee

By email: lasc@parliament.qld.gov.au

Dear LACS Committee,

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

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.

Women's Health Queensland (WHQ) is a state-wide organisation that provides specialist trauma informed recovery services for women and their families who have experiences of sexual and domestic and family violence. WHQ is funded by the Department of Child Safety, Youth and Women to provide these services and advocate on behalf of these women.

WHQ would like to highlight that sexual violence and other forms of intimate partner violence are largely experienced by women. International research shows that **1 in 3 women have experienced some form of violence** in their life,¹ and our legislation generally does not go far enough to address this and protect vulnerable people.

WHQ opposes the Bill and amendments to the Consent and Mistake of Fact legislation for 4 main reasons:

1. **The Bill retains an outdated model of consent (clause 8).** This is a historic opportunity to reframe and modernise Queensland's outdated sexual assault laws. Unfortunately, this *Bill* only legislates a definition of consent already established in case law.² The recommended changes fail to strengthen consent law because:
 - a. passivity could still amount to consent in some circumstances,³

¹ World Health Organization, 'Violence Against Women', *Fact Sheets*, (Web page, 29 November 2017) <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>> ('Violence Against Women').

² Statement of Compatibility, Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld) 2 ('Statement of Compatibility').

³ *R v Makary* [2019] 2 Qd R 528, [50] (Sofronoff P) ('*R v Makary*').

- b. the onus is placed on the person who is being subjected to unwanted sexual acts to withdraw their consent,⁴ and
- c. the amendment to section 347 is no more than technical reform.⁵

WHQ would prefer to see the *Bill* introduce an **affirmative consent model**. Such a model would require individuals to enthusiastically and clearly affirm their willingness to have sex through words or actions. This model would provide greater protection for individual sexual autonomy. It would also send a clear message to the community that a person seeking consent is responsible for taking **active** and reasonable steps to ensure that consent exists.

2. **The excuse of mistake of fact (clause 9) will continue to be used to perpetuate rape myths.** The *Bill* retains the mistake of fact excuse which allows a defendant to argue mistaken belief rather than requiring the defendant to show the positive steps they took to gain consent. The excuse also does not recognise that victims may 'freeze' (tonic immobility) a common and recognized response during an assault.⁶ A victim may be afraid of an implied threat of violence, attempt to pacify the aggressor or it may be safer for them to not resist during an assault.⁷ Queensland case law, which these amendments are based on, demonstrate that the mistake of fact defence regularly undermines the model of consent included in the proposed *Bill*.⁸ The proposed changes do not require defendants to show they took positive steps to ascertain consent. This will continue a dangerous precedence that undermines the proposed consent legislation and fails to protect victims.
3. **The *Bill* fails to uphold the human rights of sexual assault survivors.** WHQ is grossly disappointed that the Human Rights analysis for this *Bill* is one-sided and only considers the rights of the defendant to a fair trial. The *Statement of Compatibility* is completely silent on the rights of the sexual assault survivors. As mentioned above, sexual violence is disproportionately a gendered crime. The human rights to equal protection of the law without discrimination, protection from torture and cruel, inhuman, or degrading treatment, and to liberty and security of person – all apply to all survivors of rape and sexual assault.⁹ However, these rights have been entirely overlooked.
4. **The *Bill* fails to address the negations 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 excuse of mistake of fact*, available on the QHRC website www.qhrc.qld.gov.au/resources/submissions) addresses this point at length. This is a

⁴ Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (Qld) cl 8 ('Consent and Mistake of Fact Bill').

⁵ Consent and Mistake of Fact Bill (n 4) cl 7.

⁶ Rachael Burgin and Jonathan Crowe, 'The New South Wales Law Reform Commission Draft Proposals on consent and sexual offence: a missed opportunity?' (2020) 8 *Current Issues in Criminal Justice*, DOI: 10.1080/10345329.2020.1801151 ('Burgin and Crowe').

⁷ Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 1, 4-5 ('Crowe and Lee').

⁸ Crowe and Lee (n 7) 5-6.

⁹ *Human Rights Act 2019* (Qld) ss 15 – 17 and 19 ('*Human Rights Act*').

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

WHQ hopes LASCs Committee takes the time now to slow this process and reflect on the proposed Bill and that the Committee will take into consideration the volume of submissions that support these four points.

Further to the points outlined above, WHQ supports the **introduction of guiding principles to Chapter 32 of the Criminal Code**. Guiding principles would assist the criminal justice system in handling rape and sexual assault and would assist in improving broader social and cultural issues about the understandings of consent. The law should provide clarity and guidance to society and play a role in addressing 'rape myths' and ideas of 'real rape' and dispel beliefs that rape is normally perpetrated by violent strangers.¹⁰ Interpretive or guiding principles would ensure that the interpretation of this law represents the suggested strengthening of the legislation. They can also ensure the proper and adequate function of the law in practice.¹¹ The Victorian *Crimes Act 1958* sets itself apart by having included guiding principles at section 37B for over a decade now.¹² It is time that Queensland's outdated legislation caught up. A model of guiding principles drafted for the *Australian Feminist Legislation Project* is a suitable example for LASCs committee to consider.¹³

Guiding principles

It is the intention of Parliament that in interpreting and applying this chapter, courts are to have regard to the following matters—

(a) there is a high incidence of sexual violence within society;

(b) sexual offences are significantly under-reported;

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment or mental illness;

(d) sexual offenders are commonly known to their victims;

(e) sexual offences most frequently occur in residential locations;

(f) there are legitimate reasons why victims of sexual violence may not physically resist an assault, including, but not limited to, physiological responses to aggression and fear of escalating or prolonging the attack;

(g) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred; and

¹⁰ Burgin and Crowe (n 6) 4-5.

¹¹ Burgin and Crowe (n 6) 6.

¹² *Crimes Act 1958* (Vic) s 37B.

¹³ Burgin and Crowe (n 6) 6.

(h) there are legitimate reasons why victims of sexual violence may not immediately report an assault to police or another person and a failure to make an immediate report, on its own, does not discredit an allegation. (Crowe, Flynn & Lee, unpublished manuscript.)¹⁴

WHQ recommends that LASCs Committee should **reject the Bill in its current form and require the government to redraft it to reflect these points.**

WHQ strongly endorses the submission to LASCs Committee by Ending Violence Against Women Queensland Inc. (EVAWQ) and its affiliate members.

Yours faithfully,



Emma Iwinska

CEO

&



Morgana Jones

Policy Officer

¹⁴ J. Crowe, A. Flynn, and B. Lee, Unpublished manuscript.