



**SHINE**  
**LAWYERS**

RIGHT WRONG.

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

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Submission to the Legal Affairs and Safety Committee  
January 2021

## 1. Introduction

Shine Lawyers are pleased to provide this submission to the Legal Affairs and Safety Committee in response to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (“the Bill”).

This submission will address Part 3 of the Bill dealing with consent and mistake of fact.

## 2. About Shine Lawyers

Shine Lawyers is the third largest specialist plaintiff litigation law firm in Australia. The firm has 680 people spread throughout 44 offices in Australia and New Zealand.

We have a dedicated team of abuse lawyers who specialise in providing legal advice and guidance to survivors of abuse, standing as a voice for clients, and helping them access justice and acknowledgement for the wrongdoing they have suffered.

Shine Lawyers has extensive experience representing survivors of abuse in both claims for redress and at common law. Shine Lawyers represented clients giving evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission). The firm has conducted many individual and group actions in processing and negotiating compensation arrangements for survivors of sexual abuse. Significant litigation that the firm has successfully concluded includes:

### **Neerkol Group Litigation**

The claim involved some 80 former orphans of the St Joseph’s Orphanage Neerkol, operated by the Sisters of Mercy.

### **Nudgee Orphanage Group Litigation**

This claim involved the successful resolution of claims for some 30 victims of sexual abuse, operated by the Sisters of Mercy.

### **Brisbane Grammar Sexual Abuse Litigation**

This action commenced in the Supreme Court of Queensland was on behalf of 75 former students of the Brisbane Grammar School who were subjected to sexual abuse as children.

### **St Paul’s Sexual Abuse Group Litigation**

The claim involved some 25 former students of St Paul’s School in Brisbane who were subjected to sexual abuse during their school years.

### **Scriven v Toowoomba Preparatory School**

This litigation on behalf of a single claimant resulted in the largest award in Australian history for compensation for a victim of sexual abuse, which included the largest award for punitive damages in Australian history.

### **Australian Defence Force**

Shine Lawyers has represented close to 200 current and former members of the Australian Defence Force in relation to abuse they suffered while in the Defence Force, including a large number of former child sailors who were abused at HMAS Leeuwin. Shine Lawyers worked closely with the legal representatives of the Australian Defence

Force to develop a collaborative, cost effective and empathetic process which provides compensation, as well as Direct Personal Responses.

#### **SMA v John XXIII College**

Shine Lawyers represented a college student in this matter against John XXIII College. Our client was sexually assaulted by another student away from the college after an organized residential college drinking event. She was awarded damages for the assault and the manner in which the College dealt with her complaint. Exemplary damages were awarded.

#### **Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird**

Shine lawyers represented two children and their mothers for abuse suffered by the girls at the hands of the father of the owner of the Child Care Centre they attended. The decision assisted further with clarification on vicarious liability for volunteers. The plaintiffs were awarded exemplary damages.

### **3. Submission**

We note the Bill implements the following four principles already settled in case law in Queensland:

That silence alone does not necessarily constitute consent;

That consent can be withdrawn after being given initially;

That a defendant is not required to take any particular specific steps to ascertain consent but a jury can consider anything the defendant said or did when considering whether the defendant was mistaken about consent; and

That voluntary intoxication of the defendant is irrelevant when considering the reasonableness of a defendant's belief about consent.

In doing so the Bill implements the recommendations of the Queensland Law Reform Commission's ("the QLRC") June 2020 report *Review of Consent Laws and the Excuse of Mistake of Fact*.<sup>1</sup> There may be some limited benefit to the public or legal practitioners understanding the law by reducing aspects of the established common law into statute.

We do not object to the modest changes in the Bill being implemented which are 'almost entirely declaratory of the existing law of Queensland' in any event. However these reforms do not go far enough to improve women's safety or experiences with the criminal justice system. Without significant additional reform, Queensland's criminal justice system will continue to fail complainants in sexual assault matters.

A new offence should be created where consent to a sexual act is obtained by way of mistaken belief, induced by the defendant, that there will be a monetary exchange for the sexual act. The QLRC did not recommend such a change because it raised broader policy questions about the protection of sex workers and their experiences with the criminal justice system which were outside the scope of the QLRC's review. We see no reason the government should put

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<sup>1</sup> <https://www qlrc.qld.gov.au/ data/assets/pdf file/0010/654958/qlrc-report-78-final-web.pdf>

Queenslanders at risk by delaying in commissioning an adequate review with a view to creating this offence.

An offence should also be enacted for circumstances where consent to a sexual act is obtained, but where the defendant fails to use a condom or sabotages the condom. Consideration should also be given to creating an offence where consent is given but under a mistaken belief, induced by the defendant, that the defendant does not suffer a serious disease.

Sexual assault, rape or abuse has a profound and lasting impact on a survivor's life. The law as it currently operates and will follow if the Bill is enacted, is characterised by low rates of reporting and conviction for sexual offences and vocal dissatisfaction by survivors of sexual violence. Maintaining the status quo clearly does not suffice to address the persistent view that survivors have been let down by the system and makes one question whether justice is being seen to be done.

We hope the law surrounding sexual offences including consent and mistake of fact will continue to be examined closely with a view to achieving real improvement for survivors.

We are grateful for the opportunity to provide our views in this submission. In the event you have any questions regarding this submission, please contact [REDACTED]